Statutes of Limitations in the Conflict of Laws

Seymour W. Wurfel

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1. PRELIMINARY CONSIDERATIONS

The purpose of this article is to examine some of the problems that arise when a statute of limitations is asserted in a case involving multi-national, multi-state, or multi-legal system elements. Recent cases will be stressed. Some emphasis will be placed on North Carolina authority and an effort made to compare general law and North Carolina law in this area of conflict of laws.

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Limitation of action-conflicts issues arose at least as early as the Eighteenth Century. In 1797, the Supreme Court of North Carolina held that the state statute of limitations ran even though at all times "the defendant was beyond sea."[1] This case also announced two fundamental principles: that to be applied a statute of limitations must be pleaded,[2] and that the forum will apply its own statute of limitations to determine whether relief is barred. The conflicts issue was there presented absent modern complications of borrowing, tolling, or long arm statutes.

An even earlier North Carolina case thus stated the basic philosophy of legislators regarding statutes of limitations, and the normal judicial reaction thereto:

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1. If the defendant was in this country when the contract was made, and the act began to run against the plaintiff, it will run on notwithstanding the defendant's removal; or if it had not began [sic] to run before his removal, his absence will not suspend its operation; or if he resided beyond sea at the time of the contract, and the plaintiff will make use of the remedies offered by our courts, he must accept of them upon the terms imposed by our law; that is to say, he must bring his suit within three years. . . . [A]ll contracts, wherever made, are subject to be affected by the lapse of time in every country . . . .

Anonymous, 2 N.C. 459, 459-60 (1797).

2. For a modern dress affirmation in an airplane crash situation, *see* Strauss v. Douglas Aircraft Co., 404 F.2d 1152 (2d Cir. 1968). "[T]he Statute of Limitations is an affirmative or so-called 'personal privilege' defense which may be waived if not promptly pleaded. . . . In sum, the party wishing to raise the defense is obliged to plead the Statute of Limitations at the earliest possible moment." *Id.* at 1155; *accord,* Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972); Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972). Teague v. Asheboro Motor Co., 14 N.C. App. 736, 189 S.E.2d 671 (1972) holds: "The defense of the statute of limitations was properly raised by a motion to dismiss for failure to state a claim for relief." As to questions of the burden of proof, *see* 2 STANSBURY'S NORTH CAROLINA EVIDENCE § 208, 148 n.76 (Brandis rev. 1973), which states:

> [U]nder the pre-Rule practice, the defendant was required to plead the statute of limitations as a defense, and could not raise it by demurrer; but once it was pleaded, the burden of proof on the issue was on the plaintiff. . . . Under the Rules, it may be raised by motion to dismiss when appearing on the face of the complaint—*see* Rule 9(f)—but is otherwise to be pleaded, being specifically labeled an affirmative defense by Rule 8(c) . . . .

but noted that "[i]n a non-jury case, the Court of Appeals . . . held, without citation of the Rule or other authority, that the defendant has the burden of proof on the issue. Airport Knitting, Inc. v. Yarn Co., Inc., 11 N.C. App. 162, 180 S.E.2d 611 (1971)."

The Supreme Court of North Carolina has held that once properly asserted by the defendant, plaintiff has the burden of proof to take the case out of the statute of limitations. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966); Powers v. Planters Nat'l Bank & Trust Co., 219 N.C. 254, 13 S.E.2d 431 (1941); Employers Commercial Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972); *accord,* Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971).

In Hodges v. Johnson, 18 N.C. App. 40, 195 S.E.2d 579 (1973), where the trial court had dismissed the case on the ground that the statute of limitations had

> The act of limitations was made to prevent the inconvenience of stale demands, and to hinder them after a reasonable length of time from rising up to charge him [the defendant]. This law though very generally reprobated, is founded upon principles of justice, and ought to be adhered to . . .[3]

However, in that case the court held that a testamentary direction to pay "all my just debts" precluded an executor from successfully pleading the statute to a time-barred claim against the estate and allowed recovery.[4] As will subsequently appear, judicial liberality in refraining from applying statutes of limitations continues today, often with a high degree of sophistication.

An 1801 case held that the provision of the 1715 Act of Assembly of North Carolina, which barred claims of creditors made more than seven years after the death of the debtor, was applicable to a suit brought by the British executor of the creditor. Plaintiff's contention that the 1715 statute did not apply to British creditors was rejected in these words: "[I]t is a general law . . . and I cannot see any reason why it ought to lose any of its force . . . when pleaded against a British creditor. . . ."[5]

It would be only of academic interest to trace in North Carolina, or elsewhere, the evolutionary development of legislative thinking and the progressively sophisticated statutes of limitations resulting therefrom. It is most important in any given conflicts situation involving limitations to keep in mind that specific statutes are involved and that the precise statutory language, and its judicial construction, will normally be determinative of the issue. There is substantial periodical literature dealing with statute of limitations-conflicts problems in gen-

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run, but failed to make a finding as to when the cause of action accrued, a new trial was granted.

In federal diversity cases, "[t]he defense of the statute of limitations may be raised by motion for summary judgment, motion to dismiss, or by motion for judgment on the pleadings," as well as by answer. Ericksen v. Winnebago Indus., Inc., 342 F. Supp. 1190, 1194 (D. Minn. 1972).

3. Anonymous, 2 N.C. 243 (1795) (per curiam).

4. *Id.*

5. Miller's Ex'trx v. Gordon's Ex'r, 1 N.C. 218 (1801). However, a later case decided by the Circuit Court of the United States in 1802 held that the act of 1715 was suspended from operation by the acts of 1777 disqualifying British adherents to sue in North Carolina courts, which suspension continued in force until the treaty of peace of 1783 was made effective in North Carolina by the federal act of 1787. Ogden v. Witherspoon, 18 F. Cas. 619 (No. 10,461) (C.C.D.N.C. 1802); *accord*, *In re* Lewis, 3 N.C. 346 (1805) (In some reprint copies of 3 N.C. page 346 is omitted).

eral.[6] In this study an effort is made first to determine the statute of limitations applicable, respectively, in state, federal question and diversity cases, and to examine the rules as to which statute controls where there is, or may be, state and federal conflicts or conflicts in diversity. The second objective is to consider conflicts arising between the limitation statutes of the forum and those of another jurisdiction, hopefully in progressive order of their complexity. A single case frequently presents a cluster of conflicts questions making separate logical presentation of issues difficult.

2. Lex Fori Determines Limitation of Action

The fundamental rule is that each jurisdiction may adopt its own statute of limitations and apply it to all litigation in its courts.[7] North Carolina gave early recognition to this principal in *Haws v. Cragie*[8] where suit was brought on a bond executed in Virginia more than ten but less than twenty years after it became due. Holding the North Carolina presumption of payment in ten years barred the action even though in Virginia the common law presumption of payment did not arise until twenty years had elapsed, the court quoted with approval section 576 of Story's *Conflicts* which said:

> In regard to statutes of limitation, or prescription, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. . . . The object of them is to fix certain periods within which all suits shall be brought . . . by subjects, or by foreigners. And there can be no reason, no sound policy, in allowing higher or more extensive privileges to foreigners, than to subjects . . . [T]his rule is equally as well recognized in foreign jurisprudence, as it is in the common law.[9]

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6. Representative articles are: Ailes, *Limitation of Actions and the Conflict of Laws*, 31 Mich. L. Rev. 474 (1933); *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1260-69 (1950); Comment, *The Statute of Limitations and the Conflict of Laws*, 28 Yale L.J. 492 (1919). Others treating specific issues are cited later.

7. M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839).

> [T]he time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. . . . It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments, is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them, that they must be brought within the period prescribed by local law, the lex fori, or the suit will be barred.

Id. at 327-28; *accord*, Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) (suit on foreign wrongful death statute).

8. 49 N.C. 394 (1857) (per curiam).

9. *Id.* at 395-97. Nonce v. Richmond & D.R.R., 33 F. 429, 435 (C.C.

The lex fori limitation has been applied to permit a North Carolina suit on a note under seal executed and delivered in New York and there barred.[10] Where the North Carolina statute had run, it was held, in diversity, to bar a suit between nonresidents in a federal district court in North Carolina for breach of an employment contract executed in Switzerland and to be performed in New York without references to limitations periods in Switzerland or New York.[11] And it was applied to uphold jurisdiction in a diversity case brought in Vermont by a North Carolina plaintiff against a Vermont defendant for injuries resulting from an automobile accident in Connecticut where the cause was time barred in Connecticut but not in Vermont.[12]

The general rule is succinctly stated in the *Restatement* in these words:

> (1) An action will not be maintained if it is barred by the statute of limitations of the forum . . .
> (2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except . . . .[13]

The lex fori rule applies to a state when it enters the courts of another state as a plaintiff.[14] In a suit by Michigan to recover for the cost of care for an epileptic daughter against the estate of a parent, the Arizona Court of Appeals held it was time barred by the Arizona statute, saying:

> [O]nce a state, as such, goes beyond its territorial limits, and seeks redress in the courts of a sister state, its mantle of sovereignty drops at its borders, and it enters the courts of another state clothed only in the common garb of an ordinary person. . . . Michigan's cause of action is controlled by the applicable Arizona statute of limitations.[15]

Thus far we have assumed that the forum statute of limitations contains no borrowing provision.[16] Though now somewhat rare, such

W.D.N.C. 1887), after an extensive examination of the issue, concludes: "[T]he merits of the cause of action are determined by the laws of the place where it arose; but the mode of procedure and remedy, including statutes of limitation, are solely regulated by the laws of the place where the action is brought."

10. Sayer v. Henderson, 225 N.C. 642, 35 S.E.2d 875 (1945).

11. Grombach v. Oerlikon Tool & Arms Corp. of America, 276 F.2d 155 (4th Cir. 1960).

12. Earnhardt v. Shattuck, 232 F. Supp. 845 (D. Vt. 1964).

13. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971).

14. Michigan v. First Nat'l Bank, 17 Ariz. App. 45, 495 P.2d 485 (1972).

15. *Id.* at 49, 495 P.2d at 489.

16. The effect of borrowing statutes is considered in text accompanying notes 144-200 *infra*.

situations still do arise. This was pointed up in a suit brought under the Clayton Act in a federal district court in New Jersey by plaintiff stockholders against Delaware and New York corporations for alleged violations in Illinois.[17] In enforcing the then applicable New Jersey statute of limitations the court stated:

> New Jersey has not enacted a so-called "borrowing statute", i.e., a law directing that the statute of limitations of the state in which a cause of action arose shall be applied to bar a suit on such cause of action if brought in New Jersey. New Jersey has thus not departed from the settled common law rule of conflict of laws that the forum applies only its own procedural statute of limitations and does not give effect to a statute of another state in which the cause of action arose . . . .[18]

The effect of borrowing statutes will be considered in another section.[19]

3. Limitations in Diversity Cases

Diversity cases in federal courts afford a special application of the rule that the forum will apply the statute of limitations of the jurisdiction in which it sits. The general diversity rule is stated in *Guaranty Trust Co. v. York*:[20] the outcome of a case heard by a federal court sitting in diversity should be no different from what the outcome would have been had the case been heard in the forum state court.

The Supreme Court has applied the same rule in an equity case in the federal court. [21] The same rule prevails as to the limitation applicable to diversity actions at law.[22] In fact, under the Federal Judi-

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17. Gordon v. Loew's Inc., 247 F.2d 451 (3d Cir. 1957).

18. *Id.* at 454. Apparently New Jersey continues to have no borrowing statute.

19. *See* text accompanying notes 144-200 *infra.*

20. 326 U.S. 99 (1945).

> [S]ince a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.
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> . . . In essence the intent of that decision [Erie R.R. v. Tompkins, 304 U.S. 64 (1938)] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court. . . . [W]e have held that in diversity cases the federal courts must follow the law of the State . . . as to conflict of laws, Klaxon v. Stentor Co., 313 U.S. 487.

Id. at 108-10. *Erie* applies to suits in equity as well as actions at law. Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

21. Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945).

22. Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971); *accord*, Player Pianette, Inc. v. Dale Electronics, Inc., 487 F.2d

ciary Act of 1789,[23] federal courts, in enforcing state created rights, whether legal[24] or equitable,[25] regularly applied state limitation statutes long before the compulsion of *Erie*. State law was also used to determine time of accrual[26] and tolling effects.[27] Current rules as to these two problems will be separately discussed.

Two 1971 diversity cases in Florida, with rather spectacular facts, applied the Florida statute of limitations. In one the plaintiff purchased a new Lincoln-Continental from a Ford dealer in New Jersey in November 1965. While driving to Florida gasoline odors in the passenger compartment nauseated the plaintiff, and she returned the car to the dealer in February 1966. A products liability suit was filed in January 1969 more than three but less than four years after plaintiff first experienced the odor. Defendant contended the Florida three year statute for "an action upon a contract"[28] applied; plaintiff, that the Florida four year statute applicable to actions "not specifically provided for" applied.[29] Florida courts had not decided the point, and the federal district judge held the three year statute applicable. Pending appellate decision in the diversity case, the Supreme Court of Flor-

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336 (8th Cir. 1973); National Family Ins. Co. v. Exchange Nat'l Bank, 474 F.2d 237 (7th Cir. 1973); Matanuska Valley Lines, Inc. v. Molitor, 365 F.2d 358 (9th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967); Jones v. Bankers Life Co., 131 F.2d 989 (4th Cir. 1942); O'Keefe v. Boeing Co., 335 F. Supp. 1104 (S.D.N.Y. 1971); *see* Rios v. Drennan, 209 F. Supp. 927, 930 (E.D.N.C. 1962) ("The North Carolina rule is that an action is not commenced until summons issues, hence this action was not timely begun and is barred by the statute of limitations . . . ."). N.C.R. CIV. P. 3 now provides:

> A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing. A civil action may also be commenced by the issuance of a summons when . . . a person . . . request[s] permission to file his complaint within 20 days and . . . the court . . . grant[s] the requested permission.

Mahalsky v. Salem Tool Co., 461 F.2d 581, 583-84 (6th Cir. 1972) holds:

> Pennsylvania substantive law is controlling. . . . The District Court [sitting in Ohio] . . . correctly conclud[ed] that in this diversity case Ohio conflict of laws rules govern. . . .
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> [Q]uestions relating to the form of action, i.e., the remedy, are procedural and are to be determined by the law of the forum . . . . In an action in the United States District Court in Ohio, the procedural law of Ohio must be applied in determining whether the cause of action sounds in tort or contract, and in deciding what is the appropriate statute of limitations.

23. Ch. 20, § 34, 1 Stat. 92, *as amended*, 28 U.S.C. § 1652 (1970).

24. *See* Bauserman v. Blunt, 147 U.S. 647 (1893); Nonce v. Richmond & D.R.R., 33 F. 429, 436 (C.C.W.D.N.C. 1887).

25. Mason v. United States, 260 U.S. 545 (1923).

26. Arkansas Fuel Oil Co. v. City of Blackwell, 87 F.2d 50 (10th Cir. 1936).

27. Van Dyke v. Parker, 83 F.2d 35 (9th Cir. 1936).

28. FLA. STAT. ANN. § 95.11(5)(e) (1960).

29. *Id.* § 95.11(4) (1960). This section provides "for relief not specifically provided for in this [limitation] chapter."

ida in another case approved a state court decision that in these circumstances the four year limitation was controlling.[30] The federal circuit court reversed,[31] remarking, "the District Court . . . divination of Florida law turned out to be wrong."[32]

The other Florida diversity case[33] was brought by the widow of astronaut Grissom under the Florida wrongful death statute for his demise while ground testing an Apollo space capsule manufactured by defendant, North American Aviation. The death occurred in January 1967. The suit was filed in the state court in January 1971 and promptly removed to the federal court. Defendant asserted the Florida two year wrongful death limitation,[34] while plaintiff contended for the special twelve year limitation against professional engineers (including corporations) in actions "arising out of any deficiency in design or planning or for any deficiency in the design or planning of an improvement to real property [sic]. . . ."[35] In the absence of state authority the federal district court dismissed the case, holding:

> [T]he only correct interpretation is that a professional engineer or architect is susceptible to suit for a period of only twelve (12) years, and that a plaintiff, once death occurs, has not more than two (2) years in which to bring suit or have the action barred.[36]

Diversity questions are further complicated when a case is transferred from one district court to another, as is permissible under Federal law.[37] When this happens the Supreme Court has said:

> [T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.
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> . . . We do not attempt to determine whether . . . the same considerations would govern if a *plaintiff* sought transfer under § 1404(a). . . .[38]

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30. Barfield v. United States Rubber Co., 234 So. 2d 374 (Fla. Ct. App.), *cert. denied*, 239 So. 2d 828 (Fla. 1970).

31. Eastburn v. Ford Motor Co., 438 F.2d 125 (5th Cir. 1971).

32. *Id.* at 126.

33. Grissom v. North Am. Aviation, Inc., 326 F. Supp. 465 (M.D. Fla. 1971).

34. FLA. STAT. ANN. § 95.11(6) (1960), *as amended*, FLA. STAT. ANN. § 95.11(6) (Supp. VII, 1972).

35. *Id.* § 95.11(10) (Supp. VII, 1972).

36. 326 F. Supp. at 468.

37. 28 U.S.C. § 1404(a) (1970) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

38. Van Dusen v. Barrack, 376 U.S. 612, 639-40 (1964) (emphasis added).

It has been held that where the parties "almost" stipulated the transfer that was made and where the tolling provisions of the statutes of the two states conflicted, that of the transferor state controls.[39] However, where a plaintiff obtained transfer, from a federal court in Georgia to one in Kentucky, of an action barred by the Kentucky statute of limitations at the time it was filed in the federal court in Georgia, the Kentucky statute was applied and the case dismissed by the transferee court.[40]

No general analysis is here made of what "procedural" elements of state law, as distinguished from state "substantive" law, are obligatory upon federal courts in diversity under the rules laid down in *Erie* and *Klaxon*. Diversity cases bearing expressly upon statute of limitations conflicts problems will be examined in subsequent sections of this article together with pertinent state decisions.[41]

4. Limitations in Federal Question Cases

The United States as a party plaintiff is not subject to a state statute of limitations unless it expressly consents thereto.[42] However, if the state limitation statute creates as an absolute prerequisite to the accrual of a cause of action that a suit must be filed within a specified time, the United States is bound thereby.[43] Moreover, by

39. Bott v. American Hydrocarbon Corp., 441 F.2d 896, 899 n.3 (5th Cir. 1971). Railing v. UMW, 276 F. Supp. 238 (N.D.W. Va. 1967) holds that in the absence of a controlling federal statute of limitations the federal court will apply the borrowing provisions of the statute of limitations of the state in which the federal action was originally brought despite the transfer, upon the motion of the defendant, to a federal court sitting in another state.

40. Carson v. U-Haul Co., 434 F.2d 916 (6th Cir. 1970); *see* Les Schwimley Motors, Inc. v. Chrysler Motors Corp., 270 F. Supp. 418 (E.D. Cal. 1967) and note thereon in 56 Geo. L.J. 1004 (1968).

41. For a general discussion of the obligations imposed on federal courts in diversity cases by *Guaranty Trust Co.* see Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 536 (4th Cir. 1970).

42. United States v. John Hancock Mut. Life Ins. Co., 364 U.S. 301 (1960); United States v. Summerlin, 310 U.S. 414 (1940); Mason v. United States, 461 F.2d 1364 (Ct. Cl. 1972); United States v. Firnhaber, 337 F. Supp. 1010 (E.D. Wis. 1971).

43. United States v. Hartford Accident & Indem. Co., 460 F.2d 17 (9th Cir. 1972). In affirming a summary judgment for the defendant company, the court said:

> [T]he government must have become entitled to a claim and have acquired a cause of action before it comes under the umbrella of 28 U.S.C. § 2415.
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> Under the clear language of the California statute and California cases construing it an insured under the uninsured motorist coverage here involved has acquired no right to sue the insurance carrier until compliance with Section 11580.2 has been accomplished [by filing suit in a court of competent jurisdiction within one year of the accident]. *Summerlin* cannot

1966 legislation Congress has imposed limitations upon the time in which the United States may bring actions as a party plaintiff.[44]

Where a federally given right is involved, Congress may, of course, prescribe an applicable statute of limitations. Where this has been done the supremacy clause of the Constitution applies, and the federal limitation is conclusive. This is true even in the case of the Federal Torts Claim Act which directs that the existence of a substantive cause of action against the Government is to be determined by the law of the state in which the act occurs,[45] but which also expressly provides a federal period of limitation.[46]

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be stretched to create a right in the government to sue under state law without complying with the condition precedent to the accrual of the action. *Id.* at 19.

44. 28 U.S.C. § 2415 (1970), in great detail, essentially limits the government as a plaintiff to three years for tort actions and six years for contract actions. Section 2416 contains tolling provisions.

As to causes of action in favor of the United States existing when the Act was passed, it was said in United States v. Transamerica Ins. Co., 357 F. Supp. 743, 746 (E.D. Va. 1973), that the Act expressly provides that: "any cause of action in favor of the United States existing at the date of the Act's passage will be deemed to have accrued on that date . . . ."

A unique twist in the criminal law area is contained in Lucia v. United States, 474 F.2d 565 (5th Cir. 1973). In a nine to five *en banc* decision the court said:

> We hold that the period of limitations for the assessment of wagering excise taxes does not commence to run until a return has been filed, even though to require a return would violate the taxpayer's constitutional right against self-incrimination. No return having been filed by Lucia for the period involved, the statute of limitations [three years after the tax return is filed] does not bar the assessment.

Id. at 572-73. Whether the Supreme Court will review and affirm this decision remains to be seen.

45. 28 U.S.C. § 1346(b) (1970) imposes liability for:

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

46. 28 U.S.C. § 2401(b) (1970) provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." In Rygg v. United States, 334 F. Supp. 219, 221 (D.N.D. 1971), the court said of this statute: "This Court has no jurisdiction to entertain an action not filed within the time prescribed and this limitation is one not capable of waiver nor subject to an estoppel." *See* American Mfrs. Mut. Ins. Co. v. United States, 453 F.2d 1380, 1382 (Ct. Cl. 1972); Katzer v. United States, 342 F. Supp. 1088 (E.D. Wis. 1972); Neher v. United States, 265 F. Supp. 210 (D. Minn. 1967); Annot., 21 A.L.R.2d 1464 (1952). *See also* Annot., 7 A.L.R.3d 732 (1966). *Neher* held that successive sonic booms generated by Air Force B-58 planes, which allegedly damaged plaintiff's building, did not constitute a continuing tort and denied recovery for sonic boom damage occurring more than two years prior to the commencement of action.

Representative examples of federal preemption of limitation are found in the Fair Labor Standards Act as amended by the Portal to Portal Act,[47] the lump sum death payment provision of the Social Security Act,[48] the Federal Employers Liability Act,[49] the Interstate Commerce Act,[50] the Jones Act,[51] the Death on the High Seas Act,[52] the Suits in Ad-

47. 29 U.S.C. § 255 (1970); *see* Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972), holding this limitation to be procedural, and hence waived if not pleaded.

48. 42 U.S.C. § 402(i) (1970) (two years).

49. 45 U.S.C. § 56 (1970) (three years). However, Burnett v. New York Cent. R.R., 380 U.S. 424 (1965), *rev'g* 332 F.2d 529 (6th Cir. 1964), held that the filing of a state court suit in Ohio on the same cause of action within three years which was later dismissed for improper venue, which circumstance tolled the running of the statute in Ohio, also had this effect in the federal court suit promptly filed after the state dismissal and that the declaration of this rule effectuated the purpose of the act. Section 56 of the act gives state and federal courts concurrent jurisdiction over suits authorized by it.

50. 49 U.S.C. § 16(3)(f) (1970) provides: "A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after." In Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc., 337 F. Supp. 674 (N.D. Ill. 1972) (mem.) the plaintiff had filed, in time, a suit for reparations against the defendant carrier. Thereafter the Interstate Commerce Commission made an order directing repayment of excessive rates charged. More than a year after this order plaintiff amended his complaint to a complaint for enforcement. The court held: "[P]laintiff's claims for enforcement of the Commission order relate back to the time it filed its complaints and are not barred by the statute of limitations." *Id.* at 684.

The holding in *Aluminum Co.* is consistent with federal preemption under the Interstate Commerce Act. However, questions may remain as to *which* federal statute of limitations applies when two are in conflict. For example, in a suit by a motor carrier against the United States to recover for the transportation of household goods of military personnel, the Court of Claims held the general six year statute of the Tucker Act applied to claims for the motor shipments in question rather than the three year statute provided by 49 U.S.C. § 304a(1) (1970) for suits brought under the Interstate Commerce Act. Global Van Lines, Inc. v. United States, 456 F.2d 717 (Ct. Cl. 1972). Here the plaintiff was both a certified motor carrier under Part II of the Interstate Commerce Act and an exempt freight forwarder of used household goods under Part IV of that Act (49 U.S.C. § 1002(b)(2)).

51. 46 U.S.C. § 688 (1970). In case of injury or death to seamen, the Jones Act gives the election to maintain an action for damages at law, with the right of jury trial and makes applicable to such actions all the provisions of the Federal Employers Liability Act including the three year limitation period contained in 45 U.S.C. § 56 (1970).

Western Fuel Co. v. Garcia, 257 U.S. 233 (1921), held that where a stevedore was killed on a vessel by employer negligence, action may be brought under a state wrongful death act in a federal admiralty court but must be filed within the time prescribed by the state act. However, in McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), the Court held that in an action for unseaworthiness, combined with an action under the Jones Act, a Texas state court could not apply its state two year limitation period to the unseaworthiness action since it is shorter than the three year period prescribed by the Jones Act.

Presumably such actions today could be brought in federal court without reference to any state act and subject only to time limitation for laches. *See* the discussion

miralty By or Against Vessels or Cargoes of the United States Act,[53] the Wrecks and Salvage Act,[54] the Tucker Act,[55] and the Military Selective

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of Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), at text accompanying notes 63-65 *infra*.

52. The cause of action given by 46 U.S.C. §§ 761-68 (1970) is limited by section 763 which requires the action to be brought within two years or thereafter within ninety days after the first reasonable opportunity to secure jurisdiction has offered.

53. 46 U.S.C. § 745 (1970) (two years). This limitation is also made applicable by 46 U.S.C. § 782 (1970) to suits brought against the United States for damages caused by public vessels or for towage or salvage services (Public Vessels Act, 46 U.S.C. §§ 781-90 (1970)).

54. 46 U.S.C. §§ 721-38 (1970). Suits brought under Chapter 19 of 46 U.S.C. are required by this Act to be brought within two years unless "there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court . . . ." *Id.* § 730.

55. 28 U.S.C. § 2501 (1970), in part, states: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Amell v. United States, 384 U.S. 158 (1966), involved cases where the petitioners were employees of various federal executive departments working aboard government vessels who had filed suit for overtime pay in the Court of Claims under the Tucker Act. The Court held that the Court of Claims properly had jurisdiction rather than the federal district courts under the Suits in Admiralty Act which contained a two year statute. The Court of Claims had transferred the cases to the federal district courts. A majority of the Supreme Court held:

> . . . To uphold this transfer would bar those claims which accrued more than two years prior to the time the actions were filed. . . .
>
> [T]he Tucker Act permits all individuals with contractual claims against the Government to sue in the Court of Claims. The Suits in Admiralty Act similarly affords an open berth in the district courts, provided the claims are of a maritime nature . . . .
>
> As in other jurisdictional questions involving intersecting statutes, there is no positive answer. . . . [W]e believe the traditional treatment of federal employees by the Government tips the balance in favor of Court of Claims jurisdiction.

Id. at 159, 166.

However, the Court of Claims is not always a safe harbor for plaintiffs. In Cason v. United States, 461 F.2d 784 (Ct. Cl. 1972), an action by a discharged navy man for military pay, the government asserted the defense of laches, complaining that plaintiff waited until the last day of the six year limitation period to bring suit. In granting defendant's motion for summary judgment the court said:

> [W]e have found lack of diligence and resulting prejudice to defendant in cases where the delay was as little as eleven months. . . .
>
> Here, plaintiff has offered no explanation for a delay one day short of six years nor has he sought to show that defendant has not been prejudiced. Plaintiff's claim accrued immediately upon his discharge. . . . And resort to a Discharge Review Board is a permissive remedy which does not toll the statute of limitations. . . . Nor should resort to permissive remedies operate to toll the running of time in the case of laches.
>
> [T]he doctrine of laches is for application to military pay cases to the same extent as for civilians.

Id. at 787-88.

In Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States, 373 F.2d 356 (Ct. Cl. 1967), *rehearing denied*, 390 U.S. 975 (1968), the Court of Claims applied its six year statute to bar an action for reimbursement for counterfeit Japanese money allegedly distributed during the war. It held that any right under

Service Act of 1967.[56]

A. *Admiralty*

A number of these preemption acts involve admiralty questions. The general admiralty jurisdiction of the federal courts, one of the important federal question areas, is not constrained by a federal statute of limitations, but only by the doctrine of laches. A unanimous Supreme Court held:

> [L]aches as a defense to an admiralty suit is not to be measured by strict application of statutes of limitations; instead, the rule is that "the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case." . . . "This does not mean of course that the state statutes of limitations are immaterial in determining whether laches is a bar, but it does mean that they are not conclusive and that the determination should not be made without first considering all the circumstances bearing on the issue. . . ." [T]he existence of laches is a question primarily addressed to the discretion of the trial court.[57]

B. *Maritime Law*

This admiralty rule has been extended to apply to actions at law arising out of federal maritime law.[58] In a longshoreman's action at

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the treaty of peace between the allied powers and Japan became fixed at the time of the proclamation thereof.

56. 50 U.S.C. §§ 451-73 (1970); *see* Bell v. Aerodex, Inc., 473 F.2d 869, 871-72 (5th Cir. 1973).

57. Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 533-34 (1956). The libel for injuries, allegedly caused by unseaworthiness and negligence, was filed seven years after the accident and long after the pertinent limitations of both New York and New Jersey had run. The case was remanded to the district court to permit the libellant the opportunity to prove facts negating laches; *accord*, Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 215 (1963): "The test of laches is prejudice to the other party. . . . The trial court, having heard the witnesses testify, concluded that there was no prejudice."

58. Oroz v. American President Lines, Ltd., 259 F.2d 636 (2d Cir. 1958), *cert. denied*, 359 U.S. 908 (1959). H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-10, at 239 & n.20 (2d ed. 1969) states:

> If a claimant wishes to sue the shipowner *in personam* he may do so either in admiralty where there is no jury or he may proceed under the "saving to suitors" clause in a common-law court where he will have the benefit of a jury trial.
>
> . . . .
>
> Section 9 of the Judiciary Act of 1789, while granting exclusive original jurisdiction of civil causes in admiralty and maritime jurisdiction to the federal district courts, expressly saved to suitors the right of a common-law remedy where the common law is competent to give it. The section was rewritten in the Judiciary Code of 1948, 28 U.S.C.A. § 1333 (1958), and the "savings" clause now reads, "saving to suitors in all cases all other

law to recover for a shipboard injury occurring in New Jersey territorial waters five years earlier, a New York federal district court dismissed the case after referring to the borrowing portion of the New York statute of limitations which referred in turn to the New Jersey limitation statute.[59] In affirming, the Second Circuit said:

> Here . . . the suit is on the civil side of the federal court . . . which permits vindication of maritime rights through other remedies. If a federal court were mechanically to apply a local limitation statute in the instant case, it would be because "in law actions where a federally created right is being enforced, the federal courts will apply the applicable state statute of limitations in the absence of a controlling federal statute of limitations." . . .
>
> [T]he application of different time bars on different sides of the federal court [is] at variance with the sound administration of maritime law. . . .
>
> [T]he proper measure of the time within which suit must be commenced is the admiralty doctrine of laches, not a local statute of limitations. . . .
>
> [I]n deciding whether maritime claims are barred by laches, courts of admiralty will use local limitation statutes as a rule-of-thumb as to the presence or absence of prejudice by reason of inexcusable delay. If the statute has run, prejudice by reason of inexcusable delay is presumed in the absence of a showing to the contrary; if it has not run, the converse is inferred.[60]

In 1971 in an action for damages for breach of contract, breach of warranty, and indemnification, brought by the former owner of a ship against the repairer more than six years after ship repairs had been made, the federal district court denied a motion for summary judgment based on an assertion of laches and refused to apply the six year New York statute of limitations.[61] Defendant knew of the lengthy arbitration proceeding that had taken place in the six year pe-

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remedies to which they are otherwise entitled." The rewrite was intended to cover equitable as well as common-law remedies, but it must be conceded that more apt language could have been used.

59. Oroz v. American President Lines, Ltd., 154 F. Supp. 241 (S.D.N.Y. 1957).

60. Oroz v. American President Lines, Ltd., 259 F.2d 636, 638-40 (2d Cir. 1958); *accord*, Esso Transp. Co. v. Terminales Maracaibo, C.A., 356 F. Supp. 1367 (S.D.N.Y. 1973).

61. Moore-McCormack Lines, Inc. v. Shin Mitsubishi Heavy Indus., Ltd., 337 F. Supp. 513 (S.D.N.Y. 1971) (mem.): "[T]he starting point in the analysis is the analogical [New York] state statute of limitations, in this case six years . . . . While the analogy is considered to be weaker than it once was . . . where . . . the statute has run . . . detriment to the defendant will be presumed absent evidence to the contrary . . . . [P]laintiff will have the burden of persuasion that his action is not stale." *Id.* at 517.

riod between the former owner (plaintiff) and a purchaser of the repaired ship and had been advised by plaintiff that if the arbitration resulted in loss to him, the plaintiff would seek recovery from the defendant. Suit was filed within two months after the termination of the arbitration. The court found that federal maritime law was applicable and held: "[T]he equities clearly militate against imposition of the bar of laches."[62]

Yet another application of laches as the time bar determinant in a maritime tort situation was initiated by a Supreme Court dictum in 1970.[63] The decedent longshoreman was killed while working on a vessel in Florida navigable waters. The district court judge, in diversity, dismissed the death claim based on unseaworthiness because the Florida death act did not give a cause of action for unseaworthiness. The Supreme Court, reversing its previous rule of decision,[64] held that an action lay under federal maritime common law for death caused by violation of maritime duties, including unseaworthiness, even though there was no federal wrongful death statute so providing. In response to a defense argument that a statute of limitations must be devised along with other ancillary matters if such a new wrongful death action were judicially created, the Court said:

> [T]here is no reason—in federal admiralty suits at least—that such actions should not share the doctrine of laches immemorially applied to admiralty claims. In applying that doctrine . . . the courts should give consideration to the two-year statute of limitations in the Death on the High Seas Act, just as they have always looked for analogy to appropriate state or foreign statutes of limitations. . . . We need not decide this question now, because the present case was brought within a few months of the accident. . . . [H]owever . . . difficulties should be slight in applying accepted maritime law to actions for wrongful death.[65]

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62. *Id.*

63. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). The Supreme Court of Massachusetts, in Gaudette v. Webb, — Mass. —, —, 284 N.E.2d 222, 229 (1972), held: "Upon consideration of the *Moragne* decision and the sound reasoning upon which it is based, we are convinced that the law in this Commonwealth has also evolved to the point where it may now be held that the right to recover for wrongful death is of common law origin, and we so hold." Further examination of these two decisions appears at notes 129-30 and accompanying text *infra*.

64. The Tungus v. Skovgaard, 358 U.S. 588 (1959); The Harrisburg, 119 U.S. 199 (1886).

65. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 406 (1970); *see* Note, *Admiralty—Wrongful Death Action Under General Maritime Law*, 49 N.C.L. REV. 329 (1971); Comment, *Nine Admirals at the Helm: A New Cause of Action for Wrongful Death in Maritime Law—Moragne v. States Marine Lines, Inc.*, 1970 UTAH L. REV. 653.

C. *The Outer Continental Shelf Lands Act: A Statutory Variant of the Admiralty and Maritime Laches Doctrine*

A statutory variant of the admiralty and maritime laches doctrine arises from the provisions of The Outer Continental Shelf Lands Act.[66] These state that the laws of the United States extend to the outer continental shelf and to all artificial islands and fixed structures erected thereon to the same extent as if the outer continental shelf were an area of exclusive federal jurisdiction,[67] but also declare that the laws of each adjacent state are to be the law of the United States for such areas.[68]

In an action against the platform owner, by an employee of an independent contractor, to recover for injuries suffered more than a year earlier while working on a fixed drilling rig platform located on the outer continental shelf off the coast of Louisiana, the question arose whether laches or the Louisiana one year statute of limitations applied.[69] While this action was pending in the district court, the Supreme Court in *Rodrigue v. Aetna Casualty & Surety Co.*[70] held that a suit for wrongful death occurring on a platform so situated is controlled by Louisiana law and not by admiralty law. Relying on that decision, the district court applied the Louisiana limitation and denied relief. The court of appeals[71] said that laches and not the Louisiana statute of limitations was applicable and reversed. The Supreme Court affirmed, holding that its decision in *Rodrigue* did apply to personal injury actions as well as wrongful death actions, but should have prospective effect only.[72] The Court also stated:

> It was the intent of Congress . . . that state laws be "adopted" or "enacted" *as federal law* . . . Thus a federal court applying Louisiana law under . . . the Lands Act is applying it as . . .

66. 43 U.S.C. §§ 1331-43 (1970).
67. *Id.* § 1333(a)(1) (1970).
68. *Id.* § 1333(a)(2) (1970).
69. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).
70. 395 U.S. 352 (1969).
71. Huson v. Chevron Oil Co., 430 F.2d 27 (5th Cir. 1970).
72. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); *accord*, Mullins v. Chevron Oil Co., 344 F. Supp. 1063 (E.D. La. 1972) (where accident occurred before, but suit filed after, the *Rodrigue* decision). In *Huson* the Court of Appeals had held that the Louisiana prescriptive limitation was not applicable in the federal court since under Louisiana law prescription, unlike preemption, bars the remedy but does not extinguish the right. On this point the Supreme Court held: "[T]he 'prescriptive' nature of Art. 3536 (the Louisiana statute) does not undercut its applicability under the Lands Act. Under § 1333(a)(2) of the Act '[s]tate law be[comes] federal law federally enforced' [*citing* Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 353 (1971)]." 404 U.S. at 102.

> the law of the federal forum. Since the federal court is not, then, applying the law of *another* forum in the usual sense, ordinary conflicts of law principles have no relevance.[73]

D. *Congressional Acts Without Limitation Provisions*

Where the Congressional act providing the federal right does not contain a limitation provision, the courts apply the most analogous statute in which the action is brought. The civil rights cases[74] are illustrative. For example in *Knowles v. Carson*[75] the Fifth Circuit held:

> Sections 1983 and 1985 [of the 42 U.S.C.] do not include a specific limitation. Since the Act contains no provision limiting the time within which an action thereunder may be brought, the applicable Statute of Limitations is that which the State would enforce had the action seeking similar relief been brought in the State Court.[76]

The selection of the "applicable" state statute may be difficult but is probably not strictly a conflicts problem. In *O'Sullivan v. Felix*,[77] the Supreme Court, in a case brought two years after the event, held that the Louisiana one year prescription statute applied to an action for assault and battery committed by defendants in a conspiracy to prevent plaintiffs from voting in a federal election, and not the five year federal limitation on actions to collect a penalty or forfeiture. In *Henig v. Odorioso*,[78] plaintiffs, parents of an eleven year old girl, sued all concerned for the arrest and detention of the girl for shoplifting. It was held that the Pennsylvania one year statute barred the ac-

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73. 404 U.S. at 102-03. For a comprehensive treatment of both *Chevron* and *Moragne*, discussed in text accompanying notes 63-65 *supra*, *see* H. BAER, *supra* note 58, at §§ 6-10.1a, -10.2 (Cum. Supp. 1973).

74. *See, e.g.*, cases cited note 76 *infra*.

75. 419 F.2d 369 (5th Cir. 1969).

76. *Id.* at 370. This case also applied the one year federal limitation contained in 42 U.S.C. § 1986 (1970) to so much of the action as applied to that section. *Accord*, Marnin v. Zampella, 456 F.2d 1097 (3d Cir. 1972) (applying 42 U.S.C. § 1983); Butler v. Sinn, 423 F.2d 1116 (3d Cir. 1970) (applying 42 U.S.C. §§ 1983, 1985); Ballard v. Taylor, 358 F. Supp. 409 (N.D. Miss. 1973) (applying 42 U.S.C. § 1983). Similar applications have been made of 42 U.S.C. §§ 1981, 1982; *see* Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972); Sims v. Order of United Commercial Travellers of America, 343 F. Supp. 112 (D. Mass. 1972).

98 A.L.R.2d 1160 (1964), contains an extended annotation entitled "What statute of limitations is applicable to a damage action under Federal Civil Rights Acts." *See also* Johnson v. Dailey, 479 F.2d 86 (8th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

77. 233 U.S. 318 (1914).

78. 256 F. Supp. 276 (E.D. Pa. 1966), *aff'd*, 385 F.2d 491 (3d Cir.) *cert. denied*, 390 U.S. 1016 (1967).

tions for alleged false arrest, slander, malicious prosecution, and false imprisonment following an arrest.

Where federal law applies the state limitation statutes, the state tolling and borrowing provisions are normally applied as well. This federal practice accords with the more general conflicts rule that where the forum borrows a statute of limitations, this includes its tolling provisions and other qualifications.[79] Since state rules regarding tolling differ substantially, this introduces lack of uniformity in results in much federal civil rights litigation. For example, where a plaintiff has been imprisoned, the rule of California,[80] New York,[81] and some other states[82] is that while the plaintiff is confined, the running of their statutes of limitations is tolled, and for this reason federal courts have denied motions to dismiss. In other states confinement of a plaintiff does not toll the running of the statute on his causes of action, and accordingly civil rights suits have been dismissed by federal courts as barred.[83]

This rule of application of all aspects of the state statute is subject to exceptions. The following three cases are illustrative: In a suit brought by a state bar applicant under section 1983 seeking only declaratory and injunctive relief against the Alabama State Bar, it was held that in spite of the general rule, the one year Alabama statute did not apply since the plaintiff was seeking only equitable relief to protect a federally created right.[84] However, when an action is brought both for damages and equitable relief, the statute of limitations, and not laches, controls both the equitable and legal causes.[85]

79. United States *ex rel.* Sabella v. Newsday, 315 F. Supp. 333, 336 (S.D.N.Y. 1970); *see* Tandoc v. Luckenbach S.S. Co., 5 App. Div. 2d 857, 171 N.Y.S.2d 381 (1958). General conflicts arising from both borrowing and tolling provisions are discussed in text accompanying notes 144-234 *infra*. A comprehensive annotation entitled, "Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations" appears in 90 A.L.R.2d 265 (1963).

80. Ney v. California, 439 F.2d 1285 (9th Cir. 1971).

81. United States *ex rel.* Sabella v. Newsday, 315 F. Supp. 333 (S.D.N.Y. 1970); *cf.* Rosenberg v. Martin, 478 F.2d 520, 527 (2d Cir. 1973).

82. *E.g.*, Miller v. Swenson, 338 F. Supp. 518 (W.D. Mo. 1972); Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); *cf.* Lathon v. Parish of Jefferson, 358 F. Supp. 558 (E.D. La. 1973).

83. *E.g.*, Thomas v. Howard, 455 F.2d 228 (3d Cir. 1972) (New Jersey); Williams v. Hollins, 428 F.2d 1221 (7th Cir. 1970) (Tennessee); Knowles v. Carson, 419 F.2d 369 (5th Cir. 1969) (Florida); *see* Brown v. United States, 342 F. Supp. 987 (E.D. Ark. 1972).

84. Nicholson v. Board of Comm'rs, 338 F. Supp. 48 (M.D. Ala. 1972); *see* Annot., 162 A.L.R. 724 (1946).

85. Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970).

It has been held that where a civil rights complaint was filed within the applicable two year limitation of Pennsylvania law, but was not served until four months after the two years had run, the federal rule that a suit is commenced when it is filed applied and not the state rule, and dismissal was refused. The court also held that the four month delay in service did not constitute laches, but that as to those defendants sued as "John Does" and not served until five and a half years after the action was filed, the suit was barred by laches.[86]

In a suit by a doctor alleging that a hospital district and its surgical staff violated his civil rights in 1961 by suspending his surgical privileges and refusing to reinstate him, the Florida statute of limitations was asserted. The plaintiff doctor had been continuously pursuing Florida state administrative and court remedies for the same cause until just before the federal suit was commenced in 1967. The district court held the action barred. The circuit court reversed and remanded,[87] holding:

> [I]n cases arising under the constitution or laws of the United States, a federal rule on tolling a state statute of limitations (when applicable) should be observed, if such rule clearly carries out the intent of Congress or of the constitutional principle at stake.[88]

A dissenting opinion stated:

> It is well settled that actions under Federal Civil Rights laws are governed by state statutes of limitations. This rule is now abrogated by judicial decree.[89]

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86. Fitzgerald v. Appolonia, 323 F. Supp. 1269 (E.D. Pa. 1971); *cf.* Railing v. UMW, 429 F.2d 780 (4th Cir 1970). The general question of when an action is "commenced" is considered at text accompanying notes 251-73 *infra*.

87. Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970).

88. *Id.* at 474. The majority opinion reasoned:

> We think it is clearly within the underlying purpose of the Civil Rights Acts to encourage utilization of state administrative and court procedures to vindicate alleged wrongs under a state-created cause of action before requiring a plaintiff to bring his federal suit to prevent his being barred by a state statute of limitations. Thus, although the federal courts apply a state limitations statute in suits to vindicate a federal right, they look to the federal purpose, policy and intent of Congress as to the objectives of the legislation in determining whether the pursuit of state remedies tolls this statute.

89. *Id.* at 476. A petition for rehearing en banc was denied by a tie (seven to seven) vote by the members of the court. Petition for certiorari was not filed.

The authority of *Mizell* on this point is substantially eroded by a later decision of the same court in Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815 (5th Cir. 1972). In *Blair* the court held that suits by veterans for back pay for alleged violation of reemployment rights accrued when the one year period of mandatory reemployment expired. It held further that the suits were subject to the Alabama one year statute of limitations from that date and were therefore barred. Finally, it held that a claim that delay in bringing suit was the result of governmental bureaucratic procedures by

Where the federal act contains no statute of limitations and the state limitation is used, the determination of when the cause of action accrues is controlled by federal and not state law.[90] This applies even though the period of limitation is borrowed from the appropriate state.[91] The determination of this federal rule in a given case may be protracted and uncertain. Thus, in a suit for injury to property and business brought in 1961 under the Labor Management Relations Act[92] against the United Mine Workers for a continuing series of illegal acts of destruction occurring in 1958 and 1959, the "accrual" issue remained unresolved[93] as late as 1971, though it had been to the United States Supreme Court. This approaches justice delayed constituting justice denied.

The Civil Rights Act of 1964,[94] as distinguished from that of 1871,[95] does contain a statute of limitations which in part reads: "If . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the [Equal Employment Opportunity] Commis-

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the Department of Labor and the Department of Justice did not toll the Alabama statute. The court said:

> In his partially dissenting opinion Judge Tuttle [author of the *Mizell* opinion] expressed the view that "The majority penalize the veteran for his inevitable delay occurring after his complaint is filed with the Labor Department but before the Government subsequently files suit against the employer. This would disembowel the Act." The majority respectfully disagrees . . . . With deference, it would "disembowel" the Act if this Court were to hold that the Department of Justice, contrary to the law applied to other litigants, may ignore the limitations clearly applicable under the Act as Congress saw fit to enact it.

Id. at 819. In a separate opinion Judge Tuttle said:

> *Mizell* is overruled sub silentio by failing to consider its application to the facts of the case. The purpose of the state limitational statute rather than the purpose of the *federal substantive statute* is given as to [sic] touchstone for the decision whether or not to toll the limitation period.

Id. at 821. *See also* White v. Padgett, 475 F.2d 79 (5th Cir. 1973).

90. Rawlings v. Ray, 312 U.S. 96 (1941).

91. Cope v. Anderson, 331 U.S. 461 (1947).

92. 29 U.S.C. § 187 (1970).

93. Railing v. UMW, 276 F. Supp. 238 (N.D.W. Va. 1967) *rev'd*, 429 F.2d 780 (4th Cir. 1970), *vacated and remanded*, 401 U.S. 486 (1971). In remanding the Supreme Court opined:

> Whether suits under the two statutes [Labor Management Relations Act and Clayton Act] are distinguishable for purposes of determining the time at which a cause of action accrues warrants further exploration by the Court of Appeals. Further attention should also be given to the question of why a [Labor Management Relations Act] cause of action has sufficiently accrued to bring suit as soon as the plaintiff suffers damage but has not sufficiently accrued to start the running of the statute of limitations on the damages already suffered and for which suit may be but is not brought.

401 U.S. at 486. This appears to be scanty guidance to aid in the ultimate resolution of a cause already in litigation for ten years.

94. 42 U.S.C. § 2000a-h (1970) Subchapter II-Public Accommodations.

95. Ch. 22, §§ 1-7, 17 Stat. 13 (codified in scattered sections of 42 U.S.C.).

sion shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . . ."[96] In a class suit based on alleged 1968 discriminatory practices in discharging employees, letters of notice of failure to secure voluntary compliance were dated July 15, 1970 and received between July 22 and August 12, 1970. The suit was commenced August 21, 1970, and defendant moved for dismissal for time bar under a Tennessee one year statute. In denying the motion the court stated:

> This thirty-day period is jurisdictional and may not be extended . . . . However, this thirty-day limitation period does not begin to run until the charging party has received notice from the Commission of its failure to obtain voluntary compliance. . . . [T]his limitation statute performs a dual role. First, it insures that an aggrieved individual will not file suit until the Commission has had an opportunity to attempt conciliation. Second, it insures that an aggrieved individual will not be precluded from suit by inaction on the part of the Commission.[97]

E. Antitrust Laws

Prior to 1956 no federal statute of limitations was applicable to suits under federal antitrust laws,[98] and in such litigation the statutes of limitations of the state in which the district court was sitting were applied.[99] In Clayton Act cases, section 4B, effective in 1956, specifically imposed a federal four year statute of limitations.[100] This is illustrative of the fact that Congress may at any time preempt limitation of federally given causes of action or may elect to withdraw a federal statute of limitations previously imposed.

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96. 42 U.S.C. § 2000e-5(e) (1970).

97. Jackson v. Cutter Laboratories, Inc., 338 F. Supp. 882, 885 (E.D. Tenn. 1970); *accord,* Kaltenborn v. Excel Personnel, 339 F. Supp. 129 (W.D. Tenn. 1972) which held that the action was barred by the Tennessee one-year statute to the extent it was based on the Civil Rights Act of 1866, but not to the extent that it was based on the Civil Rights Act of 1964.

98. Gorden v. Loew's Inc., 247 F.2d 451, 454 (3d Cir. 1957). This case held that a New Jersey two year statute of limitations on actions brought under a penal statute, was applicable to treble damage suits brought under section four of the Clayton Act.

99. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906). However, the federal doctrine that concealment of the cause tolls the statute was applied to borrowed state limitations in Clayton Act cases, *see* Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961), *noted in* 75 HARV. L. REV. 629 (1962).

100. 15 U.S.C. § 15b (1955), *as amended,* 15 U.S.C. § 15b (1970).

When an antitrust suit accrues for limitation purposes may present a complex question of fact. The guideline provided by the Supreme Court is that forbidden acts which have long since taken place but as to which the victim is unable earlier to prove with requisite certainty the existence and amount of damages, such subsequent damages do not accrue until they can be reasonably established, but the moment the victim can prove such subsequent damages the four year statute begins to run.[101]

F. Securities Laws

Other limitation problems arise out of the Securities Act of 1933[102] and the amendments and additions thereto in the Securities Exchange Act of 1934.[103] Some of the numerous actions thereby created are expressly covered by federal statutes of limitation,[104] others are not. The latter is true of actions under section 17(a) of the 1933 Act[105] and section 10(b) of the 1934 Act.[106] Accordingly, the appropriate limita-

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101. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). The Court said:

> In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted. . . . Otherwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve "as a bulwark of antitrust enforcement," . . . and that the antitrust laws fully "protect the victims of the forbidden practices as well as the public". . . .

Id. at 339-40; *accord,* Poster Exchange Inc. v. National Screen Serv. Corp., 456 F.2d 662 (5th Cir. 1972).

102. 15 U.S.C. § 77a-aa (1970).

103. Ch. 404, tit. II, 48 Stat. 881 (1934) (codified in scattered sections of 15 U.S.C.); *see* Kramer v. Loewi & Co., 357 F. Supp. 83 (E.D. Wis. 1973).

104. In Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972), the court notes:

> The original Securities Act of 1933 provided a limitation of two years from discovery of the alleged misrepresentation for all civil actions under the Act, and a ten year over-all limitation for all actions except those under Section 12(2). . . . The 1934 amendments to the Act, however, reduced the limitation period to its "present shrunken form": Sections 11(a) . . . 12(1) and 12(2) . . . limited actions brought under these sections to one year from discovery and three years from the time of wrong. . . . Substantially the same limitations are applicable to actions under Sections 9(e) . . . 18 . . . and 29(b) . . . of the Securities and Exchange Act of 1934.

Id. at 125 n.3. This complex situation has been examined in Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion,* 13 WAYNE L. REV. 635 (1967).

105. 15 U.S.C. § 77q(a) (1970).

106. 15 U.S.C. § 78j(b) (1970). This section is commented on in Note, *Securities Regulation—A Little Light and More Obfuscation on Rule 10b-5,* 50 N.C.L. REV. 706 (1972).

tions act in the forum state of Illinois became controlling in an action predicated on those two sections.[107] The court there held that the three-year limitation provision of the Illinois securities law applied and not the five-year Illinois statute applicable to fraud. It also held that in a series of sales of corporate stocks by the defendant president of the company to plaintiff employees of the company over a period of six years, the limitations statute applied separately to each transaction from the date of consummation. The court did read into the three-year limitation the equitable doctrine that the statute does not begin to run until fraud is discovered where a plaintiff remains in ignorance without want of diligence on his part, but found that these plaintiffs, a bookkeeper and a salesman of the corporation, had not exercised due diligence.

The preceding examination of limitation problems which may arise in actions based on federal rights seeks to present representative situations only. It does not purport to be exhaustive of the myriad specific questions that have arisen.[108]

5. Statutes of Limitations Applicable to Foreign Judgments

The forum applies its own local statute of limitations to suits brought on foreign judgments in the same manner as other causes of action.[109] Where the foreign judgment is that of another nation, the

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107. Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972); *accord,* Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir. 1970); Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967); Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953).

In Sargent v. Genesco, Inc., 352 F. Supp. 66 (M.D. Fla. 1972), a Securities Act violation case, the court said:

> [T]his action was originally filed in federal court in New York. The case was transferred [on] . . . defendants' . . . motion . . . pursuant to 28 U.S.C. § 1404(a) [for the convenience of the parties]. When an action is transferred from a federal district court in one state to a federal district court in another state pursuant to § 1404(a) the applicable limitation is that of the state wherein the action was originally filed.

Id. at 76. This is wholly consistent with the pronouncement in Van Dusen v. Barrack, 376 U.S. 612 (1964), that "A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." *Id.* at 639.

108. *See Developments In The Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1264 (1950); Note, *The Tolling of State Statutes of Limitations in Federal Courts,* 71 COLUM. L. REV. 865 (1971); Note, *State Statutes of Limitations in Federal Courts: By Whom Is The Statute Tolled?* 1971 DUKE L.J. 785. *See also* Annot., 90 A.L.R.2d 265 (1963).

109. *See* Wurfel, *Recognition of Foreign Judgments,* 50 N.C.L. REV. 21, 50 (1971), and authorities cited therein; Annot., 36 A.L.R.2d 567 (1954); 47 AM. JUR. 2d *Judgments* §§ 953-54 (1969); *accord,* Dodd v. Lovett, 46 Ala. App. 686, 248 So. 2d 724 (1971).

full faith and credit clause[110] of the the Federal Constitution does not apply.[111] Where the foreign judgment is that of a sister-state it has been frequently argued[112] that unique treatment is mandated. Such is not the case.

In the absence of a borrowing provision in the forum statute, the forum's own limitations on suits on judgments are applied to those of sister-states.[113] Thus, a judgment not yet time barred where rendered may be denied enforcement if the forum limitation on judgments has expired; such procedure does not violate the full faith and credit clause.[114] This is true even where the forum statute provides a shorter enforceable period for foreign judgments than that prescribed for its own domestic judgments, so long as the forum applies the statute only to sister-state judgments that have not been revived by proceedings in the judgment-rendering state within the forum's own judgment limitation period.[115] Conversely, the forum may enforce a sister-state judgment already barred by a shorter statute of limitations in the judgment-granting state. Moreover, this second judgment must be given full faith and credit by the original judgment state as well as by the courts of other states.[116] If a borrowing provision of the forum state adopts the shorter limitation of the judgment-granting state, the latter will be applied.

For a federal court judgment to be enforceable by registration in another federal court,[117] it must not be time barred at the time of such registration by the statutes of the state in which the registration occurs. Thus, a federal district court judgment rendered in Alaska and

110. U.S. CONST. art. IV, § 1.

111. Hilton v. Guyot, 159 U.S. 113 (1895).

112. *See, e.g., id.*

113. Sayer v. Henderson, 225 N.C. 642, 35 S.E.2d 875 (1945); Webb v. Webb, 222 N.C. 551, 23 S.E.2d 897 (1943); *accord,* Dodd v. Lovett, 46 Ala. App. 686, 248 So. 2d 724 (1971); Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970); Catlett v. Catlett, 412 P.2d 942 (Okla. 1966); *see* Matanunska Valley Lines, Inc. v. Molitor, 365 F.2d 358 (9th Cir. 1966), *cert. denied,* 386 U.S. 914 (1967); Annot., 36 A.L.R. 2d 567 (1954).

114. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); McElmoyle *ex rel.* Bailey v. Cohen, 38 U.S. (13 Pet.) 312 (1839); Strickland v. Watt, 453 F.2d 393 (9th Cir. 1972); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 118(2) (1971).

115. Watkins v. Conway, 385 U.S. 188 (1966); *see* Strickland v. Watt, 453 F.2d 393 (9th Cir. 1972). *See also* Bank of the State of Alabama v. Dalton, 50 U.S. (9 How.) 522 (1850).

116. Roche v. McDonald, 275 U.S. 449 (1928); Weir v. Corbett, 40 Cal. Rptr. 161 (1964); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 118(1) (1971).

117. 28 U.S.C. § 1963 (1970) provides for such registration of final judgments of any federal district court and then their direct enforcement in the federal court in which registered.

not barred in Alaska, but barred in Washington at the time it was registered in the federal district court in Washington, was denied enforcement.[118] The court held that though the enforcement action was not a diversity case, there was nothing in the federal registration act to permit the limitation statute of the state of registration to be ignored, and accordingly the *Klaxon* principle[119] of invoking the forum state's conflict of law rules was applicable. This result is consistent with the conventional classification of statutes of limitations as procedural for conflict of law purposes and, hence, determinable by forum local law.

The problem of when a statute of limitations runs on a foreign continuing alimony or support decree calling for periodic payments, is a recurring one. North Carolina[120] had early occasion to pronounce what has become the general rule, which is that the forum statute is applied not to the original date of such a judgment but separately to each required periodic payment as of the date it becomes due.[121]

In Delaware there was no statute of limitations as to judgments or actions on judgments but only the rebuttable common law presumption of payment after twenty years. In a suit on a New York judgment filed in Delaware one day before the New York twenty year statute on judgments ran, it was held that under these circumstances the New York statute would be applied but had received compliance by the suit in Delaware.[122]

A North Carolina case points up the difference in treatment accorded judgments in personam and judgments in rem awarded in sister states.[123] A West Virginia money judgment for rent was obtained in 1926 in an in rem proceeding against office furniture in West Virginia. In 1930 suit was brought on the West Virginia judgment in North Carolina to collect the balance due. The court held that since the West Virginia judgment was not in personam, the applicable North Caro-

118. Matanunska Valley Lines, Inc. v. Molitor, 365 F.2d 358 (9th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967).

119. *See* note 20 *supra.*

120. In Arrington v. Arrington, 127 N.C. 190, 197, 37 S.E. 212, 214 (1900), the court said, "The plea of the statute, in an action in our state on a judgment obtained in another state, is a plea to the remedy, and consequently the lex fori must prevail in such an action."

121. *E.g.*, Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970); Catlett v. Catlett, 412 P.2d 942 (Okla. 1966), and authorities cited therein.

122. Guayaquil & Q. Ry. v. Suydam Holding Corp., 50 Del. 424, 132 A.2d 60 (1957).

123. Smith v. Gordon, 204 N.C. 695, 169 S.E. 634 (1933).

lina limitation was three years upon the original debt and not the ten year limitation on judgments.

The general subject of foreign judgments and problems of judgment in rem and quasi-in rem, in particular, have been the subject of a separate article by this author.[124]

6. Is the Limitation Statute Procedural or Substantive? The Specificity Test as to Which Limitation Governs

Traditionally statutes of limitations, particularly those applicable to common law causes of action, have been characterized as "procedural" and hence governed by forum law in conflict situations.[125] With the expansion of causes of action given only by statute and in derogation of the common law, limitation provisions in such statutes, or those limitations made specifically applicable thereto began to be usually characterized as "substantive", that is, as being an integral part of the statutory cause of action itself,[126] and therefore, controlled by loci law where different than the law of the forum.[127] There has been erosion of this latter doctrine, at least in wrongful death cases, by the common practice of applying whichever statute is shorter.[128] More recently there has been a judicial trend to find that wrongful death, long considered only a statutory cause of action and not a common law right, has now ripened into a common law action[129] and that, accordingly, the applicable limitation bars only the remedy, not the right, and may be tolled or waived.[130]

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124. Wurfel, *supra* note 109.

125. Holdford v. Leonard, 355 F. Supp. 261, 263 (W.D. Va. 1973); Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930) (annotated in 68 A.L.R. 217 (1930)). This approach may be applied where the cause of action arises in a foreign country, Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955); Baldwin v. Brown, 202 F. Supp. 49 (E.D. Mich. 1962); Lillegraven v. Tengs, 375 P.2d 139 (Alas. 1962).

126. Gaston v. B.F. Walker, Inc., 400 F.2d 671 (5th Cir. 1968); *see* Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955).

127. Keep v. National Tube Co., 154 F. 121 (D.N.J. 1907); Theroux v. Northern Pac. R.R., 64 F. 84 (8th Cir. 1894); *see* Annot., 95 A.L.R.2d 1162 (1964).

128. Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930); *see* Annot., 146 A.L.R. 1356 (1943); Annot., 77 A.L.R. 1311, 1324 (1932).

129. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), discussed in text accompanying notes 63-65 *supra*; Gaudette v. Webb, — Mass. —, 284 N.E.2d 222 (1972).

130. Gaudette v. Webb, — Mass. —, 284 N.E.2d 222 (1972). The court, expressly overruling its long and consistent line of authority to the contrary, said:

> [O]ur wrongful death statutes will no longer be regarded as "creating the right" to recovery for wrongful death. They will be viewed rather as . . . requiring that the action be commenced within the specified period of time, as a limitation upon the remedy and not upon the right. We further

The Supreme Court of the United States has held that the forum state may properly apply its own shorter statute of limitations to a suit brought on a foreign wrongful death statute, since it is not a denial of full faith and credit.[131] If the forum elects to apply the longer or shorter limitation of the loci it may, but it is not obliged to do so. This line of decision arose where the forum did not have a borrowing statute. Where there is a borrowing statute, there is generally no difficulty in applying the shorter statute of the jurisdiction in which

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hold that statutes limiting the period for bringing actions for death are to be construed in the same manner as the limitations contained in . . . the general statute of limitations, and that in appropriate cases they may be tolled . . . .

Id. at —, 284 N.E.2d at 229.

The North Carolina evolution in the treatment of wrongful death limitations took place earlier and more gradually than did the Massachusetts transition. The North Carolina wrongful death statute was enacted in 1854. Ch. 39, §§ 1-4, [1854] N.C. Sess. Laws 97-98. The limitation read "action shall be commenced within one year from the death . . . ." The time limit of one year therein prescribed was held to be a condition annexed to the cause of action. Taylor v. Cranberry Iron & Coal Co., 94 N.C. 525 (1886). "This is not strictly a statute of limitations. It gives a right of action that would not otherwise exist, and the action to enforce it, must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it." *Id.* at 526; *accord,* Colyar v. Atlantic States Motor Lines, Inc., 231 N.C. 318, 56 S.E.2d 647 (1949).

Moreover, in affirming dismissal of a case in which a resident of Florida brought suit in North Carolina for a Miami automobile accident death just before the Florida two year limitation expired, it was held the North Carolina one year time limit was a statute of limitations as well as a condition annexed to a liability. Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930). The court said:

> All statutes of limitations are essentially time clocks, and while C.S., 160, has been construed as a condition annexed to the cause of action, it is also a time limit to the procedure. . . . Certainly, it is not to be supposed that the legislative department intended to confer upon nonresidents more extensive rights in the courts than accorded to citizens of this State.

Id. at 404, 151 S.E. at 861.

Until 1951 the one year limitation provision was an integral part of the North Carolina wrongful death statute, Ch. 113, § 70, [1868] N.C. Sess. Laws 276 (codified at N.C. GEN. STAT. § 28-173 (1966)), *applied in* Stamey v. Rutherfordton Elec. Memb. Corp., 249 N.C. 90, 105 S.E.2d 282 (1958). *See also* Kinlaw v. Norfolk S. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967) (held when the two days preceding the commencement of the action fell on Sunday and Labor Day respectively these were both to be excluded in computing the two year period). The legislature then removed it from the wrongful death statute, increased the time to two years, and placed it in the chapter of the statutes dealing with statutes of limitations in general. Ch. 246, §§ 1-4, [1951] N.C. Sess. Laws 203 (codified at N.C. GEN. STAT. § 1-53(4) (1969)). The North Carolina Supreme Court thereafter held that: "The [1951] amendment removed the time limitation as a condition annexed to the cause of action and made it a two-year statute of limitations." Graves v. Welborn, 260 N.C. 688, 691, 133 S.E. 2d 761, 763 (1963); *cf.* McCrater v. Stone & Webster Eng'r Corp., 248 N.C. 707, 104 S.E.2d 858 (1958). Thus the bar now is only to the remedy and not to the right itself.

131. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); *accord,* as to a personal injury case, Horvath v. Davidson, — Ind. App. —, 264 N.E.2d 328 (1970).

the cause of action arose without regard to whether it is substantive or procedural. North Carolina, using its borrowing statute, has thus applied the shorter Pennsylvania limitation to a wrongful death action brought by Maryland residents arising out of an air crash in Pennsylvania.[132]

Suits brought under wrongful death statutes have typically involved this "substantive" versus "procedural" issue, but the issue may be raised in any action based upon a right created by statute. For example, as to suits to recover damages under the Workmen's Compensation Act,[133] the North Carolina rule continues to be that the limitation extinguishes the right.[134] Thus, where the widow of a volunteer fireman sought recovery in the Industrial Commission for her husband's death but did not file the claim within one year, the court affirmed dismissal by the Commission, holding:

> G.S. 97-24 provides in pertinent part: "(a) The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter."
>
> This Court has held the requirement that a claim be filed in accordance with . . . the above statute constitutes "a condition precedent to the right to compensation, and is not a statute of limitations."[135]

No indication is given as to whether this result is derived from the fact that the limitation is contained in the chapter of the statutes dealing with workmen's compensation and not the general statute of limitations chapter, or because of the language "shall be forever barred," or from other reasons.

The local law of each state determines whether its own limitation statute bars the right or only the remedy. Where the question in the forum is whether the right or the remedy is barred by the limitation imposed by the loci state, this question is determined by the conflicts law of the forum. The forum conflicts rule normally requires the adoption of the classification made by the loci state. If the other state holds its limitation to be substantive, the forum will enforce it

132. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

133. N.C. GEN. STAT. ch. 97 (1972).

134. Montgomery v. Horneytown Fire Dep't, 265 N.C. 553, 144 S.E.2d 586 (1965).

135. *Id.* at 555, 144 S.E.2d at 587; *see* Annot., 41 A.L.R.2d 1044 (1955), for a discussion of statutes of limitations applicable to action, by way of subrogation or the like, by employer or insurance carrier against a third person for injury to the employee.

rather than the longer[136] or shorter[137] procedural limitation of the forum. If the loci state holds its limitation to be procedural, the forum then applies its own statute of limitations, subject to its own borrowing provisions, if any.[138]

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136. Capps v. Atlantic Coast Line R.R., 183 N.C. 181, 186, 111 S.E. 533, 536 (1922). In Moore v. Atlantic Coast Line R.R., 153 F.2d 782 (2d Cir. 1946) the Second Circuit held that in an action under the North Carolina wrongful death statute brought in New York Supreme Court and removed to federal court, the [then] North Carolina rule that the one year limitation in the statute is a condition precedent to maintenance of right of action must be applied, and barred the action though it would not have been barred by the New York statute of limitations. *Accord,* Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970) (wrongful death suit in Mississippi for air-crash in Belgium); Bengston v. Nesheim, 259 F.2d 566 (9th Cir. 1958) (diversity action in Washington for wrongful death in Oregon, held barred by two year Oregon limitation which was not tolled by the subsequent removal of defendant from Oregon to Washington, and that Washington three year statute was inapplicable); Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957) (suit based on air crash wrongful death in New Jersey held barred by two year New Jersey limitation and Delaware three year limitation and borrowing provisions were not applicable even in behalf of a Delaware resident decedent); Click v. Thuron Indus., Inc., 475 S.W.2d 715 (Tex. 1972) (suit for wrongful death by aircraft in Missouri); Francis v. Herrin Transp. Co., 423 S.W.2d 610 (Tex. Civ. App. 1968) (Louisiana one year statute applied in suit for Louisiana wrongful death, rather than two year Texas statute), *rev'd,* 432 S.W. 2d 710 (Tex. 1968) (remanded for determination whether under all the facts the Louisiana statute had been tolled); *see* 37 J. AIR. L. & COM. 235 (1971); Annot., 95 A.L.R.2d 1162 (1964).

137. Theroux v. Northern P. R.R., 64 F. 84 (8th Cir. 1894) (diversity suit in Minnesota for wrongful death in Montana upheld where suit was brought after the Minnesota two year limitation had run but before three years as provided in the Montana statute); Marine Const. & Design Co. v. Vessel Tim, 434 P.2d 683 (Alas. 1967) (Washington three year limitation applied to suit in Alaska to enforce a statutory lien for labor and services furnished to the vessel in Washington, and not the shorter Alaska limitation. This case contains an extensive discussion of the authorities); California v. Copus, 158 Tex. 196, 309 S.W.2d 227, *cert. denied,* 356 U.S. 967 (1958) (in suit to recover cost of care for dependent mother of defendant, held that California four year statute and not the shorter Texas limitation applied to defendant's liability while still a resident of California). *Contra,* Michigan v. First Nat'l Bank, 17 Ariz. App. 45, 495 P.2d 485 (1972) (dictum), where the Arizona Court of Appeals said: "[S]ubstantive status is only achieved when the time limitation is shorter in the state of origin than in the forum, and has no applicability where the limitation extends the time." *Id.* at 49, 495 P.2d at 489.

It should be recalled that it is constitutional for the forum to time-bar a wrongful death action that is timely under the built-in limitation provision of the loci statute. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

138. Haury v. Allstate Ins. Co., 384 F.2d 32 (10th Cir. 1967). In holding diversity suit brought in New Mexico was not barred by a California statute providing that a demand for arbitration must be made by the insured within one year against his insurer under an uninsured motorist policy clause, the court said:

> New Mexico has held that the law of the forum determines the bar of statutes of limitation. A well recognized exception to this rule is that the local statute of limitations governs unless the foreign statute is part of the foreign substantive law. New Mexico has not passed on this point but it is fair to assume it will follow the general law. In such an event, the California statute does not apply because in California the statute of limitations is procedural rather than substantive and is effective only to bar the remedy.

Where the cause of action arises in a foreign country, or in a sister state in which the nature of the limitation has not been adjudicated, the forum may itself make the determination. Perhaps the best statement of the various tests available to make this determination continues to be that expressed in 1955 in *Bournias v. Atlantic Maritime Co.*[139] There the plaintiff was a seaman in the employment of the defendant company at the time it changed registry of its vessel from Panama to Honduras. A provision of the Panama Labor Code required upon change of registry that seamen be paid three months extra wages, and article 623 of that Code provided "Actions . . . arising from labor contracts . . . shall prescribe in a year from the happening of the events . . . ."[140] Suit for such wages, and penalties for nonpayment, was brought by the seaman in the United States federal district court in New York more than one year after his discharge but within the limitation prescribed by the applicable federal statute. The

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Id. at 34; *accord,* Natale v. The Upjohn Co., 356 F.2d 590 (3d Cir. 1966) (diversity suit in Delaware district court based on cause of action arising in Pennsylvania; held, Pennsylvania four year limitation applicable to breach of sales contract is procedural and not part of the substantive right created by the statute allowing recovery for breach of warranty. Thus, Delaware two year and not Pennsylvania four year limitation is applicable); Clark v. Pennsylvania R.R., 341 F.2d 430 (2d Cir. 1965) (diversity suit in New York for personal injuries in New Jersey resulting from defendant's negligence; held, the New Jersey Railroad Law statute with a two year limitation did not preclude plaintiff from maintaining a common law tort action in New York filed within the New York tort three year limitation); Kozan v. Comstock, 270 F.2d 839 (5th Cir. 1959) (diversity suit in Louisiana for medical malpractice in Indiana; held, since the Indiana limitation, which had not yet run, was procedural only, the shorter Louisiana limitation, which had run, was applicable); Page v. Cameron Iron Works, Inc., 259 F.2d 420 (5th Cir. 1958) (diversity suit in Texas by Florida resident pilot against Texas aircraft manufacturer for injuries resulting from plane crash in Louisiana; held, the suit is timely since the shorter Louisiana limitation is procedural and the longer Texas limitation is here applicable); Chartener v. Kice, 270 F. Supp. 432 (E.D. N.Y. 1967) (diversity survival and wrongful death actions by California husband for New York malpractice on wife; held, the applicable limitations of both California and New York are procedural, hence the New York limitation applies including the New York tolling provisions).

A further application of the "substantive-procedural" test is found in Earnhardt v. Shattuck, 232 F. Supp. 845 (D. Vt. 1964) (personal injury diversity suit by North Carolina resident in Vermont against Vermont residents arising out of a Connecticut accident; held, under Connecticut law the one year Connecticut limitation is procedural, thus the action is timely brought within the three year Vermont limitation period since Vermont has no borrowing statute applicable to non-resident defendants); Michigan v. First Nat'l Bank, 17 Ariz. App. 45, 495 P.2d 485 (1972) (discussed *supra,* in text accompanying notes 14-15); Sherley v. Lotz, 200 Va. 173, 104 S.E.2d 795 (1958) (held, that a suit in Virginia brought under a Tennessee survival statute for death resulting from a Tennessee accident was barred by the Virginia one year personal injury limitation); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971); *cf.* Gates v. Trans World Airlines, 493 S.W.2d 668 (Mo. Ct. App. 1973).

139. 220 F.2d 152 (2d Cir. 1955).

140. *Id.* at 154.

district court dismissed. The court of appeals reversed, holding the action was brought in time. It noted that six tests could be used to determine whether the limitation was substantive or procedural. These were: (1) whether the same statute that created a new liability contained a limitation of time within which the liability could be enforced; (2) whether a limitation in a different statute was so specifically directed at a newly created liability that it could be said to qualify the right; (3) whether the defense to the limitation would be classified as "substantive" or "procedural"; (4) whether the operation of the limitation completely extinguished the right; (5) whether the foreign court concerned viewed the limitation as "procedural" or "substantive"; (6) whether the limitation is couched in language commonly regarded as "procedural" rather than "substantive".[141]

The court found that for the instant case the "specificity" test was the most appropriate. It said:

> [B]ecause of the breadth of the Panama Labor Code . . . the limitation period should not automatically be regarded as "substantive". Nor would it be appropriate to make this case turn on the fact that the right sued upon was unknown at common law . . . when we are dealing with the statutes of a country where the common law does not exist.
>
> We conclude . . . the "specificity" test is the proper one to be applied in a case of this type, without deciding, of course, whether the same test would also be controlling in cases involving domestic or other kinds of foreign statutes of limitations.[142]

These guidelines, while helpful, do not prescribe a hard and fast rule.

The impact of "significant relationship" and "policy analysis" approaches to choice of law problems upon the selection of the applicable statute of limitations is discussed in a subsequent section of this article.[143]

7. Borrowing Provisions

The general rule that the statute of limitations of the forum is applicable to the exclusion of loci law has been modified by most state legislatures by adopting "borrowing" provisions as an integral part of their own statutes of limitations.

In general, a borrowing provision is usually applied only to cur-

141. *Id.* at 155-56.
142. *Id.* at 154.
143. *See* text accompanying notes 294-315 *infra.*

tail, and not to enlarge, the applicable limitation of the forum.[144] This is also the rule where the "substantive" built-in limitation of the loci is shorter.[145] Thus, if the period of time prescribed by the forum statute has run, the action is barred in the forum even though not barred by the statute of limitations of the jurisdiction in which the cause arose. This is true whether or not the forum statute contains a borrowing provision.[146] This rule is subject to the exception, previously stated, that if the loci limitation statute is by loci law considered to be an integral part of the cause of action itself and is longer than that of the forum, the forum may,[147] but is not constitutionally required to, apply the longer statute of the loci.[148]

Such borrowing provisions have been held to be constitutional even where they do not apply to a plaintiff who was at all times a citizen of the forum state. Thus, the United States Supreme Court upheld a Minnesota statute which read:

> When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there

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144. Natale v. The Upjohn Co., 356 F.2d 590 (3d Cir. 1966); Conner v. Spencer, 304 F.2d 485 (9th Cir. 1962); Keaton v. Crayton, 326 F. Supp. 1155 (W.D. Mo. 1969); Prince v. Trustees of Univ. of Pa., 282 F. Supp. 832, 839 (E.D. Pa. 1968); *see* Shamie v. Shamie, 45 Mich. App. 384, 206 N.W.2d 463 (1973); Lindsey v. Colgate-Palmolive Co., 491 S.W.2d 269 (Mo. Ct. App. 1973).

However, a state may construe its borrowing statute as making applicable a limitation of the *loci* longer than that of the forum, where the cause of action arose elsewhere. Thus, since Kentucky courts had so held, in a diversity case, brought in Kentucky, it was held that a suit for injuries suffered in New York commenced after the Kentucky one year statute had run, but before the New York three year statute had run, was not barred. Koeppe v. Great Atlantic & Pacific Tea Co., 250 F.2d 270 (6th Cir. 1957); *accord*, Collins v. Clayton & Lambert Mfg. Co., 299 F.2d 362, 364 (6th Cir. 1962). This minority Kentucky rule was expressly overruled by the Kentucky Court of Appeals in Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. Ct. App. 1965), where it held barred an action on an Illinois accident instituted after the expiration of the one year Kentucky limitation but before the expiration of the two year Illinois limitation.

The Uniform Statute of Limitation on Foreign Claims Act provides: "The period of limitations applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever bars the claim." By 1971 this act had been adopted in three states: Michigan, Oklahoma and West Virginia, *see* Wilson v. Eubanks, 36 Mich. App. 287, — n.5, 193 N.W.2d 353, 355 n.5 (1972). The Michigan statute, MICH. STAT. ANN. § 27A.5861(2) (1962), was applied in Pusquilian v. Cedar Point, Inc., 41 Mich. App. 399, 200 N.W.2d 489 (1972).

145. Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957).

146. *See* Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 66 (1962).

147. State v. Eis Automotive Corp., 145 F. Supp. 444 (D. Conn. 1956).

148. *See* notes 131-32 and accompanying text *supra*.

> barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued.[149]

The court said:

> [T]he constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for enforcement of any rights he may have, even though they may not be technically and precisely the same in extent to those accorded to resident citizens.[150]

In other words, borrowing statutes, by their terms, may be made inapplicable to resident plaintiffs if that status existed when the foreign cause of action originally accrued. All other provisions of the forum limitation statutes remain applicable to such plaintiffs.

A 1953 decision held that the statute of limitations of North Carolina, as then stated, never ran as against either a nonresident or resident plaintiff until the defendant had been present in North Carolina for the time required by its limitation statute, and this rule applied even though both parties were non-residents and the cause of action arose outside of the state.[151] Upon recommendation of the Judicial Council[152] this statute was changed in 1955 to include a borrowing provision.[153] This enactment was held, in an unappealed diversity decision in the Federal District Court for the Western District of North Carolina, not to be a borrowing statute but simply to be a limitation to prevent the operation of the North Carolina tolling provisions where

149. MINN. STAT. § 7709 (1913) (presently MINN. STAT. ANN. § 541.14 (1947)).

150. Canadian N. Ry. v. Eggen, 252 U.S. 553, 562 (1920); *see* Chemung Canal Bank v. Lowery, 93 U.S. 72 (1876); *accord*, Lowell Wiper Supply Co. v. Helen Shop, Inc., 235 F. Supp. 640, 644 n.8 (S.D.N.Y. 1964).

151. The Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953). This common law rule that: "Statutes of limitations are universally regarded as peculiar and local laws, operating exclusively within the bounds of the state that enacts them," is discussed at length in Nonce v. Richmond & D.R.R., 33 F. 429, 432 (C.C.W.D.N.C. 1887).

152. Little v. Stevens, 267 N.C. 328, 334, 148 S.E.2d 201, 205 (1966); 33 N.C.L. REV. 531 (1955).

153. N.C. GEN. STAT. § 1-21 (1969) reads:

> If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred, by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.

the claim is barred by the lex loci if the original potential plaintiff was not a resident of North Carolina.[154] The same issue reached the North Carolina Supreme Court in a later case. Asserting its prerogative under the *Erie* doctrine, the court disapproved the earlier federal court reading of the statute and held it to be a borrowing statute except where the cause of action originally accrued in favor of a resident of North Carolina.[155]

Normally borrowing provisions refer only to the jurisdiction in which the cause of action "arises". Thus, the time a defendant is present in any jurisdiction, other than the forum or where the cause of action arose, is not to be considered in applying a borrowing provision. For example, in *West v. Theis*[156] the maker of promissory notes in Kansas left Kansas without paying, but before the Kansas period of limitations on the notes had run. He went to Washington and lived there for more than six years, the Washington limitation period on promissory notes, and then moved to Idaho where the holder of the notes brought suit before the Idaho statute of limitations had run. The court held the action would lie because it was not barred in Kansas

154. Snyder v. Wylie, 239 F. Supp. 999 (W.D.N.C. 1965). Plaintiff, an Ohio resident, sued defendant, a North Carolina resident, for injuries sustained in Virginia more than two but less than three years before the diversity suit was filed in the federal district court in North Carolina. Applicable limitations were respectively, North Carolina three years, Virginia two. Judge Craven held:

> (2) There is no *general* "borrowing" statute which refers our courts to *lex loci* for determining prescription periods.
> (3) Only when the claim is stale under *lex fori*, and only when the circumstances invoke the application of the "tolling" statute to revive it, are our courts referred to *lex loci delicti* for determination of the period of prescription.
> [T]he Supreme Court of North Carolina . . . would permit Snyder to prosecute his claim which is stale in Virginia for the simple reason that it is not stale under the prescription law of the State of North Carolina, which is the law to be applied.

Id. at 1003.

155. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966). Plaintiff, a resident of Tennessee, sued in North Carolina for personal injuries suffered in Tennessee more than one year before action filed. Defendant had been physically present in North Carolina more than a year before the action was commenced, but his place of residence was not determined. Limitations were, Tennessee one year, North Carolina three. In holding the suit time barred, Justice Sharp, writing for a unanimous court, said:

> The closely reasoned opinion in *Snyder* employs such lucid "convolution of theory" that admiration for its artistry tempts its adoption. Nevertheless, our conclusion—likewise drawn from the legislative history of the proviso—is that the Legislature intended it to be a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin, or in this State.

Id. at 334, 148 S.E.2d at 205; *accord*, Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967); *see* Wurfel, *Conflict of Laws*, 45 N.C.L. REV. 842, 845 (1967).

156. West v. Theis, 15 Idaho 167, 96 P. 932 (1908); *accord*, McKee v. Dodd, 152 Cal. 637, 93 P. 854 (1908).

since the Kansas statute was tolled by the absence of the defendant from Kansas, and the Idaho borrowing provision could not be applied to the limitation period prescribed in Washington or any other third jurisdiction where the cause of action did not arise.

This same Idaho case announced the generally accepted rule that entry into the state fixes the time the statute starts to run as to a person who comes within the state who has never been there before, as well as to one who departs from the state and then returns to its jurisdiction.[157]

The absence of a federal statute of limitations applicable to a federally created right causes resort not only to the appropriate limitation rule but also the borrowing provisions of the forum state. Acccordingly, by application of the New York borrowing provision, an action in New York state courts for wrongful discharge in California was barred by the shorter California limitation where the cause "arose."[158]

In a diversity case it has been held that the *Erie* requirement that the forum state limitation statute is applicable in the federal court action, includes its borrowing provision as construed by state courts of the forum.[159] Specifically, a diversity suit for contribution by one cosurety in a California transaction brought in Colorado against Colorado domiciled co-sureties was held not to be barred by the applicable two-year California limitation where the defendants, though they had made various trips to California, had not been present there for an aggregate of two years. The federal appeals court interpreted the Colorado Supreme Court decisions construing the effect of the Colorado borrowing provision to be that "if an action is not barred in the state where the cause of action arose, because of the defendant's absence therefrom, it is not barred in Colorado."[160]

Complex questions arise as to how much of the loci law is included when its statute of limitations is borrowed by a forum statutory

157. West v. Theis, 15 Idaho 167, 96 P. 932 (1908), the statute there in issue read:

> If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

REV. STAT. OF IDAHO § 4069 (1887) (presently IDAHO CODE § 5-229 (1948)); *accord*, as to a statute of limitations which then contained no borrowing provision, Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953).

158. Tandoc v. Luckenbach S.S. Co., 5 App. Div. 2d 857, 171 N.Y.S.2d 381 (1958); *see* Annot., 90 A.L.R.2d 265 (1963).

159. Schoenfield v. Neher, 428 F.2d 152 (10th Cir. 1970).

160. *Id.* at 156.

provision. *Nolan v. Transocean Air Lines*,[161] a diversity wrongful death suit in a federal court in New York in which plaintiff's decedent, a resident of South Carolina, was killed in an aircraft crash in California, is illustrative. At the time of the death the widow plaintiff was sixteen. At the time of suit she was a resident of New York but had been appointed administratrix in South Carolina. California law imposed a one year limitation on wrongful death actions which became applicable to a married female plaintiff at age eighteen. Under South Carolina law its one year statute of limitations did not start to run against a married woman until age twenty-one. The suit in New York was filed just before the plaintiff reached age twenty-two. The New York statute, borrowed, as against a non-resident plaintiff, the limitation of "the state or country where the cause of action arose."[162] The court of appeals affirmed the district court decision that this New York borrowing provision applied the California statute of limitations in its entirety, embracing all of its accoutrements including its tolling provisions during minority and its definition of what constituted minority.[163] The court also agreed that the law of the then domicile of the plaintiff should not be referred to for this latter purpose.

Nolan has been cited with approval in at least two subsequent diversity cases[164] where the plaintiffs were non-residents of New York. One said:

> Whether these causes of action, involving . . . internal affairs of a Tennessee corporation and arising there, are time barred must be determined in accord with the body of law which would be applied by New York, the forum state . . . . New York would

161. 276 F.2d 280 (2d Cir. 1960), *aff'g* 173 F. Supp. 114 (S.D.N.Y. 1959). The opinion of Judge Friendly contains the celebrated language, "Our principal task, in this diversity case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so." 276 F.2d at 281. The Supreme Court granted certiorari, 363 U.S. 836 (1960), and in 365 U.S. 293 (1961) remanded for a determination as to whether California law then barred the action of the infant daughter plaintiff because the action of the adult mother was barred. On remand the court of appeals in 290 F.2d 904 (2d Cir. 1961) held that it did, reaffirmed its judgment of dismissal and said: "[W]e cannot believe the Supreme Court of California meant to overturn, without citation, an unbroken line of decisions of intermediate appellate courts, of thirty years standing, consistent with that policy. Since we cannot believe this, we equally cannot believe the New York Court of Appeals could believe it." *Id.* at 907-08. As to this second decision, certiorari was denied in 368 U.S. 901 (1961).

162. N.Y. CIV. PRAC. ACT § 13, *presently* N.Y. CIV. PRAC. LAW § 202 (McKinney 1972).

163. CAL. CIV. CODE § 25 (West 1954), *as amended* (West Supp. 1973).

164. Chartner v. Kice, 270 F. Supp. 432 (E.D.N.Y. 1967); Lowell Wiper Supply Co. v. Helen Shop, Inc., 235 F. Supp. 640 (1964).

> apply its "borrowing statute" and bar this suit if the limitation period had run either here or in Tennessee. Relevant to this determination are not only the statutory period itself, but "all its accountrements', including tolling doctrines and rules governing accrual of causes of action.[165]

The Michigan Court of Appeals reached an opposite result in a case arising out of an Ontario automobile accident where the seventeen year old plaintiff and the defendant were both Michigan residents.[166] The Michigan borrowing statute required the application of the one year Ontario statute of limitations rather than the three year Michigan statute. Michigan law thereafter lowered the age of majority so that plaintiff became of age on January 1, 1972, and she filed suit on June 9, 1972, which was more than two but less than three years after the accident. Michigan law provided that a minor may bring suit within one year after reaching majority. Ontario had no such law and did not toll the running of the statute against actions accruing to minors even during their minority. Reversing a summary judgment for defendant, the court ruled:

> [W]e hold that the shorter Ontario limitations period applies to plaintiff's claim but that Michigan's disability statute tolled the statute of limitations until one year after plaintiff's minority ended.
>
> . . .
>
> [T]he trial judge erred in holding that the limitations period constituted a procedural bar to litigation of plaintiff's suit on the merits.[167]

In multi-state transactions whether a borrowing statute applies often turns on determinations of where and when a cause of action accrues. Such a case is *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*[168] Defendant (Bendix) sold brake pedal assemblies to plaintiff (Mack) in Pennsylvania who in turn sold one to a Florida resident. A defect in the assembly caused an accident in Florida resulting in a Florida judgment against plaintiff which was satisfied on June 30, 1960. Though Mack gave Bendix timely notice of the Florida suit, it did not file the diversity suit for indemnity against Bendix in Pennsylvania until October 10, 1963. The suit was not time barred in Pennsylvania. However, Pennsylvania's borrowing statute stated "When a cause of action has been fully barred by the laws of the

165. 235 F. Supp. at 643-44; *cf.* Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966); Gates Rubber Co. v. USM Corp., 351 F. Supp. 329 (S.D. Ill. 1972).

166. DeVito v. Blenc, 47 Mich. App. 524, 209 N.W.2d 728 (1973).

167. Id. at —, 209 N.W.2d at 731.

168. 372 F.2d 18 (3d Cir. 1966), *cert. denied*, 387 U.S. 930 (1967).

state . . . in which it arose, such bar shall be a complete defense . . ."[169] In affirming a decision that the action was barred by the three year Florida statute the majority said:

> [T]he cause of action for indemnity arose when Mack satisfied the judgment . . . in . . . Florida. . . . [T]he concept[s] of when . . . and . . . of where a cause of action arises . . . are *in pari materia* . . . [T]he cause arises where as well as when the final significant event that is essential to a suable claim occurs. . . . Under the Pennsylvania borrowing statute a court is required to apply the statute of limitations of the state where the cause of action arose without regard to any contacts of any other state with the parties and their prior dealings.[170]

A dissenting opinion stated:

> [T]he present cause of action for indemnity arose in Pennsylvania where there originated the contractual relationship between the parties out of which the right of indemnity arose, rather than in Florida where . . . satisfaction of the judgment was made which ripened the claim for indemnity and started the time of the running of the statute of limitations.[171]

In *Prince v. Trustees of University of Pennsylvania*, a later Pennsylvania diversity case following *Mack*, the court said: "It is clear that in arriving at . . . *when* the cause of action arose, the [*Mack*] court relied on Pennsylvania decisional law."[172] In *Prince*, a New Jersey administratrix, on behalf of a deceased New Jersey resident, sued in 1965 in Pennsylvania for wrongful death and also brought a survival suit for damages predicated on both negligence and breach of warranty in injecting a cancer-inducing drug in Pennsylvania in 1944. Death occurred late in 1963 in New Jersey, and it was alleged the cancer was first discovered in New Jersey shortly before death. Suit was filed more than one but less than two years after death. As to the wrongful death suit the court held the shorter one year Pennsylvania limitation applied and hence, the Pennsylvania borrowing statute did not come into play. Similarly it held that the warranty cause of action, which accrued in Pennsylvania in 1944, was barred by the Pennsylvania six year statute. Regarding the negligence cause, the court felt bound by *Mack* to determine by Pennsylvania law when the cause of action arose. It found that the cause of action did not arise until discovery of the negligence in 1963. Both Pennsylvania and New Jersey negligence limita-

169. PA. STAT. ANN. tit. 12, § 39 (1953).
170. 372 F.2d at 20-21.
171. *Id.* at 26.
172. 282 F. Supp. 832, 838 (E.D. Pa. 1968).

ton statutes were two years and had not expired since the alleged date of discovery. Defendants contended that New Jersey law should apply, and that in New Jersey the cause of action ran from the date of the negligent act. Defendants asserted that once it was determined the cause of action arose in New Jersey, there must be a new determination as to when the cause of action arose under New Jersey law and that the court "should totally disregard the answer to that question earlier provided by Pennsylvania law."[173] The court rejected this argument and denied a motion for summary judgment as to the survival negligence action, saying: "In *Mack*, the majority simply measured the Florida statute of limitations from the date the action arose, *a date determined by Pennsylvania law alone.*"[174] The court did go on to find it did not believe that under New Jersey law the cause of action would arise until the negligence was discovered.

The apparent discrepancy between *Nolan*, which holds that a borrowing statute embraces all of the accoutrements of the limitations law of the jurisdiction borrowed from, and *Mack* and *Prince* which held that *when* the cause of action arises is to be determined by forum law, might possibly be explained by the different wording of the respective New York and Pennsylvania borrowing statutes. The former read:

> *Where* a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose. . . .[175]

The Pennsylvania language is:

> *When* a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth.[176]

However, "arose" seems to be the key word in each statute, and the use of the word "when" in the latter statute, standing alone, does not impel the use of forum law to determine when a cause of action arose. Since, in each case, the question is one of conflict of laws, as to which *Erie* compels federal diversity courts to adhere to the rule of the state in which it sits, it is unlikely that the Supreme Court will inter-

173. *Id.* at 842.
174. *Id.*
175. N.Y. CIV. PRAC. ACT § 13, *presently* N.Y. CIV. PRAC. LAW § 202 (McKinney 1972) (emphasis added).
176. PA. STAT. ANN. tit. 12, § 39 (1953) (emphasis added).

vene to establish uniformity since no constitutional mandate is involved. These constructions, arrived at by the courts of appeal for the Second and Third Circuits, are, under *Erie*, subject to be changed by later decisions of the state courts of last resort in New York and Pennsylvania, respectively, should they so elect. Such new rule would apply only to cases then in litigation or thereafter brought.[177]

Two other cases further illustrate the complex problems which arise when determinations of when and where causes of actions arise are juxtaposed with questions concerning the application of borrowing statutes. *Chartener v. Kice*, held that the diversity cause of action in a New York survival suit for pain and suffering resulting from alleged malpractice by a New York doctor in the treatment of a California resident in New York, "accrued . . . in New York immediately upon the termination of the last treatment, and, therefore . . . the borrowing statute is inapplicable."[178] However, in the same case it was held that the wrongful death action for the subsequent death in California arose in California, and that the New York borrowing statute would apply unless the shorter New York statute had run. The wrongful death suit was brought within one year of the death and so was timely under California law. However, under New York law when the underlying wrongful death cause of action is for malpractice the two year malpractice limitation applies to the wrongful death action and starts to run from the time the malpractice occurred. This period had expired, but the question remained whether events had tolled the running of the New York statute. This depended under New York law on whether the decedent was rendered incompetent by defendant's tortious act prior to her death. A factual determination of these limited issues under New York law was ordered, prior to proceeding to trial on the merits.[179] The use here of New York law is appropriate since it was found that the cause of action arose in New York at the time of treatment, was barred in the forum, and could not be saved by the borrowing statute which applies only to causes of action "accruing without the state".[180]

177. Huddleston v. Dwyer, 322 U.S. 232 (1944); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429-30 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970).

178. 270 F. Supp. 432, 438 (E.D.N.Y. 1967).

179. *Id.* at 439.

180. N.Y. CIV. PRAC. LAW § 202 (McKinney 1972) provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Similarly, the borrowing portion of the New York limitation statute is inapplicable to causes accruing elsewhere to residents of New York. *Braniff Airways, Inc. v. Curtiss-Wright Corp.*[181] held that as to such plaintiffs only New York law is applicable as to all aspects of limitation questions. In that case an Oklahoma airline corporation and two New York resident passengers, in consolidated proceedings, sued Curtiss-Wright in New York for damages suffered in a plane crash in Florida under the theory of breach of implied warranty. New York law was applied to bar suit by the New York residents, and Florida law was applied, via the New York borrowing statute, to permit the action of Braniff, the Oklahoma corporation, to proceed. In 1956 defendant sold the airplane engines involved in the March 25, 1958 Florida crash. The report does not indicate where the sale was made. Braniff sued in the federal district court in New York on March 21, 1960. The two passenger suits were not filed until December 23, 1963, and March 24, 1964, respectively. Under New York law the limitation on suit for breach of warranty is six years and commences to run from the date of sale. The Florida limitation is two years, but does not start until the defect was, or should have been discovered. The New York plaintiffs' contention that the six year New York limitation should apply but that the Florida rule of time of discovery should mark when the action accrued was rejected by the court.[182] Non-resident Braniff's suit, filed in 1960, was held to be not barred in either Florida or New York.[183]

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181. 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970); *accord*, Coan v. Cessna Aircraft, 53 Ill. 2d 526, 293 N.E.2d 588 (1973), holding the Illinois borrowing statute inapplicable where plaintiff and one defendant in a personal injury suit arising out of an airplane crash in Kentucky were residents of Illinois.

182. There appear to be no New York decisions precisely in point. . . . The general aim of statutes of limitation is to cut short pursuit of stale claims; in New York a relatively long period of limitations is sharply cut back by the rule that the cause for implied warranty accrues at the sale, and not at discovery of breach. The New York policy . . . is to afford a litigant no more time to sue than that contemplated by the interplay of the two rules. The same may be said of Florida's shorter time limit, which is in effect extended by beginning computation at discovery rather than sale. . . . [W]e have no reason to believe that New York would choose to extend its already long period of limitations by permitting the Florida accrual at discovery rule to govern.

. . . .

. . . Florida, by its accrual at discovery rule, has placed a greater burden than has New York on manufacturers who may cause injury within that state. The additional standard of care imposed by Florida is not unlike a "rule of the road." . . . The time an action accrues imports "notions of substantive law."

424 F.2d at 430-32.

183. The sales took place in 1956; suit was filed in 1960, making the action timely in New York. Assuming that the time of the crash [1958]

In an earlier diversity warranty case brought in New York, the same circuit held that the cause of action of Texas resident crew members against an airplane manufacturer for injuries sustained in a Florida crash of a plane manufactured and delivered in California to the airline "arose" not in Florida but in California within the New York borrowing statute, and that the California one year statute of limitations barred the New York action.[184] This decision, in which certiorari was denied,[185] would appear to have made material in *Braniff* the place where title to the engines passed, unless this too was in the state of Florida, yet this fact was not determined in *Braniff*.

The preceding *Nolan, Mack, Chartener* and *Braniff* cases emphasize the importance of a minute reading of the applicable borrowing statute. They also point up the duty of federal courts in diversity to apply the state rule as to all aspects of borrowing, if ascertainable, and if not to divine what it will be when presented to the forum state courts for decision. This is simply a specific application of general *Erie* doctrine.

However, in the exercise of admiralty jurisdiction, the federal courts are bound by federal policies even though they must look to the analogous statute of limitations of the forum state as a step in ascertaining whether a plaintiff has been guilty of laches.[186] Thus, the New York borrowing statute was held not to be applicable to a collision occurring eight miles off the Venezuelan coast, though this area was claimed by Venezuela as territorial waters and the Venezuelan period of limitations had expired.[187] A motion to dismiss for laches was denied since the analogous New York three year limitation had not expired.

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was the first time that Braniff had notice of the defects in the engines, it also satisfied the Florida statute, since the Florida Supreme Court . . . indicated that its limitation period ran from the time when the party "discovered or should have discovered" the defect.

Id. at 430.

184. George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964); *accord*, O'Keefe v. Boeing Co., 335 F. Supp. 1104, 1113 (S.D.N.Y. 1971); Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969). The latter case held that where the aircraft was manufactured, sold and delivered in the state of Washington, Washington law applied in an Illinois diversity action against the manufacturer by nonresident plaintiffs who, asserting breach of warranty, sought damages resulting from a crash of the plane in Italy.

185. 379 U.S. 904 (1964).

186. *See* note 60 and accompanying text *supra*.

187. Esso Transp. Co. v. Terminales Maracaibo, C.A., 356 F. Supp. 1367 (S.D. N.Y. 1973).

New York's "borrowing statute," CPLR § 202, is not applicable in the instant case. The courts of the United States have consistently deferred to

It is possible for two borrowing statutes by their different provisions to raise the *renvoi* question.[188] Such a case is *Hobbs v. Firestone Tire & Rubber Co.*[189] Plaintiffs, injured in an accident in Kentucky, commenced a suit in diversity in Indiana against an Ohio corporate defendant more than one, but less than two years after the accident. The Indiana limitation in bodily injury cases is two years, but as to causes arising outside the state, the Indiana borrowing statute provides: "[W]hen a cause has been fully barred by the law of the place where the defendant resided such bar shall be the same defense here as though it had arisen in this state. . . ."[190] The Ohio limitation in bodily injury cases is two years, but the Ohio borrowing statute reads:

> If the laws . . . where the cause of action arose limit the time for the commencement of the action to a lesser number of years than do the statutes of this state in like causes . . . then said cause . . . shall be barred in this state at the expiration of said lesser number of years.[191]

The Kentucky limitation for bodily injury is one year.[192] In the absence of Indiana authority, the court denied a motion to dismiss. After an extended discussion of the *renvoi* doctrine, the district court held that *renvoi* is not part of United States law and accordingly the borrowing provision of Indiana law should embrace only the specific prescription period and not the borrowing provision of the Ohio statute. In rejecting *renvoi* the court relied in part on the provisions of the *Restatement of Conflict of Laws Second.*[193] The court reasoned that borrowing provisions of the limitation law of a state are a statutory part of its conflict of laws rules, whereas the specific periods of

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> the judgment of the legislative and executive branches in refusing to recognize claims by other nations to a territorial sea greater than three miles in breadth . . . . The collision, approximately eight miles off the Venezuelan coast, must be viewed as occurring on the high seas so that no other jurisdiction's law would be applicable under CPLR § 202.

Id. at 1369.

188. *Renvoi,* of course, may become a problem where the forum looks to the conflicts rule, rather than to the substantive rule of another jurisdiction. With great restraint, the author refrains from discussing *renvoi.* For detailed explanations, see a highly selected abbreviated bibliography: A. Von Meheren, *The Renvoi and its Relation to Various Approaches to the Choice-of-Law Problem,* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 380 (1961); Griswold, *Renvoi Revisisted,* 51 HARV. L. REV. 1165 (1938); Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (pts. 1-2), 10 COLUM. L. REV. 190, 327 (1910); Rabel, *Suggestions for a Convention on Renvoi,* 4 INT. L.Q. 402 (1951).

189. 195 F. Supp. 56 (N.D. Ind. 1961).

190. IND. ANN. STAT. § 2-606 (Burns 1960).

191. OHIO REV. CODE ANN. § 2305.20 (Page 1953).

192. KY. REV. STAT. ANN. § 413.140(1)(a) (Supp. 1972).

193. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 7-8 (1971).

prescription are a part of its internal or domestic law. This analysis, which is consistent with general conflict of laws doctrine, supports the decision refusing to enter into *renvoi* by refraining from resorting to the conflicts rule of Ohio. Although the court did not expressly so classify it, the situation presented is one which invites transference *renvoi* rather than classical *renvoi.* The court did point out that if the Kentucky borrowing statute had referred to the law of the residence of the defendant, then in four steps, instead of the usual two, an endless circle would have been established. The Kentucky borrowing statute, in fact, referred to the limitation of the place of collision, but the court found this to be applicable only if it were shorter than the Kentucky limitation.[194] Moreover, since Kentucky was the place of collision, this precluded the possibility of further transference *renvoi.*

The preceding *Hobbs* case is consistent with *Nolan,*[195] to the extent that in each the court refused to apply the law of a third jurisdiction once the borrowing statute of the forum had referred to the limitation statute of a second jurisdiction. They part company when *Hobbs* excises borrowing provisions of the limitation statute of the second jurisdiction from "all of its accoutrements", which *Nolan* says are applicable.[196]

At least two states hold that their borrowing statute does not apply if the cause of action arose in a state in which the defendant could not be summonsed. Thus, in *Western Natural Gas Co. v. Cities Service Gas Co.,*[197] where plaintiff pleaded that its claim accrued in the District of Columbia more than three years before suit filed in Oklahoma, and the defendant asserted the cause was barred by the three year District statute of limitations, the court found that the District of Columbia courts had no jurisdiction over the defendant and held: "We see no reason to conclude that the Oklahoma Legislature . . . intended to borrow the limitation law of a jurisdiction in which the defendant cannot be summonsed."[198] The Oklahoma court pointed out that the

194. 195 F. Supp. at 63, *relying on* KY. REV. STAT. ANN. § 413.320 (1942). This conclusion appears to be contrary to the results reached by the Sixth Circuit in *Prince* and *Collins* cited in note 144 *supra.* However, since the district court rejected *renvoi* in all forms so far as borrowing statutes are concerned, this conclusion, if erroneous, would not affect the decision of the case.

195. Nolan v. Transocean Air Lines, 276 F.2d 280 (2d Cir. 1960); *see* note 161 and accompanying text *supra.*

196. 276 F.2d at 283; *see* note 165 and accompanying text *supra.*

197. 507 P.2d 1236 (Okla.), *cert. denied,* 409 U.S. 1052 (1972); *accord,* Green v. Kensinger, 199 Kan. 220, 429 P.2d 95 (1967).

198. 507 P.2d at 1243.

District of Columbia tolling provisions would not have been applicable to this case. The Oklahoma borrowing statute under consideration defined "claim" as "any right of action which may be asserted in a civil action or proceeding . . . ."[199]

Where a cause of action arises both in the forum state and a second state, the borrowing statute of the forum is applicable to bar the action by applying the limitation of the second state.[200]

The preceding discussion of borrowing statutes is sufficient to indicate that they raise complicated conflicts problems. Subsequent sections of this article undertake to isolate and discuss specific areas of difficulty.

8. TOLLING PROVISIONS

Since forum borrowing statutes frequently bring into play the tolling provisions of the limitation statute referred to, some tolling problems were inevitably encountered in the preceding section on borrowing. Here attention is devoted to situations raising primarily multi-state tolling questions.

Parrish v. B.F. Goodrich Co.[201] reflects a subtle application of the tolling principle. Plaintiffs sued in Michigan for personal injuries sustained when a tire manufactured by defendant blew out in Ohio. The tire was sold in Michigan, and the blow out occurred just under three years prior to commencement of the Michigan suit. The trial court dismissed, holding the two year Ohio limitation statute applicable under the Michigan borrowing statute. The Michigan Court of Appeals reversed. It first observed that characterizing the warranty theory of product liability as contract or tort was procedural and to be determined by Michigan law which declares it to be a tort action for which the Michigan limitation period is three years. The court then referred to section 600.5833 of the Michigan statutes which provides that: "In actions . . . based on breach of . . . warranty . . . the claim *accrues at the time* the breach . . . is discovered or reasonably should be discovered."[202] It also noted: "The period of limitation applicable to a claim *accruing outside of this state* shall be either that prescribed by the

199. OKLA. STAT. ANN. tit. 12, §§ 104-08 (Supp. 1972).

200. Sack v. Low, 478 F.2d 360 (2d Cir. 1973); Pattridge v. Palmer, 201 Minn. 387, 277 N.W. 18 (1937).

201. 46 Mich. App. 85, 207 N.W.2d 422 (1973); *cf.* Stell v. Firestone Tire & Rubber Co., 306 F. Supp. 17 (W.D.N.C. 1969); *see* note 235 *infra.*

202. MICH. STAT. ANN. § 27A.5833 (1962).

law of the place where the claim accrued or by the law of this state, whichever bars the claim."[203] It next adverted to the Michigan Uniform Commercial Code section which in pertinent part provides:

> (1) An action for breach of any contract of sale must be commenced within four years after the cause of action has accrued . . . .
>
> (2) . . . *A breach of warranty occurs when tender of delivery is made* . . . .
>
> (4) This section does not alter the law on *tolling of the statute of limitations*.[204]

The court reconciled the two statutes holding

> the language of the commercial code to the effect that a breach of warranty occurs at delivery should be used to determine *where* the cause of action accrued, not when. There has been a long standing policy in Michigan that the statute of limitations should not expire before the damage has been suffered. . . . M.C.L.A. § 600.5833 . . . should be read as a *tolling* statute, unaffected by the subsequent language of the commercial code. . . . [T]he causes of action . . . accrued in Michigan where the potential liability for breach of warranty occurred, but . . . the limitation period did not begin to run until the damage was suffered . . . [P]laintiffs' . . . causes of action for breach of warranty . . . did not accrue outside this state . . . , and hence, are not barred by the Ohio statute of limitations.[205]

The more normal context of conflicts tolling problems is the direct question whether the borrowing statute of the forum extends to include the tolling provisions of the loci limitations statute to which it refers. The great weight of authority is that it does, and whether that statute has been tolled is to be determined by loci law.[206] Accordingly, where, nearly five years after the event, a Kansas resident sued a Missouri resident in Missouri for damage inflicted on livestock in Kansas and the defendant had been present in Kansas only briefly during this time, it was held that the five year Missouri statute rather than the two year Kansas statute, applied. The court reasoned that under Kansas law the absence of the defendant from Kansas tolled the Kansas statute, and accordingly the Missouri borrowing statute did not come into play.[207] The court said: "[P]laintiff's cause of action was not 'fully barred' by

203. *Id.* § 27A.5861(2) (1962).
204. *Id.* § 27A.5833 (1962).
205. 46 Mich. App. at —, 207 N.W.2d at 426.
206. Annot., 149 A.L.R. 1224 (1944).
207. Devine v. Rook, 314 S.W.2d 932 (Mo. App. 1958).

the Kansas statute of limitations and hence was not barred by the Missouri borrowing statute."[208]

Where loci states continue to view wrongful death action limitations as extinguishing the right, forum states hold their borrowing statutes do not extend to the general tolling provisions of the loci state. Thus, in a diversity suit in a Washington federal district court for a wrongful death by drowning in Oregon, brought slightly more than two years after the event, the action was held barred by the Oregon two year statute and not saved by the fact that the defendant had ceased to be a resident of Oregon shortly after the death, which by Oregon general tolling provisions would have suspended the running of the Oregon statute.[209] Washington's limitation statute contained a borrowing provision and a three year limitation on wrongful death actions. The court said:

> Obviously, the Washington court will apply Oregon law because this is an integral part of the act creating the right; it is not mere procedure, as a normal statute of limitations would be.[210]

Similarly, it has been held that the six year statute in patent infringement law is a condition on the right, and not the remedy, and may not be extended by fraud or concealment on the part of the defendant.[211] However, the three year limitation on Federal Employer Liability Act suits was held to be tolled by the fraud of the defendant practiced on an infant which induced delay in bringing suit.[212] In these two cases the courts were simply determining whether the circumstances tolled the applicable federal limitation provision.

Where federal courts apply a state statute of limitations to a federally created cause of action, they generally adopt all of the statute including its tolling provisions. For example, in Louisiana a suit for a prison death was brought within one year after the event against the United States under the Federal Tort Claims Act.[213] More than one year after the event, a Louisiana sheriff was added as a party defendant. It was held that the one year statute of Louisiana, applicable to suits against sheriffs, did not bar the action since Louisiana law also provides

208. *Id.* at 936.
209. Bengston v. Nesheim, 259 F.2d 566 (9th Cir. 1958).
210. *Id.* at 567. The court states this result is the overwhelming weight of authority, *citing* Annot., 132 A.L.R. 292 (1941); Annot., 67 A.L.R. 1070 (1930). *See also* Annot., 4 A.L.R.3d 821 (1965).
211. Pollen v. Ford Instrument Co., 108 F.2d 762 (2d Cir. 1940).
212. Scarborough v. Atlantic Coast Line R.R., 178 F.2d 253 (4th Cir. 1949).
213. Williams v. United States, 353 F. Supp. 1226 (E.D. La. 1973).

that a suit brought against one person tolls the prescription against all persons co-obligated.[214]

However, federal courts, in federal question cases, will not always adopt state tolling provisions. The clearest case in which they will refuse to do so is when the tolling provision conflicts with existing federal law. For example, in a treble damage antitrust suit brought in a New York federal district court for conduct in Connecticut, the court applied the New York borrowing statute which looked to Connecticut law, but refused to apply the Connecticut tolling provision. That provision would have prevented the bar of the Connecticut three year statute because the defendant corporation was not "doing business in Connecticut" in the conventional sense.[215] The court said:

> [W]e . . . hold as a matter of federal law that in a suit to enforce a federal claim, the existence of a federal statute rendering the defendant subject to suit in Connecticut precludes the adoption of state service of process rules to determine whether the defendant was without the state within the meaning of a state tolling statute. . . . While state law may be adopted by federal law where Congress has not spoken, in order to fill the interstices of federal enactments, it may not be adopted where it supplants or conflicts with existing federal law.[216]

The application of tolling provisions by federal courts sitting in diversity does not produce uniform results since the *Erie* mandate is that normally the federal court must follow the conflicts rule of the state in which it sits and reach the same borrowing and tolling results reached by the supreme court of that state, or if the supreme court has not spoken, the results which the federal court believes that state supreme court will reach when the matter is submitted to it.[217]

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214. *Id.* at 1231.

215. Banana Distrib., Inc. v. United Fruit Co., 269 F.2d 790 (2d Cir. 1959).

216. *Id.* at 794.

217. The following cases are illustrative:

In Wilt v. Smack, 147 F. Supp. 700 (E.D. Pa. 1957), brought in a federal district court in Pennsylvania for injuries sustained in a Delaware accident, plaintiff was permitted to amend his complaint to allege facts showing a dismissal without prejudice, on venue grounds, of a prior suit on the same cause which had been timely commenced in a federal district court in Delaware, since under such circumstances a new action could be brought under Delaware law within one year after such dismissal. The second suit in Pennsylvania was filed more than one, but less than two years after the accident and within less than a year after the dismissal of the action in Delaware. The limitation in Delaware was one year, in Pennsylvania two. It was held that since under the Delaware law the suit was not fully barred in Delaware, it was not barred within the meaning of the Pennsylvania borrowing statute. *Cf.* Litten v. Peer, — W. Va. —, 197 S.E.2d 322 (1973), holding that the dismissal of a previous federal court action on the same cause for lack of prosecution, was a dismissal on the merits, and

An interesting case arises when diversity actions in different states are consolidated. Does the federal court hearing the case have to apply the borrowing statute of the forum state, or may it use the limita-

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acted as res judicata to bar the later state court action even though the running of the statute of limitations had been tolled.

In Wade v. Lynn, 181 F. Supp. 361 (N.D. Ohio 1960), suit was filed in the federal court in Ohio more than one but less than two years after an accident occurred in West Virginia. Nine months after the accident the defendant moved permanently from West Virginia to Ohio, and under West Virginia law this tolled the running of the one year West Virginia statute. Ohio's limitation period was two years, but its borrowing statute had been construed by the Ohio Supreme Court in Payne v. Kirchwehm, 141 Ohio St. 384, 48 N.E.2d 224 (1943), to extend to the limitation imposed by the state in which the cause arose but not to matters which would there toll that limitation. The diversity suit was held to be time-barred by applicable Ohio law.

In Andrew v. Bendix Corp., 452 F.2d 961 (6th Cir. 1971), a North Carolina administratrix brought a wrongful death suit in 1965 in a federal district court in Ohio against a Delaware corporation for a death in North Carolina in 1960. Plaintiff had filed an identical suit in the federal court in the District of Columbia in 1961 which was dismissed for want of prosecution in 1964, just within one year before the suit was filed in Ohio. To prevent the application of the Ohio two year statute of limitations, plaintiff relied on an Ohio savings statute permitting commencement of a new action within one year after an action fails other than upon the merits. OHIO REV. CODE ANN. § 2305.19 (Page 1953). Whether this saving statute extended to actions commenced outside of Ohio had not been determined by the Ohio courts. In holding that the time within which to sue was not extended by the prior out of state suit, the court relied upon a North Carolina decision (among other cases). The *Andrew* court noted:

> A . . . recent state court decision . . . is High Admr. v. Broadnax . . . . Therein the original wrongful death action was instituted in . . . Virginia, and following its nonsuit a new action was filed in North Carolina after the statute of limitations had run but within the one-year period prescribed by the North Carolina savings statute. In holding the latter statute inapplicable, the court stated, "We adhere to the general rule that a statute of the forum which permits a suit to be reinstituted within a specified time after dismissal of the original action otherwise than upon its merits has no application *when the original suit was brought in another jurisdiction.*"

452 F.2d at 963.

In Mizell v. Welch, 245 F. Supp. 143 (D. Conn. 1965), plaintiff sued in Georgia state court for injuries sustained there in 1962. Upon removal to the federal court, the suit was dismissed for lack of jurisdiction over defendant's person. Plaintiff on November 19, 1964 sued on the same cause in a federal court in Connecticut. The applicable statute of limitations in Connecticut is one year. The court held:

> [I]t would be anomalous . . . to extend the benefit of a remedial Connecticut statute . . . to a Georgia litigant in a situation where no remedy would be available to a Connecticut litigant . . . Plaintiff, having failed . . . to bring his action within the time prescribed by Connecticut law . . . cannot reap the benefit of the Connecticut Accidental Failure of Suit Statute and is, therefore, barred from seeking relief in this Court . . . .

Id. at 144. This happens to be consistent with the Georgia rule which holds that a mere filing of a suit, absent personal service, will not serve to toll the statute of limitations; *see* Davis v. Patrick, 128 Ga. App. 730, 197 S.E.2d 743 (1973).

A seemingly contrary result was reached in Speight v. Miller, 437 F.2d 781 (7th Cir. 1971). Plaintiff filed a personal injury suit in Tennessee within one year after the 1967 accident occurred in Tennessee. The defendant had moved from Tennessee to Illinois and could not be served in Tennessee. More than one year after the accident, plaintiff sought to effect service on the Tennessee Secretary of State, but the Tennessee long arm statute then provided that such service could be accepted only with-

tion period and tolling provisions of the other state? In *Bott v. American Hydrocarbon Corp.*[218] plaintiff who had been employed in California by the defendant, a Delaware corporation, brought a diversity suit in federal court in Texas in 1969. Later in the same year he brought an identical suit in a California state court, seeking recovery on claims arising in California in 1965. The California suit was removed to a federal court in California, and that court transferred it to the federal court in Texas where it was consolidated for trial with the other pending action. Defendant asserted the statute of limitations, which in both California and Texas was two years. Plaintiff countered that defendant had not done business in California since May 1965 and that this tolled the running of the California statute. The Court of Appeals for the Fifth Circuit held in these circumstances that the California tolling provision would be applied.[219] In doing so it reversed the district court which had held the action barred by the Texas two year limitation. The Texas federal court suit was the first filed,[220] and Texas has no specific borrowing statute which would call into play the California tolling statute. Moreover, under the usual rules, if the action were barred by the Texas statute of limitations, its borrowing statute would not come into play.

The case of *Atkins v. Schmutz Manufacturing Co.*[221] raises the issue of the tolling effect of the pendency of the first of identical suits in different federal courts and concludes this is a matter to be determined

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in one year of the accident. Plaintiff in 1969 sued on the same cause in a federal district court in Illinois. The trial court dismissed the suit as being barred by the Tennessee one year statute of limitations by means of the Illinois borrowing statute. The court of appeals in reversing, construed the Illinois borrowing statute, ILL. ANN. STAT. ch. 83, § 21 (Smith-Hurd 1966), as borrowing the tolling as well as the limitation provisions of Tennessee law. It then pointed out that the Tennessee law provided: "The suing out of a summons is the commencement of an action . . . whether it be executed or not, if the action is duly prosecuted . . . or recommenced within one (1) year after the failure to execute." TENN. CODE ANN. § 28-105 (1955); *accord*, Vance v. Blegen, 366 S.W.2d 223 (Tenn. 1971), *noted in* 39 TENN. L. REV. 341 (1972).

218. 441 F.2d 896 (5th Cir. 1971).

219. [W]e are persuaded that Texas would apply California's tolling rule, so that the Texas District Court, with the two cases before it, would apply California law in the consolidated trial because it is the law that would be chosen by both states. However, even if Texas' choice of law were different, so that the District Court was required to choose between competing rules for the consolidated trial, we have no doubt that the primacy of California interests should prevail and that the court should choose California law.

Id. at 900. The phrase "primacy of California interests" seems to smack of a "most significant relationship" choice of limitation law, the subject of a subsequent section in this article, *see* text accompanying notes 294-315 *infra*.

220. *Cf.* Parham v. Edwards, 346 F. Supp. 968 (S.D. Ga. 1972).

221. 435 F.2d 527 (4th Cir. 1970).

by federal rather than state law. Here plaintiff, a Virginia resident, was injured in Virginia by a defective machine manufactured in Kentucky by the defendant, a Kentucky corporation. Since Virginia then had no long arm statute, plaintiff sued in a federal district court in Kentucky within the two year limitation of Virginia but not within the one year limitation of Kentucky. Contrary to the rule in the vast majority of jurisdictions, Kentucky's borrowing statute, as then construed, adopted the limitation of the loci state regardless of whether that limitation was longer or shorter than Kentucky's. While this diversity action was pending the Kentucky Court of Appeals reversed its former rule and held that Kentucky limitations applied to causes accruing elsewhere if the limitation in the state where the event occurred was longer than that of Kentucky.[222] The Kentucky federal district court applied the new Kentucky rule to the pending action and dismissed it as time barred. The court of appeals affirmed, and the United States Supreme Court denied certiorari.[223] The second action was brought in a federal court in Virginia after Virginia enacted a long arm statute. This was before the suit in Kentucky was dismissed but was more than two years after the injury. The suit in Virginia was dismissed as time barred under Virginia law.[224] The Court of Appeals for the Fourth Circuit reversed, held the first suit tolled the Virginia time bar, and said: "We conclude that we must seek the answer as a matter of federal, not state law."[225] Two of the seven judges, sitting en banc on

222. Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. Ct. App. 1965), *see* note 144 *supra.*

223. Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir.), *cert. denied,* 389 U.S. 829 (1967).

224. Atkins v. Schmutz Mfg. Co., 268 F. Supp. 406 (W.D. Va. 1967).

225. Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 538 (4th Cir. 1970), *cert. denied,* 402 U.S. 932 (1971), *noted in* 71 COLUM. L. REV. 865, 875-80 (1971); *critically noted in* 50 TEXAS L. REV. 162 (1971). Since the case decides a new point and has at least tentative Supreme Court approval, excerpts from the decision seem appropriate: The Fourth Circuit opinion, in part, said:

> If, in determining the tolling effect of the pendency of the action in the federal courts of Kentucky, we were required, as we are in determining the applicable period of limitation, to follow the state law of Virginia, it is possible, although not certain, that we would uphold the time-bar.

435 F.2d at 529.

> . . . Allowing Atkins to litigate the merits of his claim at this time would be consistent with the basic purpose reflected in the tolling rule—saving the right of action for plaintiffs who, without fault, have been unable to obtain an adjudication on the merits.

Id. at 530.

> . . . By its nature this issue never has been and never will be resolved, or even considered by any court of the Commonwealth of Virginia. Given the differences between the two judicial systems, no one can say with any assurance what Virginia's Supreme Court of Appeals would do if confronted with the question now before us in the context in which it arises.

resubmission, filed concurring opinions based on the belief that under Virginia law the suit was not time barred.[226]

It should be remembered there are circumstances where a borrowing statute of the forum is inoperative and hence does not call into operation a loci tolling provision. These include situations where the limitation statute of the forum has itself barred the suit[227] and where the event is pleaded as a pure defense in a pending suit and the limitation statute is wholly inapplicable.[228] However, in a diversity suit for personal injuries and property damage suffered on May 30, 1970, commenced on May 14, 1971, to which the defendant on June 9, 1971 filed a counterclaim for his personal injuries and property damage, a federal district court in Tennessee held:

> The counterclaim herein of June 9, 1971 was obviously interposed more than one year after the cause of action arose on May 30, 1970. The commencement of this original action did

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. . . .

On an issue so closely procedural and so intimately involved in the nature and functioning of the federal judicial system, we believe that service of the integrity and needs of that institution should prevail over random guesses about essentially irrelevant state law stemming from different institutional considerations.

Id. at 531.

Though here there was no transfer of the action in the Western District of Kentucky and the question of its transferability was not raised, the commencement of this action in the Western District of Virginia during the pendency of the Kentucky action has achieved the same practical result. A determination of the tolling effect of the commencement and prosecution of the federal action in the Western District of Kentucky ought to be had under the same body of law regardless of the procedural means by which prosecution of the substantive cause of action is discontinued in the district court sitting in Kentucky and continued in a district court sitting in Virginia.

Id. at 537-38.

. . . Since every purpose of Virginia's proscription against the commencement of tort actions more than two years after the injury has been served, we conclude that, as a matter of federal law, the statute has been satisfied.

Id. at 538.

226. *Id.* at 539.

227. Conner v. Spencer, 304 F.2d 485 (9th Cir. 1962).

[T]he statute of limitations of the forum provides an ultimate limitation upon the period within which suit may be brought in its courts, even though by operation of a tolling statute the period of limitations on the cause of action has not yet expired in the jurisdiction in which it accrued . . . .

Id. at 487.

228. United States v. Western P.R.R., 352 U.S. 59 (1956).

. . . To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale.

Id. at 72; *cited as controlling in* Heck v. Rodgers, 457 F.2d 303 (7th Cir. 1972).

> not toll the applicable statute of limitation for purposes of interposing a counterclaim . . . . Accordingly, the counterclaim hereby is dismissed . . . .[229]

The Tennessee rule here applied seems unduly harsh once the accident was made the subject of litigation by a suit brought in time.

A ground frequently asserted as tolling a limitation statute is fraudulent concealment of the cause of action by the defendant. Proof of affirmative misrepresentation is normally required. Where a federal statute of limitations is applicable, the federal fraudulent concealment rule, that time does not begin to run until the plaintiff has or should have had knowledge of the facts, controls.[230] This also applies where a federal statute by silence brings into play the state statute of limitations.[231]

Diversity cases apply the state rule regarding the effect of fraudulent concealment.[232]

Where there is a fiduciary relationship between the parties, the rule requiring affirmative misrepresentation may be relaxed. In *Hood*

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229. Maxwell v. Roark, 337 F. Supp. 506, 507 (E.D. Tenn. 1971).

230. Exploration Co. v. United States, 247 U.S. 435 (1918); Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2d Cir. (1962), *cert. denied*, 373 U.S. 909 (1963). The plaintiff has the burden of proving non-discovery. Laundry Equip. Sales Corp. v. Borg-Warner Corp., 334 F.2d 788 (7th Cir. 1964).

231. Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir. 1961). "We hold that the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period . . . ." *Id.* at 83; *cf.* Knuth v. Erie-Crawford Dairy Coop. Ass'n, 463 F.2d 470 (3d Cir. 1972).

232. In a representative case where an assertion of tolling by fraud was rejected, the court said:

> . . . The argument is based upon plaintiff's contention that defendant fraudulently represented to plaintiff that the press base was low stressed though defendant knew it was high stressed, that defendant repeated the same misrepresentation to plaintiff in conjunction with its subsequent sale to plaintiff of another press, and that defendant failed to inform plaintiff of information available to it concerning plaintiff's cause of action.
>
> Accepting those allegations as true, they simply do not invoke the provisions of Section 23 [of the Illinois Act] . . . . [I]t is clear that no affirmative act or representation of defendant was inclined to prevent plaintiff from ascertaining the true facts.

Gates Rubber Co. v. USM Corp., 351 F. Supp. 329, 337-39 (S.D. Ill. 1972). Section 23 of the Illinois Act provides:

> If a person liable to an action fraudulently conceals the cause of action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards.

ILL. REV. STAT. ch. 83, § 23 (1971).

Where the time when alleged fraud was discovered or should have been discovered becomes a factual issue it is inappropriate to grant summary judgment. Benjamin v. Western Boat Building Corp., 475 F.2d 1085 (9th Cir. 1973); *cf.* Wall v. Flack, 15 N.C. App. 747, 749, 190 S.E.2d 671, 672 (1972).

v. McConemy,[233] plaintiffs, residents of Pennsylvania, in late 1969 filed diversity suits for legal malpractice in a Delaware federal court against a Pennsylvania and a Delaware attorney. The plaintiffs alleged that the defendants had improperly dismissed a medical malpractice suit in Delaware in which they represented the plaintiffs and then concealed the dismissal. The proceedings were consolidated, and the defendants asserted the Delaware three year statute of limitations. In denying a motion for summary judgment, the court held:

> . . . Although no Delaware cases have faced the issue, numerous state courts do not require an affirmative act where the wrongdoer maintains a fiduciary relationship to the plaintiff.
>
> [T]he court is of the opinion that Wilson's alleged failure to notify the Hoods or McConemy could be sufficient to constitute a fraudulent concealment.[234]

9. Accrual and Termination of Limitation Period

A tenuous line, if any, separates events that toll, and events that cause the accrual of, a period of limitation.[235] The two areas could be

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233. 53 F.R.D. 435, 445-47 (D. Del. 1971).

234. *Id.* at 445. The North Carolina rule regarding the tolling effect of fraud is stated in Calhoun v. Calhoun, 18 N.C. App. 429, 197 S.E.2d 83 (1973):

> [N.C.] G.S. § 1-52 provides that an action for relief on the ground of fraud or mistake must be brought within three years after "the discovery by the aggrieved party of the facts constituting the fraud or mistake." The Supreme Court of our State has held in numerous cases that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence.

Id. at 432, 197 S.E.2d at 85; *cf.* Hendrickson v. Sears, 359 F. Supp. 1031 (D. Mass. 1973). In a diversity legal malpractice action, it was held, that for purposes of the Massachusetts statute of limitations, the federal district court was required to follow the decision of the Supreme Judicial Court of Massachusetts that the limitation period commenced when the malpractice occurred. The Federal Court did not have an option to apply the "discovery rule." Accordingly, a suit brought in 1971 for alleged malpractice in connection with a title search made in 1961 was barred, whether considered to be in tort or contract.

235. It is beyond the scope of this article to consider the various forum rules as to when different causes of action accrue, where no conflicts problem is involved. Thus the interesting question of when a breach of warranty action accrues has been herein discussed in multi-state borrowing (*see* text accompanying notes 68-85 *supra* and the analysis of Parrish v. B.F. Goodrich Co., 46 Mich. App. 85, 207 N.W.2d 422 (1973) in text accompanying notes 201-05 *supra*), and tolling situations, but will not be given separate treatment. There are numerous collections of local law rules which govern as to when actions accrue in a single state setting. *See, e.g.*, Annot., 4 A.L.R.3d 821 (1965); Annot., 97 A.L.R.2d 1151 (1964); Annot., 80 A.L.R.2d 368 (1961); Annot., 11 A.L.R.2d 277 (1950); Annot., 144 A.L.R. 209 (1943); Annot., 75 A.L.R. 1086 (1931); Annot., 74 A.L.R. 1317 (1931).

A 1971 change in the North Carolina statute of limitations regarding accrual merits notice. It provides:

> (a) Civil actions can only be commenced within the periods prescribed

lumped together, but perhaps clarity is enhanced by an effort to differentiate them. The emphasis in this section is on the following three problems: (1) what events cause a right of action to accrue; (2) under what circumstances are amended pleadings said to "relate back;" and (3) what events amount to initiation of suit within the statutory period. At times the distinction does become significant in a conflicts setting.

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in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

(b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

N.C. GEN. STAT. § 1-15 (Supp. 1973). The language of N.C. GEN. STAT. § 1-15(b), while somewhat obscure, appears to apply not only to personal injuries resulting from breach of warranty, but also to property damage so arising. So construed, it substantially changes the North Carolina law.

The previous North Carolina rule regarding accrual of a breach of warranty action is set out in Employers Commercial Union Co. of America v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972). The court said:

> The courts of this state have consistently held that the statute of limitations for claims for injury or damage from a defective product begins to run from the date of the sale and delivery of the product (not the date of the ultimate failure of the product or the injury). . . . G.S. 1-15(b) was enacted after this cause of action arose and it has no application to this case.

Id. at 410, 190 S.E.2d at 367; *accord*, Hall v. Gurley Milling Co., 347 F. Supp. 13 (E.D.N.C. 1972) (mem.).

Stell v. Firestone Tire & Rubber Co., 306 F. Supp. 17 (W.D.N.C. 1969) was a diversity suit by a truck driver to recover for injuries received in an accident in North Carolina, allegedly resulting from sale of a defective tire by the defendant to plaintiff's employer (apparently in Virginia). The suit was filed more than three years after the sale of the tire but less than three years after the accident. In denying a motion for summary judgment contending the action was time barred, the court held:

> The North Carolina statute by its terms begins to run after the action has "accrued." The suit does not involve an "*injury*" to the person or rights of another until the plaintiff was hurt. There was no "injury" and no basis for action until the wreck occurred in North Carolina on July 26, 1965. New Dixie might have had an action for breach of contract when the tire was delivered, [place of delivery was not revealed] but plaintiff, the driver had no cause of action until he was injured.
>
> Since the cause of action, if any, arose or "accrued" to Stell in North Carolina, rather than in Virginia, the two-year Virginia statute of limitations does not apply.

Id. at 18-19. N.C. GEN. STAT. § 1-15(b) (Supp. 1973) appears to put a ten year limitation from the time of sale on a factual situation such as that presented in *Stell*; *see* discussion of Parrish v. B.F. Goodrich Co., 46 Mich. App. 85, 207 N.W.2d 422 (1973), in text accompanying notes 201-05 *supra*; *cf.* Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973), which held that a claim for indemnity does not arise until the injured party brings an action against the one seeking indemnity; *accord*, Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

A. When Cause Of Action Accrues.

When a cause of action accrues may be determined by statute or by judicial decision. Normally, the matter is determined by the law of the forum. However, the forum court may apply the law of the state *where* the cause of action accrues.[236] *Association for the Preservation of Freedom of Choice, Inc. v. Simon*,[237] a diversity libel suit, is an example of the use of a statute to determine when a cause of action accrues. The New York federal district court applied the New York single publication statute and held that the subsequent out-of-state publications of an alleged libel, as well as the original publication in New York, were barred by the New York one year statute.[238]

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236. *E.g.*, Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858 (5th Cir. 1966). This was a third party negligence action in a federal court in Georgia, by one Lockmiller and an insurance company to recover for personal injuries received in an accident in Texas in January 1959, for which Texas workmen's compensation had been previously awarded. Defendant Baron asserted the Georgia two year statute of limitation had run when suit was filed against him in March 1964. The court held the suit was brought in time, and said:

> The applicable Georgia statute of limitation is two years and the period begins running when the cause of action accrues. . . .
>
> To determine when the cause of action accrued we must look to Texas law. . . . Under Texas law the cause of action accrued when judgment was entered on Lockmiller's Texas workmen's compensation claim, December 11, 1962. . . . The present suit was instituted on March 19, 1964, within the two year Georgia statute of limitations, and hence is not barred.

Id. at 860.

237. 299 F.2d 212 (2d Cir. 1962) (per curiam).

238. In affirming, the court of appeals said:

> . . . The alleged libelous statements were first published in New York. Judge Murphy held this claim to be time barred, by virtue of the one-year period of limitations provided in New York Civil Practice Act, § 51, which is measured from the time of first publication. . . . Were New York forced to recognize as a separate claim for relief each subsequent publication in another jurisdiction, the policy of its Statute of Limitations and single publication rule "to spare the courts from litigation of stale claims" . . . would be swept away. We are not here concerned with a tort which arose full-born in a sister state. . . .
>
> . . . [A] Federal District Court sitting in . . . diversity, should comply with this state rule for the state rule is bound up with rights and obligations of the parties and its application does not disrupt the procedures of the federal system. Otherwise, the outcome would likely depend on the courthouse where suit is brought.

299 F.2d at 214-15.

An interesting California case applying its Uniform Single Publication Act one year statute of limitations is Belli v. Roberts Bros. Furs, 240 Cal. App. 2d 284, 49 Cal. Rptr. 625 (1966). Suit was filed against the furrier for alleged defamatory statements. The court held:

> Here the statements alleged to be an invasion of privacy appeared in various editions of the San Francisco Chronicle on February 13, 1962, although the newspaper bore the date February 14, 1962. Appellants' alleged causes of action arose therefore on February 13, 1962 when various editions containing the article to which they object were distributed to the public. The statute of limitations began to run against appellants when the first general distribution of the first edition of the Chronicle was made on February

Fowler v. A. & A. Co. [239] involved a suit filed February 18, 1966 in the District of Columbia against a contractor for breach of a contract, accompanied by a guarantee, to waterproof a basement in Maryland. Defendant asserted the action was barred by the Maryland statute of limitations which he contended started to run from the date the basement wetness recurred—June 1962. The court rejected this contention, holding the breach of contract action began to run under District of Columbia law from the date defendant breached the contract by failing to correct the defect on demand.—June 10, 1963, and that the suit was brought in time under the applicable District of Columbia statute.[240]

B. Relation Back Of Amended Pleadings.

A recurring problem is whether, in an action filed before the limitation statute has run, the filing of amended pleadings after that time "relates back" so as not to be time barred. This article will not concern itself with the many domestic procedural law problems arising under diverse state "relation back" statutes and rules. Within a given state these are subject to frequent legislative reformulation. In conflicts situations the forum court usually applies its own rule to this problem, but may, if it chooses, look to the relation back law of another jurisdiction with a relationship to the asserted cause(s) of action. Here, only sparse examples of multi-jurisdictional relation back situations are presented.

In federal question cases in the federal court, this issue is clearly controlled by federal law. Hence, in an action under the Federal Torts Claim Act, a mother, who had originally appeared as next friend for her minor son for his injuries by an army explosive device, was permitted nearly five years after the accident to amend the complaint to include her claim as a parent for loss of services of the minor.[241] The court said:

> ". . . The Federal rule on the 'relation back' of amendments to pleadings, as embodied in Federal Rule 15(c), is permissive. As long as the amended complaint refers to the same transaction or occurrence that formed the basis for the original complaint and

13th. . . . [I]t necessarily follows that appellants' complaint, filed February 14, 1963, was too late and the statute of limitations has barred their claims.

Id. at —, 49 Cal. Rptr. at 629.

239. 262 A.2d 344 (D.C. App. 1970).

240. *Id.* at 347.

241. Williams v. United States, 405 F.2d 234 (5th Cir. 1968).

> the defendant was put on notice of the claim by the first complaint, there will be no bar to amendment; even new defendants and new theories of recovery will be allowed."[242]

It is not yet crystal clear that Federal Rule 15(c) applies in diversity cases in the federal courts, to the exclusion of the relation back rule of the state in which the federal court sits. A guarded dictum in a federal district court case assumes that Federal Rule 15(c) is controlling,[243] and a recent Seventh Circuit decision clearly held the rule to apply.[244]

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242. *Id.* at 236-37, *citing* Travelers Ins. Co. v. Brown, 338 F.2d 229, 234 (5th Cir. 1964); *accord,* Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc., 337 F. Supp. 674 (N.D. Ill. 1972). Here the court upheld a suit for refund of overcharges paid by a shipper brought under the Interstate Commerce Act, holding: "[P]laintiff's claims for enforcement of the Commission order relate back to the time it filed its complaints and are not barred by the statute of limitations." *Id.* at 684. *See also* Hoffman v. A.B. Chance Co., 346 F. Supp. 991 (M.D. Pa. 1972).

243. Hockett v. American Airlines, Inc., 357 F. Supp. 1343 (N.D. Ill. 1973). The court said in denying defendant's motion to dismiss:

> In this case the Second Amended Complaint filed March 2, 1973, named Janet Hockett as a new plaintiff. No new defendants were added. Her claim for loss of consortium against the defendants, contained in Counts IV, V, and VI, are based upon the same allegations of negligence as are Curtis Hockett's. The factual matrix for Janet Hockett's claims is identical to that of her husband's. The defendants cannot claim prejudice in this case since they have been fully advised of the facts upon which Curtis Hockett has based his claim and have been vigorously preparing their defenses. Accordingly, Janet Hockett's claims relate back under Rule 15(c) to the date of the original pleading. As that pleading was filed within the appropriate limitation period, the claims of Janet Hockett set forth in the Second Amended Complaint, are not subject to the bar of the statute of limitations, even if one were to assume that the two-year period applied.

Id. at 1348. This is dictum because the opinion had previously determined that under Illinois law a five year, and not the two year statute of limitations applied.

FED. R. CIV. P. 81(c) in part provides: "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal." However, no express reference is made to diversity cases, and the Rules are not helpful in resolving the "outcome determinative" quandary as to whether state or federal law should be applied to this specific situation. The trend of many states to adopt the essence of the Federal Rules of Civil Procedure as their own rules of civil procedure may tend to moot this question.

In diversity, in a wrongful death suit, again by dictum, since the case was decided on the ground of sovereign immunity, a federal district court disposed of the question of the relation back of an amended pleading. In Nickell v. Westervelt, 354 F. Supp. 111 (W.D. Va. 1973), the court ruled:

> . . . The court must answer the question whether dismissal of the action by this court terminated the action so that an amended complaint, when filed, would be time-barred. The court holds that when the judgment of dismissal was vacated by the Fourth Circuit and the case was remanded to this court, granting leave to amend, it was a continuation of the original action, and the limitations period would be measured from the date the right of action accrued to the time of the filing of the original complaint and not to the date of the filing of the amended complaint. Therefore, the action did accrue within the two year limitations period stated in the wrongful death statute, Section 8-634 of the Code of Virginia.

Id. at 114.

244. Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1973). The court clearly held

Yet another facet of Rule 15(c) was presented in a civil rights suit brought by a prisoner convicted of killing two police officers while he was engaged in an armed robbery.[245] The plaintiff alleged violations of his civil rights under section 1983 asserting that a police officer "caused him to be convicted by illegal means in lying and inflaming the public about [him]."[246] Since section 1983 cases have no applicable federal limitations statute, the court applied the then analogous six year statute of New York, the state in which the federal action was brought.[247] The events in issue occurred May 22, 1962. Plaintiff filed suit on April 15, 1968. On December 1, 1969 he sought to amend his complaint to allege a cause of action for assault, asserting this might be done under Federal Rule 15(c) and so would be in time. The court held the alleged action for assault was time barred under Rule 15 (c).[248]

Federal Rule of Civil Procedure 15(c) to be determinative of the relation back effect of an amended complaint in a diversity tort action. There the complaint was filed in a federal district court in Illinois one day before the two year statute ran but was not served until three weeks later, and then upon the twelve year old daughter of the driver of the car who had mistakenly been named as the defendant. Thereafter plaintiff sought to amend to name the mother, who had been the driver, as the defendant. In affirming the district court denial of plaintiffs' motion for leave to amend the circuit court said:

> We are presented with a novel question concerning the amendment of a complaint in a diversity tort action and the date to which it may or may not relate back pursuant to Rule 15(c), Federal Rules of Civil Procedure.
>
> [S]tate statutes of limitation are frequently geared to the filing of the complaint. This appears to be so in Illinois. However, Rule 15(c) is geared to notice. The party to be substituted must receive *notice of the action* "within the period provided by law for commencing the action against him". . . . Doris J. Fenton had no notice until after the statute of limitations had run. She could not have had notice that a suit had been filed against her until she heard about it.
>
> Since . . . the requirement had not been met that the defendant sought to be substituted by amendment must have notice of the filing of the action prior to the running of the statute of limitations, plaintiff cannot prevail.

Id. at 134, 137.

245. Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973).

246. *Id.* at 522.

247. *See* text accompanying notes 74-93 *supra.*

248. If the test were merely temporal, the assault claim would fall within Rule 15(c), since the alleged assault came within a short time after the exhibition before the television cameras. However, the test is not contemporaneity but rather adequacy of notice. As said by Judge Larimore in Snoqualmie Tribe v. United States, 372 F.2d 951, 960, 178 Ct. Cl. 570 (1967), "the inquiry in a determination of whether a claim should relate back will focus on the notice given by the general fact situation set forth in the original pleading." Under that test the case for relation back conspicuously fails. On the most liberal reading not a word in the complaint even suggested a claim of physical assault. . . .

Since the assault claim must be deemed not to have been asserted until December 1, 1969, it was time-barred unless the six year statute of limitations had been tolled. New York's tolling provision in behalf of certain prisoners affords Rosenberg no aid [since] . . . limited to persons who

In a case arising out of an accident in Ontario, where all parties were residents of Michigan and where suit was brought in Michigan within the Michigan three year statute but not within the Ontario one year statute, the court refused to permit amendment of an answer to plead the Ontario statute.[249] It held:

> [I]n an action between litigants all of whom are domiciliaries of Michigan, timely brought but for the provisions of [the Uniform Statute of Limitations on Foreign Claims Act], a failure to plead the bar of a foreign statute of limitations in the first responsive pleading is not amendable.[250]

C. *What Constitutes The Institution Of Suit For Limitation Purposes.*

There remains for consideration in this section the problems as to when a suit is commenced for purposes of determining whether it was brought within the limitation period.

Rule 3 of the Federal Rules of Civil Procedure reads: "A civil action is commenced by filing a complaint with the court." Where a federally created right is the subject of suit, it has been held that the language of Rule 3 controls and that when a complaint is filed with the clerk of court this act alone tolls the running of a federal statute of limitations. A typical case so holding is *Moore Co. v. Sid Richardson Carbon & Gas Co.*,[251] an action based on alleged violations of the Robinson-Patman Act and the Clayton Act for which a four year federal statute of limitations is prescribed.[252]

The federal rule also applies to a cause of action based on a federal statute even though the right sought to be enforced is given by

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are imprisoned "on a criminal charge or conviction for a term less than life."

Rosenberg v. Martin, 478 F.2d 520, 526-27 (2d Cir. 1973); *accord*, White v. Padgett, 475 F.2d 79 (5th Cir. 1973), which affirmed dismissal of a civil rights violation suit brought by a plaintiff who had been confined to a mental institution, saying: "In Florida the only limitation statute suspended or tolled by insanity or other disability is that applicable to the recovery of real property." *Id.* at 83.

249. Wilson v. Eubanks, 36 Mich. App. 287, 193 N.W.2d 353 (1972).

250. *Id.* at —, 193 N.W.2d at 356.

251. 347 F.2d 921 (8th Cir.), *cert. denied*, 383 U.S. 925 (1965). In reversing a district court judgment dismissing the complaint, the court opined:

> No reasonable basis exists for engrafting upon the rule or statute a condition that summons be served with diligence. If Congress or the rule-makers had intended to impose such condition, it would have been a simple matter to include the condition by appropriate language in the rule or the statute. As heretofore pointed out, the Rules Committee deliberately chose not to impose any such condition.

Id. at 925; *see* Annot., 90 A.L.R.2d 265 (1963).

252. 15 U.S.C. § 15b (1970).

state law.[253]

For limitation purposes, pinpointing the time when a diversity case is commenced raises a difficult federal question, which yet awaits final resolution by the Supreme Court. In *Ragan v. Merchants Transfer & Warehouse Co.*,[254] where plaintiff sued in diversity in federal court in Kansas for highway accident injuries, his complaint was filed less than two years after the event, but summons was not served until after two years had expired. Kansas law provided that the statute was not tolled until service of summons. The district and appeals courts dismissed the action, applying the Kansas law. The Supreme Court affirmed:

> [I]n the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. . . . Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.[255]

The holding in *Ragan* might conceivably have settled the problem, but in 1965, in *Hanna v. Plumer*,[256] another personal injury diversity suit presenting the issue as to when suit is commenced, the Supreme Court held the *federal* rules prevailed, saying:

> The question to be decided is whether, in a civil action where the jurisdiction of the United States district court is based upon

253. Mohler v. Miller, 235 F.2d 153 (6th Cir. 1956). Plaintiff sued under section 43 of the Civil Rights Act (codified at 42 U.S.C. § 1983 (1970)) for alleged false arrest and false imprisonment under color of law in violation of his constitutional rights. Plaintiff filed a complaint and a petition to sue in forma pauperis in less than two years after the event, but before the petition was approved more than two years had elapsed. In reversing a district court order granting summary judgment for defendants on the ground the suit was time barred, the court held:

> Civil Rights Act, § 43 . . . so far as it is pertinent, provides: "Every person who, under color of any statute . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ." The right sought to be enforced however, is a creation of the state and the period during which the right may be enforced is governed by the limitation put upon it by the state. . . . The two-year limitation of the Michigan statute would, therefore, bar the suit, if it had not been begun in time.

235 F.2d at 155.

In determining that the time had not expired the court relied upon Isaacks v. Jeffers, 144 F.2d 26 (10th Cir. 1944); *see* Annot., 98 A.L.R.2d 1160 (1964); Annot., 90 A.L.R.2d 265 (1964).

254. 337 U.S. 530 (1949).

255. *Id.* at 533.

256. 380 U.S. 460 (1965).

> diversity of citizenship between the parties, service of process shall be made in the manner prescribed by state law or that set forth in Rule 4(d)(1) of the Federal Rules of Civil Procedure.
>
> [T]he District Court granted respondent's motion for summary judgment citing *Ragan v. Merchants Transfer Co.* . . . and *Guaranty Trust Co. v. York* . . . in support of its conclusion that the adequacy of service was to be measured by § 9 (Massachusetts law), with which, the court held, petitioner had not complied. . . . The Court of Appeals for the First Circuit, finding that "[r]elatively recent amendments to § 9 evince a clear legislative purpose to require personal notification within one year," concluded that the conflict of state and federal rules was over "a substantive rather than a procedural matter," and unanimously affirmed . . . . Because of the threat to the goal of uniformity of federal procedure posed by the decision below, we granted certiorari . . . .
>
> We conclude that the adoption of Rule 4(d)(1), designed to control service of process in diversity actions, [neither exceeded . . . the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule] is [therefore] the standard against which the District Court should have measured the adequacy of the service . . . .
>
> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d)(1) is valid and controls the instant case.[257]

In *Hanna* Chief Justice Warren relegated consideration of *Ragan* to a "See" citation in a footnote to the textual statement, "Petitioner, in choosing her forum [in *Hanna*] was not presented with a situation where application of the state rule would wholly bar recovery. . . ."[258]

This treatment of the problem has, not surprisingly, produced conflicting decisions in the circuit courts of appeal which the Supreme Court has not yet resolved. The Eighth,[259] and Sixth,[260] and Fifth[261] Circuits

257. *Id.* at 461-64, 473-74.

258. *Id.* at 469. Other manifold diversity problems raised by *Hanna* are here ignored.

259. Groninger v. Davison, 364 F.2d 638 (8th Cir. 1966). The court, in a diversity accident case where the complaint was filed in less than the two years prescribed by the Iowa statute, but the summons was not placed in the hands of the United States marshal until one day after two years, affirmed a dismissal for time bar, saying:

> It is the contention of the plaintiff-appellant that the Supreme Court of the United States, in Hanna v. Plumer . . . overrules *Ragan* . . . . The court there held that in a civil action in a federal court, where jurisdiction is based on diversity of citizenship, service of process shall be made in the manner set forth in the Federal Rules of Civil Procedure, Rule 4(d)(1),

follow *Ragan*. The Second[262] and Tenth[263] Circuits follow *Hanna*. The academic-legal considerations involved have been ably explored in two *American Bar Association Journal* articles.[264] At least one recognized federal jurisdiction authority has referred to *Hanna* as "an opinion that appears to overrule *Ragan*."[265] While speculation as to

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rather than in the manner prescribed by state law. While citing and referring to *Ragan* the court very carefully avoids overruling its holdings . . . . The instant case appears to us to be directly governed by *Ragan*. . . . While it is difficult to reconcile Hanna v. Plumer . . . until the Supreme Court itself overrules its very positive statements in *Ragan*, the lower courts must follow its holdings.

Id. at 642; *accord*, Prashar v. Volkswagen of America, 480 F.2d 947 (8th Cir. 1973); Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967), *citing* Groninger v. Davison, *supra*, as conclusive.

260. Sylvester v. Messler, 351 F.2d 472 (6th Cir. 1965).

261. Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971) (per curiam), held that the federal rule of relation back of amended pleadings did not bar the running of a one year Louisiana limitation on personal injury suits. The court stated: "We think *Ragan*, then, controls this case. Conceding as we do, that it has its critics, it remains viable." *Id.* at 842; *cf.* Alford v. Whitsel, 52 F.R.D. 327, 331 (D. Miss. 1971); *see* discussion of relation back in text accompanying notes 241-50 *supra*.

262. Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968). The court held:

> Judge Wyatt, in ruling on [defendant] Comad's motion for judgment on the pleadings, held that *Ragan* . . . which he felt, if still good law, would require application of [New York] CPLR § 203, had been overruled by *Hanna* . . . so that Rule 3, Fed. R. Civ. P., was applicable . . . . We agree with Judge Wyatt that in view of Hanna v. Plumer . . . the federal rule as to the time of commencement of action governs.

Id. at 604.

263. Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971). The court said:

> [W]e conclude as follows: (1) *Ragan* does not govern the instant case because under the law of Kansas as it presently exists the statute concerning the time an action is deemed to be commenced (K.S.A. 60-203) is purely procedural in nature and is not an integral part of the applicable Kansas statute of limitations (K.S.A. 60-501 and 513(4)); (2) *Hanna* does control to the end that Fed. R. Civ. P. 3 takes precedence over K.S.A. 60-203; (3) and under federal rule the actions having been commenced within two years after the causes of action accrued, the trial court did not err in denying defendant's motions for summary judgment.

Id. at 450.

264. Siegel, *The Federal Rules in Diversity Cases: Erie Implemented, Not Retarded*, 54 A.B.A.J. 172 (1954). That author concludes:

> *Erie* will continue to spawn troublesome children. However long a respite she may need after *Hanna*, her fertility is not impaired. These mischievious [*sic*] children will romp until Congress abolishes diversity of citizenship jurisdiction, a course urged for a long time by the late Justice Felix Frankfurter and many commentators on the federal courts.

Id. at 176; *see* Zabin, *The Federal Rules in Diversity Cases: Erie in Retreat*, 53 A.B.A.J. 266 (1967), in which the author asserts:

> The practical and salutary effect of *Hanna* is to give the practitioner the assurance that he will be safe if he follows the Federal Rules and Judicial Code when they apply, for it is hard to envision any of the Federal Rules as invalid under the broad standard of *Hanna*. *Hanna* removes *Erie* as a relevant guide in the determination of the validity of any of the Federal Rules of Civil Procedure.

Id. at 269.

future Supreme Court action is always hazardous, this author inclines to the view that *Hanna* will ultimately prevail over *Ragan*. In an epoch in which many states are adopting the federal rules as their own, and in view of the basic philosophy of the federal rules that they shall provide uniform civil procedure for all litigation in the federal courts, and considering the desirability of a rule that will provide reasonably certain guidance to diversity litigants and their lawyers, it is perhaps permissible to hope that narrow exceptions such as *Ragan* may wither away. However, until the Supreme Court definitely proclaims such withering, plaintiff's counsel in diversity should, where possible, scrupulously comply with *both* state and federal rules in the initiation of the litigation.

A federal district court in North Carolina has adhered to *Ragan*. In *Rios v. Drennan*[266] plaintiff filed a wrongful death diversity complaint five days before the North Carolina statute had run, but because of a failure to post the required bond, summons was not issued until over a month later. The court held that the then North Carolina practice as to when the action was commenced, that is, upon the issuance of summons, governed, and the action was dismissed as time barred. Thereafter, the North Carolina General Statutes Commission, believing that the variance between the federal and state rule should be eliminated,[267] proposed, and the North Carolina Legislature adopted, Rule 3,[268] which essentially conforms to Rule 3 of the Federal Rules

265. 1 J. MOORE, A. VESTAL, P. KURLAND, MOORE'S MANUAL, FEDERAL PRACTICE AND PROCEDURE § 4.06, at 174 (rev. 1973). It is also there stated that, "It has now been definitely settled . . . that wherever there is a conflict between the Federal Rules of Civil Procedure and state law, the former is to control."

C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1057, at 189 (1969) assert: "It is certainly difficult to reconcile the reasoning in *Hanna* with that in *Ragan*; and it is worthy of note that in his concurring decision in *Hanna*, Justice Harlan expressed concern over the Court's failure to deal sufficiently with *Ragan* and stated that in his view the *Ragan* decision 'was wrong'. . . ." However, these authors continue:

> There is some substance to the distinction offered in *Hanna*, particularly in the notion that Rule 3 does not deal with the particular problem raised in *Ragan*. By way of contrast, Rule 4(d)(1) directly covers the situation presented in *Hanna*. Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations. Thus, *Ragan* and similar cases may still be read as holding that Rule 3 does not determine or measure the point at which certain state-created rights are extinguished and that this conclusion is unaffected by *Hanna*.

Id. at 190-91.

266. 209 F. Supp. 927 (E.D.N.C. 1962).

267. *See* N.C.R. CIV. P. 3, Official Comment.

268. N.C.R. CIV. P. 3, effective July 1, 1970, provides:

of Civil Procedure. In this manner, except where the statute alternative is involved, the North Carolina Legislature has mooted the question of the ultimate dominance of *Ragan* or *Hanna.*

The preceding cases all involved only a conflict between the federal rule and that of the state in which the federal diversity court presided. In a suit for damages resulting from an accident in Kentucky brought in a United States district court in Ohio, the Ohio borrowing statute brought into play the Kentucky one year statute of limitations.[269] The complaint was filed within one year, but the summons was not issued until after one year had passed. Ohio law provided suit was not commenced until summons was issued, but this provision was not an integral part of the Ohio statute of limitations. It was here held that the question was procedural, that Federal Rule 3 applied, and the action was not barred by the Ohio rule. Thus, by applying *Hanna,* no interplay of Ohio-Kentucky limitations was reached.

A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The second paragraph of the preceding Rule, is in essence, the first part of former N.C. GEN. STAT. § 1-121 (1953), designed to take care of emergencies in which there is no time to prepare a complaint. Regarding these alternative provisions, *cf.* Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Carolina Freight Carriers Corp. v. Teamsters Local 61, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

The flexible possibilities now available under North Carolina Rules 3 and 4 are demonstrated in Sink v. Easter, 19 N.C. App. 151, 198 S.E.2d 43 (1973). The appellate court reversed a trial court order granting a motion for summary judgment based on a contention that the action was time barred. The appellate court held the action was brought in time under the following set of facts:

> The accident . . . occurred on 6 September 1968. Summons was issued on 4 September 1971. On the same day, plaintiff made application to the court for an extension of time within which to file his complaint. The application stated the nature and purpose of the action. The court extended the time within which plaintiff could file his complaint to 24 September 1971 and ordered that a copy of the application and order be delivered to the defendant with a copy of the summons. On 10 September 1971 the sheriff returned the summons and order extending time to file complaint unserved, with the following notation: "Kenneth Wesley Easter not to be found in Guilford County—in Amsterdam address unknown." The complaint was filed on 23 September 1971. Notice of service by publication was published on 1, 8 and 15 October 1971. The notice complied with Rule 4(j)(9)c. On 11 November defendant filed a motion to dismiss, saying that he had not been served with process and that the court lacked jurisdiction.

Id. at 152-53, 198 S.E.2d at 43-44.

269. Mahan v. Ohio Auto Rentals Co., 207 F. Supp. 383 (S.D. Ohio 1962).

The question of when a suit is commenced may, of course, arise in a multi-state setting in a state court without federal diversity jurisdiction being involved. *Ginise v. Zaharias*[270] was such a case. There a California resident sued in California for injuries sustained in Connecticut. The California borrowing statute made the Connecticut statute of limitations applicable. The complaint was filed within the time limitation prescribed by Connecticut, but summons was not issued until after it had expired. California law provided that filing of the complaint commences the suit; Connecticut law provided that suit is not commenced until the summons is issued. The California court held that since the Connecticut commencement rule was not a part of the Connecticut statute of limitations, the California borrowing statute did not embrace it, that this procedural question would be governed by the forum law of California and that the action was not time barred.

New York has held its commencement rule is procedural and has applied it both where it borrowed the period of limitations from another state,[271] and as to a federal statute of limitations with respect to a federally created cause of action.[272]

Finally, the previous filing of an action in a court without jurisdiction of the subject matter does not interrupt the running of the statute of limitations.[273]

10. The Effect of a Long Arm Statute on Tolling

Normally, statutes of limitations are tolled during the time a nonresident defendant is not within the borders of the forum state. This is ostensibly because a defendant should not be able to take advantage of a state's statute of limitations when he has placed himself out of personal reach of the state's service of process. However, long arm statutes in many circumstances permit states to obtain in personam jurisdiction over a defendant beyond its borders. Therefore the majority rule is that the running of a statute of limitations is not tolled during the time that in personam jurisdiction may be obtained by substituted service on a nonresident defendant. The minority rule is that during the absence of a defendant from the state, tolling occurs even though he is subject to in personam jurisdiction under a long arm

270. 224 Cal. App. 2d 153, 36 Cal. Rptr. 406 (1964).
271. Drummy v. Oxman, 280 App. Div. 800, 801, 113 N.Y.S.2d 224, 225 (1952).
272. Irons v. Michigan-Atlantic Corp., 279 App. Div. 32, 108 N.Y.S.2d 824 (1952).
273. United States v. Continental Cas. Co., 354 F. Supp. 1353 (D.P.R. 1972).

statute.[274] The problem frequently arises in the context of whether a borrowing statute of the forum is, or is not, applicable, where under loci law the absent defendant has been subject to in personam jurisdiction by service of substituted process. The forum applies the domestic law of the locus to determine whether, under that limitation and tolling statute, the action is fully barred so as to make applicable the borrowing statute of the forum. The following cases illustrate the problem and its resolution:

Daigle v. Leavitt[275] was an action brought by four Connecticut residents, both adults and minors, for injuries sustained in an accident in Massachusetts, against the defendant driver, a New York resident. Applicable statutes of limitations were, respectively, Massachusetts two

274. At least nineteen states have followed the majority rule and six the minority rule. Daigle v. Leavitt, 54 Misc. 2d 651, 283 N.Y.S.2d 328, 331 (1967). The Appendix to the case collects the authorities. It reads:

> The following cases hold that the law of the jurisdiction listed is that tolling statutes do not apply when a nonresident defendant may be served by substituted service. *Alabama*: Peters v. Tuell Dairy Co., 250 Ala. 600, 35 So. 2d 344; Karagiannis v. Shaffer, D.C., 96 F. Supp. 211. *California*: Kroll v. Nevada Industrial Corp., 65 Nev. 174, 191 P.2d 889. *Connecticut*: Coombs v. Darling, 116 Conn. 643, 166 A. 70; Tublitz v. Hirschfeld, 2 Cir., 118 F.2d 29; Colello v. Sundquist, D.C., 137 F. Supp. 649; Sage v. Hawley, 16 Conn. 106. *Delaware*: Hurwitch v. Adams, 52 Del. 13, 151 A.2d 286 aff'd 52 Del. 247, 155 A.2d 591. *Illinois*: Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17; Hale v. Morgan Packing Co., D.C. 91 F. Supp. 11. *Iowa*: Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711; Carpenter v. Kraft, 254 Iowa 719, 119 N.W.2d 277; Burkhardt v. Bates, D.C., 191 F. Supp. 149. *Kansas*: Bond v. Golden, 10 Cir., 273 F.2d 265. *Michigan*: Hammel v. Bettison, 362 Mich. 396, 107 N.W.2d 887. *Missouri*: Haver v. Bassett, Mo. App., 287 S.W.2d 342; Scorza v. Deatherage, 8 Cir., 208 F.2d 660; Garth v. Robards, 20 Mo. 523. *Nevada*: Cal-Farm Ins. Co. v. Oliver, 78 Nev. 479, 375 P.2d 857. *New Hampshire*: Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156; Hatch v. Hooper, 101 N.H. 214, 138 A.2d 671. *New York*, Fuller v. Stuart, 3 Misc. 2d 456, 457, 153 N.Y.S.2d 188. *Oklahoma*: Moore v. Dunham, 10 Cir., 240 F.2d 198; St. Louis & S.F.R. Co. v. Taliaferro, 67 Okl. 37, 168 P. 788. *Oregon*: Whittington v. Davis, 221 Or. 209, 350 P.2d 913. *South Dakota*: Busby v. Shafer, 75 S.D. 428, 66 N.W.2d 910. *Tennessee*: Arroweed v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566, 119 A.L.R. 855; Young v. Hicks, 8 Cir., 250 F.2d 80. *Utah*: Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915. *Vermont*: Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189. *Washington*: Smith v. Forty Million, Inc., 64 Wash. 2d 912, 395 P.2d 201.
>
> The remaining cases listed below hold that the jurisdictions affected toll the statute of limitations as to non residents even though substituted service is available. *Idaho*: Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021. *New Jersey*: Gotheiner v. Lenihan, 20 N.J. Misc. 119, 25 A.2d 430; Lemke v. Bailey, 41 N.J. 295, 196 A.2d 523; Blackmon v. Govern, D.C., 138 F. Supp. 884. *Ohio*: Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139; Chamberlain v. Lowe, 6 Cir., 252 F.2d 563. *South Carolina*: Macri v. Flaherty, D.C., 115 F. Supp. 739. *Texas*: Cellura v. Cellura, 24 A.D.2d 59, 263 N.Y.S.2d 843. *Wisconsin*: Bode v. Flynn, 213 Wis. 509, 252 N.W. 284, 94 A.L.R. 480.

Accord, McClendon & Co. v. Hernando Phosphate Co., 100 Ga. 219, 224, 28 S.E. 152, 153 (1897).

275. 54 Misc. 2d 651, 283 N.Y.S.2d 328 (1967).

years, New York three. Suit was brought in the New York state court more than two, but less than three, years after the accident occurred. A Massachusetts long arm statute provided for substituted service upon nonresident motorist defendants. Whether this statute prevented application of the general Massachusetts tolling provision when defendants are absent from the state had not been determined by the Massachusetts courts. However, a federal district court in Massachusetts had determined that Massachusetts would follow the majority view that, under these circumstances, the tolling provision would be inapplicable.[276] The New York court dismissed as to the adult plaintiffs, holding their action barred. Both Massachusetts and New York allowed minors to bring suit after reaching majority. Accordingly, their claims were not barred.

Mangene v. Diamond,[277] a diversity suit based on a California automobile accident and filed in a federal district court in Pennsylvania, was dismissed as time barred under the following circumstances:

> Our sole concern is whether at the time of the accident . . . appellee was a non-resident motorist of California within the meaning of the California Motor Vehicle Code . . . .
>
> . . . During the full year of the running of the one year California statute of limitations appellee was available for service of process. For the first three months he was still in the Marines and could have been personally served in California irrespective of whether he was a resident or nonresident. Thereafter he was available by the statutory mail method of service. Since this action was commenced after the California statute had expired it is prohibited by the applicable Pennsylvania Borrowing Act . . . which provides that "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."[278]

Bernard Food Industries, Inc. v. Dietene Co.,[279] held that a diversity action for libel, filed in Illinois against a Minnesota corporation by an Illinois corporation, was barred by the Illinois statute of limitations where the Minnesota corporation held a certificate of authority to transact business in Illinois and had a registered agent for service of process in Illinois during the entire period following the alleged publication.

276. Smith v. Pasqualetto, 146 F. Supp. 680 (D. Mass. 1956).
277. 229 F.2d 554 (3d Cir. 1956).
278. *Id.* at 555-56.
279. 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

Before the appellate court, plaintiff argued that the libel was initiated Minnesota and did not arise out of any transaction of business between plaintiff and defendant in Illinois. The court held that this objection to personal jurisdiction was not presented in the trial court and was therefore waived.

An interesting application of the minority rule is contained in *Ohio Brass Co. v. Allied Products Corp.*[280] Suit was in federal court in Ohio for breach of warranty as to steel pins delivered by the defendant nonresident corporation to plaintiff in Ohio in August, 1962. During all of this time under an Ohio statute in personam jurisdiction could have been acquired over the defendant by substituted service. However, defendant had not appointed an agent for service in Ohio until January, 1968. Suit was filed December 11, 1969. The applicable statute of limitations was four years. In denying defendant's motion for summary judgment, the court held the Ohio tolling statute was applicable and the action was not time barred. It said, "[t]he literal language of the Ohio 'savings clause' tolling provision is tied to the tolling of acts which prevent *personal service* in Ohio rather than to acts which would prevent any judgment in personam."[281]

Subtle questions concerning who has the burden of proof in establishing whether process could or could not be served sometimes arise. For example, in *Marterie v. Dorado Beach Hotel*,[282] a diversity suit was brought in Puerto Rico for personal injuries inflicted on plaintiff by defendant Champagne, an employee of the defendant hotel. Champagne was a nonresident of Puerto Rico and left shortly after the occurrence. Long after the one year limitation period had expired, plaintiff amended his complaint to join Champagne as a defendant and

280. 339 F. Supp. 417 (N.D. Ohio 1972). In further explanation of its decision the court said:

> The . . . conclusion to be drawn from the decisions of the Ohio Supreme Court . . . is that a foreign corporation upon which personal service in Ohio could not be had is absent from the state within the meaning of O.R.C. § 2305.15, and that the statute of limitations does not run against such corporation until such time as it is subject to personal service in Ohio, regardless of the fact that an Ohio court could have acquired *in personam* jurisdiction over such corporation by virtue of substituted service. The Court recognizes that such rule is contrary to the rule applied by the Sixth Circuit Court of Appeals . . . . While a District Court is generally bound to adhere to rulings of a Court of Appeals, in a diversity action where the highest state court has subsequently interpreted state law in a manner inconsistent with the interpretation of the federal court it is the ruling of the state court which must be followed.

Id. at 424.

281. *Id.*

282. 330 F. Supp. 860 (D.P.R. 1971).

served him by registered mail in Louisiana. The court refused to dismiss, stating:

> [T]he facts of this case make it wholly unnecessary for this Court to now take a stand on the interpretation of Puerto Rico's tolling statute, a matter which has not been passed upon by the Commonwealth courts . . . . [Champagne] has failed to show that substituted service of process could be effectively had upon him during the period of his absence.
>
> . . . Therefore, the one-year statute of limitations was tolled and the action against co-defendant Champagne stands.[283]

A contrary result on the burden of proof was reached in *Hill v. Schantz*,[284] an action in New York for damages resulting from a collision in New Jersey at a time when both parties were residents of New Jersey. The court recognized the New Jersey rule that its statute of limitations was tolled by respondent's removal from New Jersey before the expiration of the two-year period of limitation, notwithstanding the New Jersey statute permitting service of process upon the Director of Motor Vehicles. However, the court held that since the statute had been raised by the defendant in his answer, the plaintiff had failed to meet his burden to prove by clear and decisive proof that the defendant had removed from New Jersey before the two year statute of limitations had run. Accordingly, a motion to strike the answer was properly denied.

North Carolina has looked both ways in determining the effect of a long arm statute upon its tolling statute. In 1905 in *Green v. Hartford Life Insurance Co.*,[285] the North Carolina Supreme Court clearly stated and followed the minority rule that such a statute did not impede the operation of the tolling statute against nonresidents. However, *Green* was expressly overruled five years later in *Volivar v. Richmond Cedar Works*,[286] and the majority rule was applied to hold that the tolling

283. *Id.* at 862-63.

284. 10 App. Div. 628, 196 N.Y.S.2d 356 (1960).

285. 139 N.C. 309, 51 S.E. 887 (1905).

286. 152 N.C. 626, 627, 68 S.E. 200, 200-01 (1910). The court held:

> The overwhelming weight of judicial precedent recognizes the doctrine as expounded by the Supreme Court of Iowa in Wall v. R.R., 69 Ia., 501: "The theory of the statute of limitations is that it operates to bar all actions except as against persons and corporations upon whom notice of the action cannot be served because of their nonresidence. If such notice be served and a personal judgment obtained which can be enforced in the mode provided by law against the property of such person or corporation, wherever found, then such person or corporation is not a nonresident as contemplated by the statute of limitations."
>
> . . . .
>
> "The rule, briefly stated, is that if under the laws of the domestic State

statute was inoperative. The rule announced in *Volivar* was strongly reaffirmed in 1934 in *Smith v. Finance Co. of America.*[287] All three of these cases dealt with a foreign corporation defendant which had either appointed an agent for service in North Carolina or, having failed to do so, was subject to service by the leaving of process with the Secretary of State.

There is unfortunate language in a 1936 case, *Hill v. Lindsay,*[288] where the question was whether the statute of limitations was tolled as to a nonresident individual defendant. The opinion of the court states:

> Being a nonresident of the state, he may not be permitted to invoke the protection of the statute of limitations, even though he may spend some time each year in the state.
>
> Nor could this rule be affected by the fact that he . . . had an agent in this State.[289]

When this case was decided in 1936, North Carolina had no borrowing statute, and its long arm statute applied only to corporations, not individuals. In the light of the broad scope of the present North Carolina long arm statute,[290] adopted in 1967, which expressly applies both to corporate and natural persons, *Hill* probably would not now be applicable in a long arm statute situation.

It remains to be seen whether the majority rule will continue to prevail as to all aspects of the innumerable state long arm statutes that have proliferated since the green light was flashed by the Supreme Court of the United States in *International Shoe Co. v. Washington*[291] and *McGee v. International Life Insurance Co.,*[292] in 1945 and 1957 respectively. The logic and reasoning of the majority rule as developed for nonresident motorist and corporate defendants, would appear

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the corporation has placed itself in such position that it may be served with process, it may avail itself of the statute of limitations when sued. Ability to obtain service of process is the test of the running of the statute of limitations."

In *Express Co. v. Ware,* 87 U.S. 543, the Supreme Court of the United States held: "A statute of limitations as against a foreign corporation begins to run from the time such corporation has a person within the State upon whom process to commence a suit may be served."

287. 207 N.C. 367, 369, 177 S.E. 183, 184 (1934).

288. 210 N.C. 694, 188 S.E. 406 (1936).

289. *Id.* at 696, 188 S.E. at 407.

290. N.C. GEN. STAT. § 1-75.4 (1969). For a comprehensive discussion of this statute see Louis, *Modern Statutory Approaches to Service of Process Outside the State—Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act,* 49 N.C.L. REV. 236 (1971).

291. 326 U.S. 310 (1945).

292. 355 U.S. 220 (1957).

to be equally applicable to all defendants, both corporate and individual, who come within the in personam reach of long arm statutes that comply with the minimum requirements of due process.[293]

11. May "Significant Relationship" or "Interest Analysis" Tests Determine the Applicable Statute of Limitations?

In approaching the complex question as to whether significant relationship or interest analysis tests should have any place in determining the statute of limitations to be applied to a given action, it should be remembered that, by definition, a statute of limitations is a legislative act. Except in the limited area of the doctrine of laches, the function of a court in resolving a limitations issue is to apply and interpret the legislative mandate, not to fashion separate judicial tests. State statutes providing limitation periods, tolling, borrowing and other related details, afford a typical example of the exercise of the legislative prerogative to prescribe conflict of law rules by statutory enactment. To the extent the legislature explicitly performs this function, the judiciary would normally be precluded from innovative deviations in applying statutes of limitations. However, in the past fifteen years the trend of judicial interest in engaging in significant relationship and interest and policy analysis has resulted in nearly half of the states adopting by judicial decision the analytical choice of law approach as their conflict of laws rule.[294] As might be expected, this technique has in a few cases seeped through to the resolution of statute of limitations questions. To these instances we now turn our attention.

The cases seem to fall into two categories. First, those where the forum court is proceeding without the benefit of a borrowing statute and is ignoring that fact. Second, diversity cases in which federal courts are manfully, but warily, seeking to comply with the *Erie* and *Stentor* mandates in doing what they surmise the supreme court of the state in which they sit would do, if it happens to be a "significant relations" or "policy analysis" jurisdiction, so far as its conflicts law is concerned. In some instances the federal courts have not hesitated to say that such conflict formulations have no application to multi-state statute of limitations problems.

An example of this last approach was exhibited by the district

293. For a North Carolina oriented discussion of widening concepts of jurisdiction over the person *see* Wurfel, *supra* note 109, at 25-29.

294. *See* Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. Rev. 243, 250-64 (1970), and authorities cited therein.

court in *Chartener v. Kice*[295] where it differentiated choice of law and limitation problems. There, in a diversity survival action predicated on illness and ultimately death in California, resulting from medical malpractice in New York, the court stated:

> The plaintiff's survival action, viewed as the continuation of a cause of action, is governed by the statute of limitations generally applicable to malpractice actions. It is well settled that, for choice of law purposes, such statutes are characterized as procedural, and that reference must be made to the law of the forum . . . . While the New York courts have led the nation in the adoption of more flexible choice of law rules, they have not applied the [interest analysis] rationale to every area, and there is little in the cases which would support a deviation from the traditional rule. The Court is faced with the issue of whether the running of the statute was tolled by the alleged intervening insanity of the decedent. Since that issue involves contested factual issues, the defendant's motion to dismiss the survival action must be denied.[296]

A jurisdiction adhering to the first approach stated above is the District of Columbia, which does not have a borrowing provision in its statute of limitations but has seized upon "interest analysis" as a means of achieving a borrowing provision result.[297] In a personal injury diversity action brought by a California citizen residing in Virginia against a New York corporation doing business in both Virginia and the District of Columbia for an injury in Virginia, a federal district court sitting in the District of Columbia applied the Virginia two year statute, and not the three year District of Columbia statute and held the suit time barred though brought within less than three years. The court opined:

> In the District of Columbia conflict of laws problems are governed by the state "interest analysis" approach in which the relationship of each jurisdiction to the controversy is determined and the interest of each in the application of its own rule of law is evaluated . . . particularly in the area of tort law, this approach has been extended to such issues as the limitation on damages in wrongful death actions . . . and intra-family tort immunity . . . .

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295. 270 F. Supp. 432, 435 (E.D.N.Y. 1967). Other aspects of this case are considered in the text accompanying notes 178-79 *supra*.

296. 270 F. Supp. at 439. In a 1971 diversity case a federal district court in Illinois expressed a preference for the traditional rule that a borrowing statute applies to the limitation of the state in which the last act occurred establishing the tort, rather than any significant relationship test, but pointed out the result in the case at bar would be the same under either test. Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890, 894 (N.D. Ill. 1971).

297. Farrier v. May Dep't Stores Co., 357 F. Supp. 190 (D.D.C. 1973).

> There is no reason why the *lex fori* rule . . . should not similarly be superseded by the interest analysis doctrine in tort cases where there are conflicts between statutes of limitations.
>
> The purpose of both the Virginia and District of Columbia statutes of limitations is to protect domiciliaries from the prosecution of stale claims. This purpose would be served in this case only by an application of the Virginia statute. The District of Columbia has no relation to the plaintiff, a Virginia resident, and no person or property in the District of Columbia has been adversely affected by the alleged act of negligence which occurred in Virginia . . . .[298]

This result seems to fly in the face of the ostensibly deliberate omission of a borrowing provision by Congress from the District of Columbia limitation statute.

Substantially the same result predicated on substantially the same reasoning as that of the previous case was reached by the Supreme Court of New Jersey in *Heavner v. Uniroyal Inc.*[299] Here one plaintiff had purchased a defective tire in North Carolina that caused a North Carolina accident in which one plaintiff suffered personal injuries and property damage, and the other, loss of consortium. Both plaintiffs were residents of North Carolina, and the foreign corporation defendants, respectively retailer and manufacturer of the tire, were both subject to personal service in North Carolina where the then applicable statute of limitations was three years. Suit was brought in New Jersey, where defendant Uniroyal was incorporated, more than three,

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298. *Id.* at 191.

299. 63 N.J. 130, 305 A.2d 412 (1973). In affirming lower court judgments for defendants, the court declared:

> New Jersey has never had such a statute [borrowing]. But as Professor Sedler points out: "The absence of a borrowing statute should not prevent application of the statute of the locus; for a policy against forum shopping can be set out by the judiciary as well as the legislature." [*citing* Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. REV. 813, 850 (1962).]
>
> We are convinced the time has come to discard the mechanical rule that the limitations law of this state must be employed in every suit on a foreign cause of action. We need go no further now than to say that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will "borrow" the limitations law of the foreign state. We presently restrict our conclusion to the factual pattern identical with or akin to that in the case before us, for there may well be situations involving significant interests of this state where it would be inequitable or unjust to apply the concept we here espouse.

Id. at —, 305 A.2d at 418; *cf.* Seymour v. Parke, Davis & Co., 294 F. Supp. 1257 (D.N.H. 1969), *aff'd*, 423 F.2d 584 (1st Cir. 1970) (without mention of this precise point).

but less than four years after both the sale and the accident. New Jersey has no borrowing statute. Under these circumstances the New Jersey court held it would judicially "borrow" the North Carolina statute, thus barring the action, since New Jersey had no substantial interest in the matter.

An example of the second category of cases mentioned above is *Horton v. Jessie*[300] in which the Court of Appeals for the Ninth Circuit acknowledged the applicability of the "significant contacts" analysis in a diversity statute of limitations setting, but in its *per curiam* opinion affirmed the California District Court's conclusion that "[u]nder the California significant contacts approach, we find too little Missouri significant contacts and too many in California to apply the Missouri statute."[301]

In *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*[302] the Third Circuit rejected the "contacts" approach to a limitation problem in a suit brought in Pennsylvania to recover indemnity for having paid a Florida judgment predicated on injury resulting from a defective brake assembly. The court applied the time bar of the Florida statute holding:

> The cause of action arose when Mack satisfied the judgment, an event evidenced by formal entry of record in Florida court on June 30, 1960.
>
> . . . .
>
> Perhaps it would be arguable, on the merits of the present controversy, that in determining the existence or extent of an obligation to indemnify, the forum should be guided . . . by the substantive law of Pennsylvania because of cumulatively significant Pennsylvania "contacts". But we do not have that problem here. We have to answer only the narrow question of the meaning of the phrase "where the cause of action arose", as used in the Pennsylvania borrowing statute and applied to a situation in which the action came into existence upon the happening of certain events in Florida.[303]

A dissenting opinion would have upheld the action, applying the longer Pennsylvania limitation because Pennsylvania was the jurisdiction of primary interest.[304]

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300. 423 F.2d 722 (9th Cir. 1970).

301. *Id.*

302. 372 F.2d 18 (3d Cir. 1966). Other facets of this case are considered in the text accompanying notes 168-71 *supra.*

303. 372 F.2d at 20-21.

304. The dissent, in part, stated:

In a diversity suit by Minnesota plaintiffs against Illinois and Colorado defendants for injuries resulting from an Iowa automobile accident, a federal district court in Iowa refused to apply "significant relationships" to select the statute of limitations.[305] The court stated that although Iowa had adopted, at least in part, the significant relationship rule as far as application of substantive tort law was concerned, the Iowa conflicts rule calls for the application of its own limitation.

> [T]he Iowa statute of limitations is dispositive of the issues herein presented. Plaintiffs' cause of action for negligence, having been brought in this Court more than two years after the alleged injuries were sustained, is barred by the Iowa two-year statute of limitations . . . .[306]

A federal district court in New York has refused to follow the "significant relationship"[307] test in applying the New York borrowing statute in diversity.[308] Plaintiff and plaintiff's decedent, citizens of British Columbia, sued the defendant manufacturer for damages resulting from the crash in Alberta of an aircraft manufactured in Pennsylvania. The applicable British Columbia and Pennsylvania limitation was one year, and that of both Alberta and New York two years. In holding the diversity suit filed more than one year after the accident not barred, the court declared:

> The New York Court of Appeals has not yet had occasion to consider whether the *Babcock* rule applies to problems involving the borrowing statute of limitations . . . . Prediction must be made almost without basis in New York precedent.

> Pennsylvania is in the forefront of jurisdictions which have recently adopted a pragmatic standard of choice of law which eschews mechanical formulas. This standard reduces the possibility of manipulation to insignificance. . . .
>
> Pennsylvania's interest in the period of limitations to be applied in this action far outweighs the interest of Florida. Florida's real interest was in the negligence action for the accident which occurred in Florida. That action, in which Florida's interest dominated, terminated in a judgment, which was satisfied by payment. The present action for indemnity, on the other hand, is dominated by Pennsylvania's interest . . . .

Id. at 23.

305. Conradi v. Boone, 316 F. Supp. 918 (S.D. Iowa 1970).

306. *Id.* at 919-21.

307. Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) is the celebrated case in which New York definitively abandoned the traditional lex loci rule in tort cases and adopted an interest analysis approach as its conflict of law rule. Thus, in a one car accident which occurred in Ontario in the course of a brief trip by New York residents, recovery was allowed to a guest plaintiff against a host driver for injuries resulting from his negligent driving. The New York court applied the substantive guest tort law of New York and rejected that of Ontario which barred such recovery.

308. Nielson v. Avco Corp., 54 F.R.D. 76 (S.D.N.Y. 1971).

> . . . There is little reason to believe that the Legislature, when it spoke of a cause of action "accruing", meant anything other than that it "accrued" in the familiar terminology "where the last act necessary to establish liability occurred". . . .
>
> . . . .
>
> Accordingly, I prophesy, and as a Federal District Court sitting in New York, hold that *under the New York borrowing statute* the cause of action for wrongful death *accrued* in Alberta where the injuries causing death occurred. Cf. *Chartner v. Kice.* Under the two-year Alberta statute of limitations, that cause of action is not time barred.[309]

A most peculiar feat of interest analysis calesthenics was performed by a federal district court in Pennsylvania in the case of *Gross v. McDonald.*[310] This was a simple negligence damage suit brought in Pennsylvania by a plaintiff guest against a host defendant driver resulting from an accident in Indiana and in the face of an Indiana guest statute prohibiting such actions. At the time of the accident both plaintiff and defendant were temporary residents of Kentucky, and the trip started from and was intended to terminate in Kentucky. The district court, following the Pennsylvania conflicts rule of policy and interest analysis, determined that the substantive tort law of *Kentucky* rather than Indiana was applicable and that the simple negligence suit was maintainable. The action was brought more than one, but less than two years, after the accident occurred. Applicable statutes of limitations were one year in Kentucky, and in both Indiana and Pennsylvania two years. The court held that under the Pennsylvania conflicts rule (interest analysis), its borrowing statute would look to *Indiana* and not Kentucky, and since the action was not barred in Indiana, the Pennsylvania borrowing statute would be inapplicable, making the two year Pennsylvania limitation controlling. Thus the court of a "disinterested" forum held the substantive law of Indiana insignificant and inapplicable but at the same time looked to Indiana lex loci as most "significant" in determining the effect of the Pennsylvania bor-

309. *Id.* at 80-81; *cf.* O'Keefe v. Boeing Co., 335 F. Supp. 1104, 1113 (S.D.N.Y. 1971), which states:

> [F]or purposes of applying the New York borrowing statute the plaintiffs' causes of action *accrued* in Washington as a result of the crash in Maine. The Court of Appeals for the Second Circuit predicted in George v. Douglas Aircraft Co. [332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964)] that for borrowing statute purposes New York would hold that the cause of action "arose" in the state of manufacture, sale and delivery and compare that state's statute of limitations. So far as this court is aware, the New York Court of Appeals has not yet specifically affirmed the prediction.

310. 354 F. Supp. 378 (E.D. Pa. 1973):

rowing statute.[311] This ingenious dichotomy of reasoning richly rewarded resourceful forum shopping.

The final current case is that of *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*,[312] enunciated by the Supreme Court of Wisconsin. This case demonstrates that after the convulsive process of interest analysis has been resorted to a court may finally reach the same result which is clearly indicated by the statute so analyzed. Here plaintiff Air Products, a Delaware corporation with its principal place of business and offices in Pennsylvania, in 1964 sent purchase orders, which were accepted, for a number of large electric motors, to an agent of the defendant Delaware corporation, in Pennsylvania. Defendant, Fairbanks Morse, Inc., manufactured the motors in Wisconsin, and they were delivered to plaintiff at installation sites in Louisiana, Delaware and New Jersey. Six of the motors failed to perform, damaging plaintiff Air Products. Plaintiff Hartford, a Connecticut corporation, indemnified Air Products for part of its loss. Plaintiff Air Products commenced the suit against defendant in Wisconsin on May 8, 1969, and plaintiff Hartford sued on December 1, 1970. Both plaintiffs alleged negligence, strict liability, breach of implied warranty, and breach of contract. Defendant asserted the Pennsylvania four year statute of limitations as a defense. The applicable Wisconsin statute of limitations is six years. All parties agreed that all issues other than the statute of limitations must be resolved under Pennsylvania law. The Wisconsin Supreme Court agreed with the decision of the trial court that the Wisconsin six year statute applied but restated the reason therefor. It said:

> The trial court concluded that each state must determine for itself the period of time in which a suit for a particular claim can be brought; and that the 'center of gravity' approach to con-

311. The court reasoned as follows:

> [W]e have decided not that Kentucky law governs this lawsuit, but rather simply that Pennsylvania choice of law principles dictate that the Indiana guest statute not be applied in this case. Similarly, Pennsylvania choice of law principles govern the choice of a statute of limitations.
>
> . . . .
>
> In the case before us, the automobile accident and the immediately resulting injuries occurred in Indiana, so that the borrowing statute would here refer to Indiana, not Kentucky, law.
>
> Secondly, the ever-resourceful defendant argues that this action is "fully barred" under the Indiana law because of Indiana's guest statute; plaintiff did not, and could not, allege wanton or wilful negligence. The borrowing statute, however, which is entitled "*Limitation of action* in foreign state a bar here," provides for observance of the other states' statutes of limitations, not of other defenses . . . .

Id. at 382 (emphasis added).

312. 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

> flicts questions which was originally adopted by this court . . . is too unpredictable to be used when the fundamental question of the appropriate statute of limitations is in issue. We agree with the trial court's ruling on the statute of limitations issue. However, we think the choice of law is a matter to be decided on the basis of the existing conflicts rules of this court.
>
> There can be no question but that *the underlying purpose in the enactment of a statute of limitations is to protect defendants and the courts from ". . . stale claims springing up at great distances of time and surprising the parties . . ." when all the evidence, once vivid, has since become obscure. . . .*
>
> A determination that Wisconsin's six-year statute controls would in no way affect any legitimate interest of Pennsylvania since their statute, like ours, is designed to protect defendants and in this case, Air Products, the Pennsylvania resident is the plaintiff—not the defendant. Likewise, Pennsylvania is in no position to in any way influence what Wisconsin feels to be an appropriate period of protection for both itself and defendants from stale lawsuits.[313]

The Wisconsin borrowing statute applied only to a nonresident plaintiff receiving personal injuries outside Wisconsin, not to property damage suits[314] and so was inapplicable to the facts of this case. Ignoring this circumstance, at least so far as the opinion is concerned, the court applied the Wisconsin statute, normal procedure in the absence of a borrowing statute.

Unremarkably, the half, or more, of the states that have either expressly rejected, or have not converted to, significant relationship or policy analysis as their norm in conflicts matters have not opened this pandora's box. So long as North Carolina continues its practice of consistent adherence to lex loci as its conflicts rule, as re-examined and enunciated in *Shaw v. Lee*,[315] it is improbable that its courts will undertake to resolve statute of limitations conflict problems by any means other than the application of the pertinent North Carolina legislative pronouncements.

12. Limitation by Contractual Provision

There remains for consideration the situation where limitations by contractual provision conflict with the statute of limitations requirements of the forum. The substantive rule is that a jurisdiction may per-

313. *Id.* at —, 206 N.W.2d at 418-19 (emphasis added).
314. Wis. Stat. Ann. § 893.205 (1966).
315. 258 N.C. 609, 129 S.E.2d 288 (1963).

mit, reject, or limit domestic contractual efforts to prescribe a period in which suit must be brought other than that contained in its own statute of limitations. Such domestic rule, legislative, judicial, or a combination of the two, is an expression of the policy of the jurisdiction. The constitutional powers of a state to control contractual limitations upon suit contained in domestic contracts have not been seriously questioned.[316]

Where the contractual limitation before the court is contained in a contract executed in a state other than that of the forum, it was long believed that federal constitutional inhibitions came into play. This has now been shown not to be the case, and it appears clear a forum court may reject a contractual time limitation in a contract made in another jurisdiction if that limitation is violative of the limitation public policy of the forum, and the forum has a reasonable relationship to the transaction. The problem usually arises from insurance policy clauses, but is not limited to that area.

For example, in *Sauer v. Law, Union & Rock Insurance Co.*,[317] the insured sued on a fire policy which contained a provision that "[no] suit . . . on this policy . . . shall be sustainable . . . *unless commenced within twelve months next after inception of the loss.*"[318] Action was commenced one year and seven months after the fire. In granting summary judgment for the defendant, the District Court for Alaska said:

> It is well established that a contractual limitation in insurance policies requiring suit to be brought within a prescribed period of time is, in the absence of statutory provisions to the contrary, valid, if reasonable. Consequently, an action brought after the expiration of such time would be barred. The fact that the period thus fixed is shorter than the general statute does not invalidate the policy requirement.[319]

An example of holding that policy of the forum, as enunciated by its own laws, may override personally agreed limitations entered into in other states, so long as the forum has a real interest in the transaction is found in an Arizona case.[320] Here the defendant, a physician, had bor-

316. Sanders v. American Cas. Co., 269 Cal. App. 2d 306, 74 Cal. Rptr. 634 (1969); Insurance Co. of North America v. Carnahan, 446 Pa. 48, 284 A.2d 728 (1971); Stewart v. North Carolina Mut. Life Ins. Co., 187 Pa. Super. 270, 144 A.2d 504 (1958).

317. 17 F.R.D. 430 (D. Alas. 1954).

318. *Id.* at 431.

319. *Id.*

320. Ross v. Ross, 96 Ariz. 249, 393 P.2d 933 (1964). The court also held:

rowed money from his father over a period of time, giving in return a series of twelve notes, each containing a provision waiving "diligence in bringing suit against any party hereto."[321] All the notes were drawn and payable in Iowa. None were paid and when the father died the notes were distributed in the estate to the plaintiff, another son. Defendant, who had lived in Arizona for more than the Arizona period of of limitation, refused to pay. An order granting dismissal for time bar was affirmed. The court stated:

> We approve the general rule . . . [that] "[m]atters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought". . . .
>
> We have before held that the statutes of limitation of this state are declarations of public policy as well as a private right of the individual. Public policy cannot be wiped out by a private attempt to repeal the statutes in advance. The waiver of "diligence in bringing suit" was ineffective.[322]

There are other cases in which the forum court has invalidated contractual limitations on grounds of public policy. In *Oil & Gas Ventures - First 1958 Fund, Ltd. v. Kung*,[323] a federal district court in New York, sitting in diversity, held inapplicable, under the facts presented, contractual agreements entered into in Texas, requiring "that all claims for discrepancies disclosed by public audits be presented within two years of the audit."[324]

The Supreme Court of Nebraska has refused to apply the New York six year statute of limitations to a suit on a Nebraska guaranty contract[325] containing a provision that "[t]his guaranty shall be governed by and construed under the laws of the State of New York."[326] It held that the contractual provision was void as against public policy

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> Appellant's plea that we suspend the operation of limitation statutes as between father and son is a novel one . . . . We hold that parents dealing with adult children do so under statutes of limitation applicable in like fashion as to dealings between total strangers.

Id. at 252, 393 P.2d at 935.

321. *Id.* at 251, 393 P.2d at 934.
322. *Id.* at 251-52, 393 P.2d at 934.
323. 250 F. Supp. 744 (S.D.N.Y. 1966).
324. *Id.* at 753.
325. Dunlop Tire & Rubber Corp. v. Ryan, 171 Neb. 820, 108 N.W.2d 84 (1961).
326. *Id.* at 821-22, 108 N.W.2d at 86.

and that the shorter Nebraska statute of limitations was applicable. Similarly, a diversity federal court sitting in Missouri refused to enforce a shortened limitation of time for suit by contract contained in an accident benefit certificate, issued by an Ohio fraternal benefit society to a resident of Missouri, holding that Missouri courts would hold the provision to be against public policy.[327] The same court in 1965 had occasion to reaffirm this Missouri position.[328]

In North Carolina since 1899, section 58-28 of the General Statutes has provided: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof."[329] The 1919 case of *Keesler v. Mutual Benefit Life Insurance Co.*[330] held that when the application is taken out of the state and neither party was then a resident of North Carolina, the rule of *lex loci contractus* applies and not section 58-28.

Similarly in *Meyers v. Ocean Accident Guarantee Corp.*,[331] the Court of Appeals for the Fourth Circuit, in a diversity case regarding an automobile policy of liability insurance decided shortly after *Erie* became law, held that the policy must be interpreted in accordance with Ohio law since it had been delivered and became effective in Ohio, although the accident occurred in Georgia. The suit was brought in a federal district court in North Carolina by the insurance company against two injured passengers, who were residents of North Carolina, to obtain a declaratory decree of non-liability and to enjoin proceedings against the insurer. The decision was apparently reached without reference to section 58-28.

The constitutionality of section 58-28 was assumed in *Wilson v. Supreme Conclave*,[332] which held that the policy of a fraternal benefit society organized in Maryland and issued to a resident of Charlotte was subject exclusively to the law of North Carolina and not to Maryland law regulating fraternal benefit societies there organized. However, in the 1930's at least, it was generally believed that this result violated

327. Order of United Commercial Travelers of America v. Meinsen, 131 F.2d 176 (8th Cir. 1942).
328. Lumbermen's Mut. Cas. Co. v. Norris Grain Co., 343 F.2d 670 (8th Cir. 1965).
329. N.C. GEN. STAT. § 58-28 (1965).
330. 177 N.C. 394, 99 S.E. 97 (1919).
331. 99 F.2d 485 (4th Cir. 1938).
332. 174 N.C. 628, 94 S.E. 443 (1917).

due process of law in failing to recognize rights vested under a valid contract and hence was constitutionally objectionable.[333] This view rested upon the United States Supreme Court cases of *Home Insurance Co. v. Dick*,[334] and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*[335] These were later reinforced by *Sovereign Camp v. Bolin*.[336]

This difficult constitutional issue was not resolved until the 1964 United States Supreme Court decision in *Clay v. Sun Insurance Office, Ltd.*[337] *Clay* held there was no due process or other constitutional impediment to enforcing a Florida statute which nullified contractual limitations on suit in insurance policies if they require suit to be filed in less than five years after the policy claim arises. In *Clay* the assured, while a resident of Illinois, purchased a policy covering loss or damage to personal property anywhere. Thereafter the assured became a resident of Florida and there suffered personal property loss for which he filed a diversity suit more than twelve months after the loss. The policy contained a twelve-month suit clause which was valid in Illinois. The insurer was licensed to do business in Illinois, Florida, and other states. It seems that under the *Clay* case, domicile of the insured by itself at the time of the occurrence of the covered event, or the presence of the insured object, may be enough to make applicable the local insurance law of the forum, including the forum law regarding the validity of contractual limitations upon the bringing of suit.

This result accords with the language of section 58-28 of the North Carolina General Statutes. In the light of the *Clay* decision, the *Myers* case might no longer be followed.

The insurance statutes of North Carolina recognize within limits, the validity of contractual limitations in policies specifying the time within which actions must be brought for enforcement of claims made under insurance contracts. The general provision is contained in section 58-31 of the General Statutes which, in part requires: "No company . . . may . . . in its insurance contracts . . . limit the time within which . . . action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal

333. The problem was ably stated in Note, *Conflicts of Laws—Insurance—Validity of Statutes Localizing Insurance Contracts*, 3 N.C.L. REV. 213 (1934).
334. 281 U.S. 397 (1930).
335. 292 U.S. 143 (1934).
336. 305 U.S. 66 (1938).
337. 377 U.S. 179 (1964).

time. All . . . stipulations forbidden by this section are void."[338] *Holly v. London Assurance Co.*,[339] held that the state statute of limitations is inapplicable and that disabilities which stop the running of the statute do not apply to such contractual time limitations on suit. On the other hand, *Dibbrell v. Georgia Home Insurance Co.*,[340] held that such contractual limitations may be waived or that the insurer may be estopped by his conduct from demanding their enforcement. *Ideal Brick Co. v. Gentry*,[341] required that such a contractual limitation must be pleaded to be available as a defense.

Section 58-176 of the General Statutes, which applies to standard fire insurance policies only, states: "No suit . . . on this policy . . . shall be sustainable . . . unless commenced within twelve months next after inception of the loss."[342] By a 1971 amendment this time was extended, as to policies thereafter issued, to three years.[343] This section and the amendment thereto were inferentially approved in *Gower v. Aetna Insurance Co.*[344]

The rules just stated regarding the validity of contractual limitations are, of course, local North Carolina law. Their enforcement in a conflicts setting as to out of state insurance contracts does not appear to have been litigated in North Carolina. Under the United States Supreme Court decision *Clay* it would appear that North Carolina could constitutionally refuse to enforce shorter contractual limitations in out of state policies so long as the risk allegedly covered is reasonably related to North Carolina.

The only *Conflicts Restatement Second* observation on this point is to the effect that the validity of a contractual provision limiting the time in which an action may be brought under the contract is determined by the law of any state related to the transaction chosen by the parties or in the absence of such choice the law of the state with the most significant relationship to the contract.[345] This approach would leave North Carolina the same options it has under its *lex loci contractus* rule in insurance policy cases.[346]

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338. N.C. GEN. STAT. § 58-31 (1965).
339. 170 N.C. 4, 86 S.E. 694 (1915).
340. 110 N.C. 193, 14 S.E. 783 (1892).
341. 191 N.C. 636, 132 S.E. 800 (1926).
342. N.C. GEN. STAT. § 58-176(c) (1965).
343. Ch. 476, § 1, [1971] N.C. Sess. Laws 403.
344. 281 N.C. 577, 189 S.E.2d 165 (1972).
345. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971). *See also id.* at §§ 187-88.
346. The preceding nine paragraphs of text are primarily derived from Wurfel,

Clay problems will continue to arise. For instance, the Tenth Circuit Court of Appeals, citing and relying on *Clay* in a diversity case, reversed the district court and held that a proceeding in New Mexico on an insurance policy was not barred by a contractual limitation permissible under California law.[347] However, even in the Florida courts which produced *Clay*, the supremacy clause has been applied in this area by adhering to the one year limitation permitted by the Federal Carriage of Goods by Sea Act,[348] where applicable.[349] Nevertheless, on occasion federal courts have liberally construed such international maritime carriage contracts to sustain passenger damage suits otherwise barred. Thus, in a suit brought more than one year after the event to recover for injuries resulting from a lurch by the Italian Line's Steamship Leonardo Da Vinci in mid-ocean, the action was permitted to proceed because the court deemed the small print reference to the contractual limitation to be inadequate to bind the passenger.[350]

Multi-State Business Transactions: Contracts, in NORTH CAROLINA BAR ASSOCIATION FOUNDATION, INSTITUTE ON RECENT DEVELOPMENTS IN MULTI-STATE TRANSACTIONS V-16, V-18, V-19 (1973).

347. Haury v. All-States Ins. Co., 384 F.2d 32 (10th Cir. 1967). The court said:

> [I]n connection with policies providing uninsured motorists protection California bars causes of action unless the insured formally institutes arbitration proceedings within one year from the date of the accident. The formal demand of the insured for arbitration was made in California more than one year after the accident.
>
> The action and the arbitration are not barred by any New Mexico statute of limitations. The questions are whether they can be maintained in New Mexico, and if they can, whether the California limitation applies.
>
> . . . .
>
> A state may impose its own rules on a foreign insuror if the state has substantial contacts with the question being litigated. [Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 181-83 (1964).] The accident happened, and the injuries were sustained, in New Mexico. The interest of New Mexico in insurance protection for persons injured within its borders is a substantial contact sufficient to sustain its jurisdiction.
>
> . . . .
>
> In our opinion, the California statute does not bar either the action or the arbitration proceedings in New Mexico.

Id. at 33-34 (citations added).

348. 46 U.S.C. §§ 1300-15 (1970).

349. Coquette Originals, Inc. v. Canadian Gulf Line, 240 So. 2d 847 (Fla. Dist. Ct. App. 1970). In a per curiam opinion, a Florida district court of appeal held:

> Under § 95.11(5)(c) Fla. Stat., F.S.A., the limitation period for actions for damages to goods is three years. Under § 95.03 Fla. Stat., F.S.A., contractual provisions shortening statutory limitation periods are against public policy and void. However, in actions controlled by maritime law contractual shortening of a statute of limitation period is permissible as authorized by [46 U.S.C. §§ 1300-15 (1970)].
>
> [D]efendant . . . acting as a shipper's agent . . . was entitled to the benefit of the terms of the uniform bill of lading as provided for in the dock receipt, and to the one year contractual limitation period for filing suit.

Id. at 848.

350. Silvestri v. Italia Societa Per Azioni Di Navigazione, 338 F.2d 11 (2d Cir. 1968). The opinion of Judge Friendly, in part, stated:

13. CONCLUSION

One firm conclusion of the author is that any reader who has persevered through this article will be most unlikely to overlook an opportunity to plead the statute of limitations, or to fail to detect a way around such a plea, whether in single-state or multi-state litigation.

> Judge Metzner granted the motion [for summary judgment], apparently for failure to begin the actions within one year, a contractual period of limitation sanctioned by 46 U.S.C. § 183b(a).
>
> . . . .
>
> If the company can establish that because of the (plaintiff) lawyer's advice or otherwise Silvestri knew that the ticket required him to bring suit within a year, we might have a different case. We hold only that it was error to grant summary judgment for the respondent.

Id. at 13, 18.