

# Missouri Law Review

---

Volume 33  
Issue 2 *Spring 1968*

Article 2

---

Spring 1968

## Tort Liability and the Statutes of Limitation

Frederick Davis

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Frederick Davis, *Tort Liability and the Statutes of Limitation*, 33 Mo. L. REV. (1968)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol33/iss2/2>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

TORT LIABILITY AND THE STATUTES  
OF LIMITATION

INTRODUCTION .....	171
I. THE STATUTORY STRUCTURE IN MISSOURI .....	173
A. <i>General Periods of Limitation Established         by Chapter 516</i> .....	174
B. <i>Special or "Built In" Limitation Periods         Applicable to Statutory Actions</i> .....	177
C. <i>Savings and Tolling Provisions</i> .....	181
II. JUDICIAL RECLASSIFICATION OF THE NATURE OF THE CAUSE OF ACTION IN ORDER TO AVOID A STATUTE OF LIMITATION .....	183
III. ACCRUAL OF THE CAUSE OF ACTION .....	187
IV. SUSPENSION AND EXTENSION OF THE STATUTORY PERIOD .....	195
A. <i>Outside the State</i> .....	197
B. <i>Personal Disabilities</i> .....	198
C. <i>Related Judicial Proceedings</i> .....	200
D. <i>Defendant's Improper Act</i> .....	204
E. <i>Extensions in Case of Death</i> .....	207
V. CONFLICTS OF LAW AND THE BORROWING STATUTE .....	214
VI. APPRAISAL .....	224

# TORT LIABILITY AND THE STATUTES OF LIMITATION\*

FREDERICK DAVIS\*\*

## INTRODUCTION

In the law schools and in the journals of legal scholarship, much attention is given to tort doctrines and to the pressures for changing them which have been brought to bear by changes in our patterns of living and working.<sup>1</sup> While statutes of limitation are by no means ignored by legal scholars, their relevance to tort doctrine and litigation strategy are not as carefully explored as, for example, damages rules<sup>2</sup> and (at least by some scholars) the role of the liability insurance policy.<sup>3</sup> One reason for this lack of emphasis on the relevance of statutes of limitation is, undoubtedly, variations among the several jurisdictions. These variations are so considerable that the standard treatises and casebooks can do little more than make mention of them in extremely general terms.<sup>4</sup>

---

\*Much of the research for this study was made possible under the terms of an Instructional Improvement Grant awarded to a grateful author during the summer of 1967 by the Board of Curators of the University of Missouri, pursuant to a recommendation of the UMC Instructional Improvement Grants Committee, Dr. Herbert W. Schooling, Chairman. The objective of the grant is the development of materials which will better enable law students to become familiar with the increasing number of statutory provisions which affect or change traditional tort liability.

\*\*Professor of Law, University of Missouri-Columbia. A.B., Yale University, 1948; LL.B. with Specialization in International Affairs, Cornell University, 1953; LL.M. (honours) Victoria University of Wellington (N.Z.), 1954; member, New York Bar.

1. See, e.g., WALTER E. MEYER RESEARCH INSTITUTE OF LAW, DOLLARS, DELAY AND THE AUTOMOBILE VICTIM (1968); KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); CONARD, MORGAN, PRATT, VOLTZ & BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964); BLUM & KALVEN, PUBLIC LAW PERSPECTIVES OF A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS (1965); EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954); Prosser, *Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); Keeton, *Products Liability—the Nature and Extent of Strict Liability*, 1964 ILL. L. REV. 693 (1964); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

2. See, e.g., PROSSER & SMITH, TORTS: CASES AND MATERIALS 611-618 (4th ed. 1967); GREGORY & KALVEN, CASES AND MATERIALS ON TORTS 408-511 (1959).

3. See, e.g., PROSSER & SMITH, *op. cit. supra* note 2 at 689-733; GREGORY & KALVEN, *op. cit. supra* note 2 at 550-609; Dodge, *An Injured Party's Rights Under an Automobile Liability Policy*, 38 IOWA L. REV. 116 (1952); and James, *Accident Liability Reconsidered*, 57 YALE L.J. 549 (1948).

4. The standard treatise gives the limitations aspect of a torts claim barely one page of discussion. PROSSER, TORTS 147 (3rd ed. 1964). In their splendid three volume treatise, Harper and James mention the limitations problem just twice,

Despite the casual treatment thus accorded statutes of limitation, it is clear that no other single factor can so decisively insulate a defendant from tort liability. The statutes of limitation of a particular jurisdiction and the modes of application are, therefore, significant factors in any analysis of a tort problem.

Whether it is an action for assault and battery,<sup>5</sup> an action for negligent misrepresentation of the potential of oil properties,<sup>6</sup> an action for malpractice of a physician,<sup>7</sup> an action for injuries sustained by an employee in the course of his employment,<sup>8</sup> or an action for wrongful death,<sup>9</sup> the appropriate statute of limitation may completely bar recovery in a case where liability is otherwise clear.

For purposes of analysis, the relationships between statutes of limitation and tort liability may be conveniently grouped under five significant heads.

First and foremost is the statutory pattern itself (topic "I" below)—i.e. what are the different periods that have been legislatively prescribed beyond which certain tort actions cannot be brought. Since these vary from state to state, no safe generalizations can be made.

A second head (topic "II") concerns judicial attitudes toward classification of a cause of action. A jurisdiction may prescribe different periods of limitation for different types of torts (e.g., five years for general tort liability, but only two years for libel and slander). It is important to know whether the judiciary is lenient or strict toward a plaintiff who characterizes an otherwise barred cause of action (e.g. libel) in such terms (e.g. invasion of privacy) as to bring the case within the longer period of limitation (5 years).<sup>10</sup>

---

once in connection with wrongful death actions, and once with respect to their classification in conflict of laws. 2 HARPER & JAMES, TORTS 1295-98, 1686-88 (1956). Although many articles have appeared dealing with particular aspects of the statutes of limitation, the most recent attempt to deal with the entire subject in a systematic and analytical fashion is now eighteen years old. Comment, 63 HARV. L. REV. 1177 (1950).

5. Hopper v. Harper, 42 Mo. 137 (1868).

6. Kaufman v. C.R.A., Inc., 243 F. Supp. 721 (W.D. Mo. 1965).

7. National Credit Associates, Inc. v. Tinker, 401 S.W.2d 954 (K.C. Mo. App. 1966); Barnhoff v. Aldridge, 327 Mo. 767, 38 S.W.2d 1029 (1931).

8. McLendon v. Kissick, 363 Mo. 264, 250 S.W.2d 489 (1952).

9. Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958), noted, 24 Mo. L. REV. 397 (1959), 35 N.D.L. REV. 171 (1959).

10. That the same acts can give rise to causes of action for both defamation and invasion of privacy is well settled. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942), noted 8 Mo. L. REV. 74, 304 (1943). In Missouri the defamation action is subject to a two-year limitation, § 516.140, RSMo 1959. The action for invasion of privacy, not having been designated as subject to a special limitation, is governed by the five-year limitation of § 516.120, RSMo 1959.

A third head of inquiry (topic "III") concerns the so-called "running" of the statute of limitation. It is important to know when the cause of action arises and when the period of limitation begins.

A fourth head (topic "IV") concerns the types of circumstances which can interrupt or suspend the running of the statute so that certain periods of time cannot be included in the measurement for determining whether the action has been barred.

A fifth head of inquiry (topic "V") deals with legislative and judicial pronouncements concerning wrongs that have a relationship with another jurisdiction where a different period of limitation applies. If the other jurisdiction's period is shorter than the forum's, it is important to know whether the forum will apply the shorter period even though the action is *not* barred by the forum's statute of limitation. Conversely, if the statute of limitation does *not* bar the cause of action in the other jurisdiction, it is important to know whether a local court will permit the action to be maintained even though the local statute would bar the cause.<sup>11</sup>

Any consideration of the circumstances under which actions have been barred by various statutes of limitation cannot avoid the question whether the benefits to judicial administration are worth the occasional injustices suffered by aggrieved persons who for good reasons may have failed to begin their actions within the statutory period prescribed. This question will be considered in the sixth and final head of inquiry (topic "VI") which will also summarize the outstanding characteristics of the statutes of limitation picture in Missouri.

### I. THE STATUTORY STRUCTURE IN MISSOURI

Setting aside the limitations applicable to actions relevant to real property<sup>12</sup> and the relatively unimportant provisions covering actions on penal statutes,<sup>13</sup> the statutory provisions in Missouri fall into three general categories:

- (1) *general* provisions establishing the periods within which certain actions must be brought;

---

11. The general rule is that the action is barred if the forum's statute bars the action, regardless of what the statute of limitations is in the jurisdiction where the action accrues. *Farthing v. Sams*, 296 Mo. 442, 446, 247 S.W. 111, 112 (1922). See Vernon, *Statutes of Limitations in Conflict of Laws*, 32 ROCKY MOUNTAIN L. REV. 287, 298-300 (1960).

12. §§ 516.010-.090, RSMo 1959. See Eckhardt, *Work of Missouri Supreme Court for 1950—Property*, 16 MO. L. REV. 372, 383-86 (1951); and Note, 22 MO. L. REV. 227 (1957).

13. §§ 516.380-.420, RSMo 1959.

- (2) *special* provisions applicable to special causes of action created by the legislature and not known to the common law; and
- (3) various limitations, provisos, savings clauses, and modifications which apply to the general limitations provisions, and deal with such matters as when the limitation period begins to run, when it is suspended, etc.

#### A. *The General Periods of Limitation Established by Chapter 516*

Insofar as tort liability is concerned, the most important general limitation provision is section 516.120. This establishes a five year period within which the majority of negligence actions and the traditional actions for trespass and for interference with personal property rights must be initiated.<sup>14</sup> Actions for fraud are made subject to a special tolling rule. This suspends the running of the five year limitation until the aggrieved party discovers the fraud, although if he fails to discover the fraud within ten years his action is barred.<sup>15</sup> In effect, this exposes a defendant who is guilty of fraud to fifteen years of civil jeopardy whereas the negligent driver or despoiler of property is relieved after five years.

The second most important general limitation is section 516.140. It establishes a limitation of only two years for the bringing of actions for libel, slander, assault, battery, false imprisonment, and criminal conversation. Physicians, surgeons, dentists, nurses, roentgenologists, hospitals, and sanitariums are also the beneficiaries of a two year limitations period with respect to malpractice. For reasons which will appear later in the discussion, such actions may be more strictly treated under this statute than actions for libel, slander, assault, battery, etc.<sup>16</sup>

The final general provision is found in section 516.130. It covers actions against sheriffs, coroners, or "other officers" for liabilities incurred in their official capacities. The second paragraph applies to actions upon a statute for a penalty or forfeiture where the action is given to the party aggrieved. All of these actions must be brought within three years. Cover-

14. Although the statute identifies by name certain types of actions which are subject to the five year limitation (e.g., trespass and injuries to goods or chattels) it does not use the terms "negligence," "tort," or "personal injury." § 516.120, RSMo 1959. Despite the absence of direct holdings that this particular statutory provision governs most tort actions, it is clear that it comprehends most tort actions not made subject to special limitations by other statutory provisions. See, e.g., *Williams v. Illinois Central R.R. Co.*, 360 Mo. 501, 229 S.W.2d 1 (1950).

15. § 516.120(5), RSMo 1959. See, e.g., *Turnmire v. Claybrook*, 204 S.W. 178 (Mo. 1918).

16. § 516.140, RSMo 1959. *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954 (K.C. Mo. App. 1966).

ing, as it does, only a very small segment of the spectrum of torts defendants, this three year limitation has not proved particularly controversial. Its chief application has been to an action against a local officer on his bond by a private citizen who has suffered legal wrong as a result of the local officer's breach of duty<sup>17</sup> (e.g., action against a bonding company under a notary's bond for losses resulting from the notary's forgery). It is also used in the rare case where a private party is permitted to sue to recover a penalty provided by statute (e.g., section 537.340, RSMo 1959 giving treble damages to the owner where another person knowingly and wrongfully enters the owner's land without his knowledge and consent and cuts and carries away growing timber).<sup>18</sup>

The fundamental pattern of limitations for tort actions in Missouri may be called the "two-three-five" system. The five year limitation is the basic period for most negligence actions, the two year limitation applies to some of the more important intentional torts and malpractice cases, and a three year period applies to certain types of actions where the wrong involves official misfeasance or is quasi-criminal in character.

The "two-three-five" system has a distinguished history. In Missouri it traces back to at least the first Territorial Laws of 1807.<sup>19</sup> Of course, amendments have been made bringing certain types of torts within a category or shifting some from one category to another.<sup>20</sup> The basic notion that different periods of limitation should apply, depending upon the quality of the tort, apparently stems from the basic seventeenth century statute of James I that established a "two-four-six" system.<sup>21</sup> No one has ever given an official explanation for the prescription of different periods of limitation for different types of torts, although arguments in justification

17. § 516.130, RSMo 1959. See, e.g., State *ex rel.* Fichtner v. Haid, 324 Mo. 130, 22 S.W.2d 1045 (1929).

18. § 537.340, RSMo 1959. Robertson v. Welch, 246 S.W.2d 828 (K.C. Mo. App. 1952).

19. Act of July 4, 1807, 1 Mo. TERR. LAWS 144.

20. With respect to torts, the original limitations periods specified only those initially comprehended by the forms of action (e.g., assault, battery, "actions on the case for words," etc.), and, generally, established periods of two years or less. Act of July 4, 1807, 1 Mo. TERR. LAWS 144; § 510, RSMo 1825. A revision in 1849 added new categories to the five year limitation previously applicable to actions sounding in contract. One of these categories ". . . fifth, an action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract. . . ." ultimately became the general period of limitations applicable to torts today. RSMo 1849, at 74. Sommerfield v. St. Louis Transit Co., 84 S.W. 172 (St. L. Mo. App. 1904).

21. 21 Jac. I., c.16 (1623). For a brief summary of the history of the evolution of statutes of limitation see 17 R.C.L. 663-64 (1917).

of the different periods are not difficult to devise.<sup>22</sup> No official legislative "findings" have typically accompanied the establishment of these periods of limitation. Therefore, the consequences they have upon legal relationships and the anomalies they produce in a federal system must be accepted upon a traditional rather than a logical basis.

*Example 1:* In Missouri, A negligently rides his bicycle into B causing injuries to B. Four years later B sues A. B's action is not barred.<sup>23</sup>

*Example 2:* Same facts as in Example "1" except that the events take place in Kansas. B's action is barred.<sup>24</sup>

*Example 3:* In Missouri, A intentionally runs his bicycle into B causing injuries to B. Four years later B sues A. A's action is barred.<sup>25</sup>

*Example 4:* Same facts as in Example "3" except that the action is brought eighteen months later. In Missouri the action is not barred. In Kansas the action is barred.<sup>26</sup>

*Example 5:* Dr. X negligently fails to remove a banana peel from his office hallway and a patient slips and falls on it. Four years later the patient sues Dr. X. In Missouri the patient's suit is probably not barred.<sup>27</sup>

*Example 6:* Dr. X negligently drops a banana peel into the incision of a patient during surgery, and four years following the completion of treatment the patient discovers the condition and sues Dr. X. In Missouri the patient's suit is barred.<sup>28</sup>

22. Some of the more astute speculations concerning the policy considerations that may have led to the particular balances generally struck in modern statutes of limitation may be found in *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1192-98 (1950).

23. § 516.120, RSMo 1959 establishes a five year limitations on actions for negligence. See note 20 *supra*. Schiermeier v. Kroger Grocery & Bakery Co., 167 S.W.2d 967 (St. L. Mo. App. 1943) (reversed on other grounds); Gordon v. Postal Telegraph-Cable Co., 24 S.W.2d 644 (K.C. Mo. App. 1929).

24. KAN. GEN. STAT. ANN. § 60-513 (1963) establishes a two year limitation period for negligence actions.

25. § 516.140, RSMo 1959 establishes a two year limitations period for certain types of actions, including battery.

26. KAN. GEN. STAT. ANN. § 60-514 (1963) establishes a one year limitation for certain actions, including battery.

27. A physician is liable as an owner or occupier of land for hidden dangers, traps, snares, pitfalls, and the like that in the exercise of ordinary care would have been removed from his premises. This liability is in the nature of negligence, and would be governed by the five year limitation. § 516.120, RSMo 1959.

28. Although no case has been uncovered wherein a surgeon has been charged with leaving a banana peel in a patient's wound, surgeons have been charged with abandoning a wide variety of objects in the incisions of patients. See, *e.g.*, Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943) (abandoned needle).



*Example 7:* Same facts as in Example "6" except that the plaintiff discovers the condition and sues eighteen months following the completion of the operation and treatment. In neither Missouri nor Kansas is the action barred.<sup>29</sup>

### B. Special or "Built in" Limitation Periods Applicable to Statutory Actions

The legislature has from time to time created or recognized causes of action other than those included in Chapter 516 of the revised statutes. Among these are actions for wrongful death,<sup>30</sup> actions for breach of contract for sale (which include the anomalous "warranty" actions)<sup>31</sup> and actions on constables' bonds.<sup>32</sup> All of the foregoing have what are called "built in" limitations. In other words the statute which creates the right also establishes the period of time within which the action must be brought. The general provisions of Chapter 516 therefore are inapplicable to these causes of action.

In the case of the action for breach of contract for sale the period is four years.<sup>33</sup> Actions on constables' bonds are subject to a three year limitation.<sup>34</sup> Finally, the action for wrongful death is subject to a special limitation of two years.<sup>35</sup>

Since a limitation period is typically significant only in terms of the particular interval it establishes it may well be questioned whether the *source* of the limitation (e.g., whether from the statute creating the right

Note, 9 Mo. L. REV. 102 (1944). See also *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932) (broken glass in vagina); Annot., 10 A.L.R.3d 9 (1966) (collecting cases).

29. Although Kansas classifies malpractice as "negligence" for the purposes of its statutes of limitations, the negligence statute in Kansas runs the same as the "short" Missouri statute governing assault, battery, false imprisonment, libel, slander, criminal conversation, and malpractice—two years. KAN. GEN. STAT. ANN. § 60-513 (1963); § 517.140, RSMo 1959; *Hill v. Hays*, 193 Kan. 45, 395 P.2d 298 (1964).

30. The limitation in actions for wrongful death was recently raised from one year to two years. § 537.100, RSMo 1967 Supp.

31. § 400.2-725, RSMo 1967 Supp. For an example of the types of inconsistencies which can result when the nonconforming UNIFORM COMMERCIAL CODE limitations period is introduced into an existing system see *Abate v. Barkers of Wallingford, Inc.*, 27 Conn. Supp. 46, 229 A.2d 366 (1967) (retailer liable under the code because of the four-year statute, but attempt to implead the manufacturer fails because the negligence statute is one year.)

32. § 63.100, RSMo 1959. Another provision establishes liability on constables' bonds for the City of St. Louis. Since this statute contains no special limitation it is subject to the general provisions of Chapter 516. *State v. Weathers*, 396 S.W.2d 746 (St. L. Mo. App. 1965).

33. See note 31 *supra*.

34. See note 32 *supra*.

35. See note 30 *supra*.

or whether from Chapter 516 which sets forth general limitations) is of any real importance. The courts have ruled, however, that the source is important. Limitation periods which are "built in" the statutes creating such rights are much more harshly applied than the general periods of limitation. These harsh applications result from two quite independent theories. In the first place it has been held, and is widely accepted, that where a limitation period is established by the very statute creating the right (or, sometimes, where it is independently established, but specifically directed to the legislatively created right) it becomes part of the substantive right itself.<sup>36</sup> As an integral part of the cause of action it is "substantive" and not "procedural." Therefore, the limitation period cannot be suspended or disregarded under conditions or circumstances which justify suspension or disregard of "procedural" statutes of limitation. Thus, where the limitation is "built in," it is unnecessary to plead the statute as an affirmative defense,<sup>37</sup> and a motion to dismiss for failure of the complaint to state a cause of action may be granted subsequent to the pleading stage and, arguably, at any stage of the proceedings.<sup>38</sup> In the second place, it is a conflicts principle recognized in Missouri, although unsettled in other jurisdictions, that a shorter period of limitation applicable in the state of the forum, is not applicable where a longer limitation has been "built in" the statute by the jurisdiction which created the cause of action, and wherein the cause of action arose.<sup>39</sup>

*Example 8:* A brings an action against B for false imprisonment. B's answer denies the facts of A's petition but does not allege, as an affirmative defense, that the facts giving rise to A's action occurred three years previously. Although B may be permitted to amend his answer in order to assert the statute of limitations as an affirmative defense, without the amendment the statute is not a bar.<sup>40</sup>

---

36. *Frazer v. Partney*, 314 S.W.2d 915 (Mo. 1958).

37. *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644 (1947).

38. *Devault v. Truman*, 354 Mo. 1193, 194 S.W.2d 29 (Mo. 1946) (dictum); *Baysinger v. Hanser*, *supra* note 37.

39. *Theroux v. Northern Pac. R.R. Co.*, 64 Fed. 84 (8th Cir. 1894). However, the rule that the shorter forum statute will not bar the claim where it accrues in a jurisdiction which has a "built in" limitation of greater duration is not universally accepted. RESTATEMENT (SECOND), CONFLICT OF LAWS, Reporter's Note § 143 at 497 (Proposed Official Draft 1967); LEFLAR, CONFLICT OF LAWS 122 (1959). For a suggestion to the effect that the foregoing rule is on the wane, see GOODRICH & SCOLES, CONFLICT OF LAWS 155 (4th ed. 1964).

40. See *Smith v. Lewis County Abstract and Investment Co.*, 415 S.W. 2d 33 (St. L. Mo. App. 1967) (dismissal of action error where defendant did not assert the statute of limitations as an affirmative defense, but only moved to dismiss for failure to state a claim on which relief could be granted.)

*Example 9:* Facts are the same as in example "8," except that A is a widow bringing an action for the wrongful death of her husband. The statute of limitations may be asserted at any stage of the proceeding since it is a part of the substantive right, and it is unnecessary for the defendant to assert it as an affirmative defense.<sup>41</sup>

(*Caveat:* It is not clear whether a petition stating a cause of action subject to the general limitations of Chapter 516 which asserts facts indicating that the action is barred by one or more of the provisions of Chapter 516 is nevertheless sufficient in the absence of an affirmative defense that the statute has run.)<sup>42</sup>

*Example 10:* Action is brought in Missouri for wrongful death occurring in State X, which has a five year statute of limitation. The action is brought three years after the occurrence of the accident. Missouri has a two year limitation on the action for wrongful death. Normally Missouri would apply its own limitation. However, if State X, like Missouri, has a special "built in" limitation on the action for wrongful death, the limitation would be considered part of the substantive right itself, and the action could therefore be maintained in Missouri.<sup>43</sup>

Although traditional conflict of laws principles are being reappraised in many jurisdictions, and considerable uncertainty presently exists concerning the rule applicable in a given situation,<sup>44</sup> a sister state is far more likely to apply the stricter Missouri limitation, where the limitation is

41. See *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958); *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644 (1947); *Vance v. Maytag Sales Corp.*, 159 Va. 373, 165 S.E. 393 (1932); *Lawrence v. Melvin*, 202 Iowa 866, 211 N.W. 410 (1926). Surprisingly few cases have considered the effect of a delayed assertion of the statute of limitations where the statute is part of the substantive right sued upon. Utah requires the plea at the first opportunity. *Chief Consol. Mining Co. v. Industrial Commission*, 78 Utah 447, 4 P.2d 1083 (1931).

42. A number of cases hold that where the expiration of a limitation period appears on the face of the petition, the action is subject to a motion to dismiss and the defense of the statute of limitations need not be affirmatively pleaded in the answer. *E.g.* *Hall v. Smith*, 355 S.W.2d 52 (Mo. 1962). However, objections may be made as to the clarity with which the disability appears in the petition, and if sustained, the failure to raise the statutory bar by way of affirmative defense may result in the loss of the defense. *E.g.* *Maddox v. Duncan*, 62 Mo. App. 474 (St. L. Ct. App. 1895). See 12 WHEATON & BLACKMAR, MISSOURI PRACTICE 731-38 (1965).

43. *Martinez v. Mo. Pac. R.R. Co.*, 296 S.W.2d 90 (Mo. 1956); *Lang v. J. C. Nichols Inv. Co.*, 227 Mo. App. 1123, 59 S.W.2d 63 (K.C. Ct. App. 1933); *Newell v. Harrison Eng. & Const. Corp.*, 149 Kan. 838, 89 P.2d 869 (1939).

44. See CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966).

"built in" the substantive cause of action, than its own more liberal period where applicable to the cause of action.<sup>45</sup>

*Example 11:* State X has a three year limitation period on actions for wrongful death. Yet where the cause of action arises in Missouri, State X will very likely hold the action barred by the two year limitation presently applicable in Missouri because that limitation is "built in" the action. It has been construed by Missouri courts to be a part of the substantive right itself. In the absence of a "borrowing statute" (a statute which makes the shorter foreign limitation applicable regardless of whether it is classified as substantive or procedural) this result would *not* follow if the action were for *negligence* and the action, though barred in Missouri, would not be barred under the statutes of limitation applicable in State X.<sup>46</sup>

The most critical differentiation made by the courts between causes of action with "built in" limitation periods and causes of action subject to the general provisions of Chapter 516 has to do with the various "tolling" provisions contained in Chapter 516. Most of these "tolling" provisions are judicially established "exceptions" to general statutes of limitation which were incorporated into the law by the legislature in Chapter 516.<sup>47</sup> Briefly stated, the rule is that these "exceptions," or "tolling" provisions, do not apply to causes of action with "built in" statutes of limitation unless the legislature specifically so provides.<sup>48</sup> Thus, the automatic one year extension in the event of a nonsuit<sup>49</sup> (Although nowhere employed by the Missouri Rules of Civil Procedure, the term "nonsuit" is employed by the

45. RESTATEMENT (SECOND), CONFLICT OF LAWS, Reporter's Note § 143 at 496 (Proposed Official Draft 1967); *Toomes v. Continental Oil Co.*, 402 S.W.2d 321 (Mo. 1966); Annot., 95 A.L.R.2d 1162 (1964).

46. *Wheeler v. Southwestern Greyhound Lines*, 207 Ark. 601, 182 S.W.2d 214 (1944).

47. Sections 516.170, .180, .230, .240, .250, .260, .280, RSMo 1959. For analytic discussion of these statutory provisions see text accompanying notes 128 et seq., *infra*. Courts have uniformly refused to create exemptions or suspensions by decisional law where the case is not within one of the categories created by the legislature. See, e.g., *Hunter v. Hunter*, 361 Mo. 799, 237 S.W.2d 100 (1951); *Wormington v. City of Monett*, 358 Mo. 1044, 218 S.W.2d 586 (En Banc 1949).

48. *Frazer v. Partney*, 314 S.W.2d 915 (Mo. 1958); *State ex rel Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347 (Mo. En Banc 1944), noted, 10 Mo. L. Rev. 302 (1945); *Kohout v. Adler*, 327 S.W.2d 492 (St. L. Mo. App. 1959), noted, 26 Mo. L. Rev. 80 (1961). Louisiana is apparently the only jurisdiction which makes its tolling provisions applicable to all limitations, whether specific or general. *Mitchell v. Sklar*, 196 So. 392 (La. App. 1940).

49. § 516.230, RSMo 1959. *State ex rel. Moore v. Weathers*, 396 S.W.2d 746 (St. L. Mo. App. 1965); *Kohout v. Adler*, *supra* note 48.

savings provisions of the statutes of limitation in Chapter 516, and in the provision applicable to actions for wrongful death. In both places, and, when referred to in this study, it refers to any termination of an action which does not adjudicate issues on the merits); the provision which suspends the running of the limitation period during a period of disability;<sup>50</sup> the "out of state" suspension provision;<sup>51</sup> and the provision tolling the statute during such time as the defendant, by his "improper act," prevents the plaintiff from suing;<sup>52</sup> do not apply to causes of action independently created with their own "built in" limitations.

*Example 12:* Defendant negligently operates his car and thereby causes the death of plaintiff's wife and plaintiff's minor child. Four other minor children of the plaintiff survive. Defendant fails to report the accident. Despite a persistently pressed search to determine the defendant's identity, plaintiff does not finally discover who he is until three years after the accident, which is one year more than the applicable statute of limitations. Plaintiff's actions on behalf of himself and on behalf of the four surviving minor children for wrongful death are barred. If plaintiff has suffered personal injuries in the collision, however, *his* action is not barred.<sup>53</sup>

Since it is clear that different results follow, depending upon whether the limitation period is "built in" the statutory remedy or whether it is one of the general provisions of Chapter 516, the various "built in" statutes must be recognized as an independent constituent of the statutory structure.

### C. Savings and Tolling Provisions

The rule holding the various tolling and savings provisions of Chapter 516 inapplicable to statutes of limitation "built in" to particular statutory remedies demonstrates that these tolling and savings provisions are themselves important parts of the general statutory structure.

These savings and tolling provisions themselves fall into five general categories. They are discussed in detail, *infra*. The categories follow:

- (1) provisions tolling the limitation period during a status disabil-

50. § 516.170, RSMo 1959. *Hellerbrand v. Hoctor*, 331 F.2d 453 (8th Cir. 1964) (dictum).

51. § 516.200, RSMo 1959. *Cobb v. Houston*, 117 Mo. App. 645, 94 S.W. 299 (St. L. Ct. App. 1906). *But see* *Airy v. Swinford*, 154 Mo. App. 584, 136 S.W. 728 (K.C. Ct. App. 1911).

52. § 516.280, RSMo (1959); *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958).

53. § 516.280, RSMo (1959); *Frazee v. Partney*, *supra* note 52.

- ity attributable to a state of war or to the defendant's being *outside of the state*;<sup>54</sup>
- (2) provisions tolling the limitation period because of a *personal disability* under which the plaintiff labors (E.g., minority, imprisonment, or insanity);<sup>55</sup>
  - (3) provisions extending the period for an additional year because of a *related judicial proceeding* such as the "suffering" of a nonsuit or arrest of judgment or verdict, or tolling the statute during such period where the commencement of the action has been stayed by injunction;<sup>56</sup>
  - (4) provisions tolling the limitation period during such time as the plaintiff is prevented from beginning the action by the *defendant's improper act*;<sup>57</sup>
  - (5) provisions applicable when *death* occurs and which extend the limitation period when a cause of action survives. This insures that the person entitled to bring the survival action is not unduly prejudiced by the uncertainties which necessarily exist during the transition period following either the death of the plaintiff or the defendant.<sup>58</sup>

Although strictly speaking not a "savings" or "tolling" provision, the statutory provision which suspends the running of a limitations period until such time as all elements of damage are sustained and ascertainable is also a part of the general statutory structure. It has been construed not to apply where the legislature has arguably established other criteria for determining the inception of the limitation period.<sup>59</sup>

54. § 516.200, RSMo 1959. See, e.g., *Koppel v. Rowland*, 319 Mo. 602, 4 S.W.2d 816 (1928).

55. § 516.170, RSMo 1959. See, e.g., *Devault v. Truman*, 354 Mo. 1193, 194 S.W.2d 29 (Mo. 1946).

56. § 516.230, RSMo 1959 ("suffer" a nonsuit). See, e.g., *State v. Litzinger*, 417 S.W.2d 126 (St. L. Mo. App. 1967). § 516.260, RSMo 1959 (injunction). See, e.g., *Cordia v. Matthes*, 338 Mo. 308, 90 S.W.2d 101 (1936), noted on collateral point, 5 Mo. L. REV. 523 (1940).

57. § 516.280, RSMo 1959. See, e.g., *Arnold v. Scott*, 2 Mo. 15 (1828). The statute has not been helpful to plaintiffs who have sought its protection. See, e.g., *Hellerbrand v. Hoctor*, 331 F.2d 453 (8th Cir. 1964).

58. §§ 516.240-250, RSMo 1959. See e.g., *Longan v. Kansas City Rys. Co.*, 299 Mo. 561, 253 S.W. 578 (1923); *Thompson v. Lyons*, 281 Mo. 430, 220 S.W. 942 (1920). The foregoing statutory provisions apply where one of the parties dies after an action has been begun. Where suit has not yet been brought the normal statute of limitations apparently continues to run. § 537.020, RSMo 1959.

59. § 537.100, RSMo 1959. *Rippe v. Sutter*, 292 S.W.2d 86 (Mo. 1956), note, 22 Mo. L. REV. 343 (1957). The inapplicability of this provision to situations where the legislature has established special periods of limitation is suggested in *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954, 959 (K.C. Mo. App. 1966), but rejected by the late Dean McCleary. Note, 9 Mo. L. REV. 102, 106 (1944).

Having surveyed the statutory structure itself, attention must be given to the ways in which these statutes have been construed.

## II. JUDICIAL RECLASSIFICATION OF THE NATURE OF THE CAUSE OF ACTION IN ORDER TO AVOID A STATUTE OF LIMITATION

As the foregoing discussion suggests, under differing circumstances the defendant may be prevented from asserting the defense of the statute of limitation. Although the tolling provision typically is statutory, most of these circumstances involve what may be characterized as "equitable" considerations. Thus fraud on the part of the defendant,<sup>60</sup> waiver, or a course of conduct short of fraud that has moved the plaintiff not to press his claim (estoppel)<sup>61</sup> are grounds for denying the defendant the benefit of the statute. Similarly, the "status" disabilities of the plaintiff may result in the loss of the statute of limitation defense. Thus, infancy, incapacity, or official incarceration of the plaintiff may suspend the running of the statute of limitation until the disability abates.<sup>62</sup> Most of these various conditions formerly appealed to "equitable" principles to overcome the defense of the statute. Today they are embodied in the general statutory structure of Missouri and other states. For this reason the types of conduct and the disabilities which toll the running of the statute are discussed in the "tolling" and "accrual" section *infra*.

At this point a subtler means of avoiding the defense of the statute of limitation—namely, reclassification will be analysed.

Because the various statutes of limitation set up different periods of limitation for different types of legal wrongs reclassification is a means of overcoming a defense based upon a statute of limitation. Plaintiffs' attorneys frequently must frame their pleadings so as to allege a wrong not normally associated with defendants' alleged conduct in order to escape from an otherwise applicable statute of limitation.

---

Dean McCleary's interpretation is consistent with that given by the federal court of appeals for the Ninth Circuit which referred to the Missouri view in connection with a case controlled by Idaho law. *Summers v. Wallace Hospital*, 276 F.2d 831 (9th Cir. 1960).

60. The classic articles are Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 87 (1933), and Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935). See also *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1220-24 (1950).

61. See, e.g., *Hickam v. Hickam*, 46 Mo. App. 496 (K.C. Mo. App. 1891) (failure to advise negro servant of the Emancipation Proclamation). The differing views with respect to the breadth of the fraud and estoppel postponements are summarized in Note, 41 N.Y.U.L. REV. 441 (1966).

62. *Developments in the Law—Statutes of Limitation*, *supra* note 62, at 1229-32.

A recurring example of the advantages of the reclassification technique is the reclassifying of what would normally be an action for malpractice as an action for breach of contract.<sup>63</sup> In Missouri and many other states, the statute of limitation for malpractice is two years,<sup>64</sup> whereas actions for most breaches of simple contract are barred after five years.<sup>65</sup> Obviously, if an action normally described as being one for "malpractice" can be reclassified as one for "breach of a contract to provide professional medical services," the plaintiff can overcome the two year barrier and bring his action within the more generous five year period. Thus, in Illinois, a wife's action against a physician for damages (her pregnancy) resulting from an allegedly faulty vasectomy performed upon her husband was held governed by the five year period of limitation applicable to contractual claims, and was therefore not barred by the shorter period applicable to malpractice actions.<sup>66</sup>

In Missouri, most attempts to bypass the two year period of limitations applicable to malpractice actions have failed. In *Barnhoff v. Aldridge*<sup>67</sup> the Supreme Court held that the action for malpractice had been distinguished from other negligence actions by the legislature. It was made subject to a shorter period of limitation than other negligence actions. Therefore actions against any of the defendants mentioned in the statute and founded upon an alleged defect in professional skill could not legitimately be classified as anything other than malpractice. The Supreme Court noted, however, that where the action for malpractice had not been singled out for special treatment, a majority of jurisdictions would apply the statute of limitations governing whichever theory the plaintiff invoked—whether tort or contract.<sup>68</sup> Similarly, an attempt to escape from the short two-year limitation period by characterizing the claim as an action for "fraud" (five years) has been barred by the Kansas City Court of Appeals.<sup>69</sup>

---

63. See, e.g., *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966); *Barnhoff v. Aldridge*, 327 Mo. 767, 772, 38 S.W.2d 1029, 1031 (1931) (acknowledging the reclassification technique but not applying it in Missouri). See also Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 347-52, 361-63 (1962).

64. § 516.140, RSMo 1959. Over half of United States jurisdictions apply a two year statute. Lillich, *supra* note 63, at 357.

65. § 516.120, RSMo 1959. In most jurisdictions the contract statute of limitations is longer than the statute otherwise applicable to malpractice actions. Lillich, *supra* note 63, at 361.

66. *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

67. 327 Mo. 767, 38 S.W.2d 1029 (1931).

68. *Id.* at 772, 38 S.W.2d at 1031.

69. *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954 (K.C. Mo. App. 1966).



An attempt to reclassify a wrongful death action (at the time of the action subject to a one-year statute of limitation) as one for malpractice, and therefore within the two-year period was also denied.<sup>70</sup>

On the other hand, nurses, unless they have been specifically designated as subject to its protection by the legislature, have been uniformly denied the protection of the shorter malpractice limitations period applicable to doctors.<sup>71</sup> That rule does not apply in this state because Missouri extends the shorter limitations period to "physicians, surgeons, dentists, roentgenologists, *nurses*, hospitals and sanitariums."<sup>72</sup>

While the Missouri Supreme Court has explained its reluctance to reclassify a malpractice action by referring to the terms of the malpractice statute, the reluctance could be viewed as representing a general policy against reclassification for this purpose. Thus, in *Chemical Workers Basic Union v. Arnold Sav. Bank*<sup>73</sup> where the action was based upon payment of a forged check, the court refused to reclassify a conversion action (barred by the five-year statute) as an action upon a writing (subject to a ten-year period). Reclassification was also denied where the basic theory was negligence in the communication of false and misleading information concerning oil properties.<sup>74</sup> Since the five year period applicable to negligence actions had expired, the plaintiff sought to have the action characterized as one for fraud so as to take advantage of the more liberal treatment extended to fraud actions, but the theory was rejected.

With the adoption of the *Uniform Commercial Code*, Missouri has, in effect, adopted a four-year period of limitation applicable to causes of action against a retailer for damages (including personal injuries) for breaches of warranty.<sup>75</sup> In many cases, the injured party may have alternative theories of relief against the manufacturer (negligence,<sup>76</sup> breach of warranty,<sup>77</sup> or absolute liability,<sup>78</sup>) or, perhaps, even against the retailer.<sup>79</sup>

70. *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644 (1947).

71. See Annot., 8 A.L.R.3d 1336 (1966) (cases collected).

72. § 516.140, RSMo 1959.

73. 411 S.W.2d 159 (Mo. En Banc 1966).

74. *Kaufman v. C.R.A., Inc.*, 243 F. Supp. 721 (W.D. Mo. 1965).

75. Statute and case cited note 31 *supra*.

76. See, e.g., *Maybach v. Falstaff Brewing Corp.*, 359 Mo. 446, 222 S.W.2d 87 (1949), noted, 16 Mo. L. Rev. 76 (1951), 15 Mo. L. Rev. 418 (1950).

77. *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963), Note, 29 Mo. L. Rev. 217 (1964).

78. *Williams v. Ford Motor Co.*, 411 S.W.2d 443 (St. L. Mo. App. 1966). It is true that the end result is the same whether one goes on a warranty without privity theory, or on the theory advanced by RESTATEMENT (SECOND), TORTS

The characterization of the products liability action as being under the *Code* or as being independent of the *Code* will affect the statute of limitation applicable to the action (four years under the *Code*, but five years if based upon another theory).

Only two significant departures from the general policy against reclassification have been noted in Missouri. Under the Missouri "borrowing statute" a cause of action barred by an appropriate statute of limitation in another jurisdiction is barred in Missouri.<sup>80</sup> However, with respect to a claim against a decedent's estate barred in Iowa, the Missouri Supreme Court allowed the claim to be presented in an ancillary administration in Missouri on the theory that since the claim was barred in Iowa under a "nonclaim statute" it was not "a cause of action . . . fully barred by the laws of the state . . . in which it originated . . . ."<sup>81</sup>

A second instance in which the general policy against reclassification was arguably not applied is *Williams v. Illinois Central R. Co.*<sup>82</sup> The plaintiff was injured in a train wreck in Louisiana. Her action was barred by the Louisiana one year statute of limitations. However she had originally purchased her round-trip ticket in St. Louis, and the Missouri Supreme Court held that her action could be brought on an *ex contractu* theory, which would not be barred by the longer Missouri period of limitations applicable to such actions. *Barnhoff v. Aldridge*,<sup>83</sup> the leading authority opposed to reclassification, was distinguished on the ground that the petition in the *Barnhoff* case sounded both in tort and contract, whereas the only theory advanced by the complaint in *Williams* was a contract theory.<sup>84</sup>

---

§ 402A (1965) (absolute liability). It is not clear whether the zones of prospective plaintiffs (sometimes described as those to whom defendant owed a "duty") are congruent, and whether each theory embraces identical *types* of injuries.

79. See, e.g., *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945) (breach of sale warranty); *McCormick v. Lowe & Campbell Athletic Goods Co.*, 144 S.W.2d 866 (K.C. Mo. App. 1940) (negligence). §§ 400.2-313, 2-314, and 2-715(b), RSMo 1967 Supp. (UNIFORM COMMERCIAL CODE) codify the action which a person in statutory privity with the merchant may have for injuries resulting from breach of warranty of a sale contract. See Lauer, *Sales Warranties Under the Uniform Commercial Code*, 30 Mo. L. Rev. 259 (1965). For a comprehensive and trenchant analysis of the evolution of warranty law in Missouri see Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri*, 10 Mo. L. Rev. 147 (1945).

80. § 516.190, RSMo 1959. *Girth v. Beaty Grocery Co.*, 407 S.W.2d 881 (Mo. 1966); *Jenkins v. Thompson*, 251 S.W.2d 325 (Mo. 1952).

81. § 516.190, RSMo 1959. *Owens v. Saville's Estate*, 409 S.W.2d 660 (Mo. 1966).

82. 360 Mo. 501, 229 S.W.2d 1 (1950).

83. 327 Mo. 767, 38 S.W.2d 1029 (1931).

84. *Williams v. Illinois Cent. R. Co.*, 360 Mo. 501, 508, 229 S.W.2d 1, 4 (1950).

In summary, although exceptions undoubtedly exist, Missouri courts are not disposed to approve reclassification of a cause of action in order to avoid an otherwise applicable statute of limitation. In this respect Missouri takes a far more conservative position than such states as Illinois,<sup>85</sup> and Florida,<sup>86</sup> which freely reclassify in terms of the form of injury of which plaintiff complains. Florida provides an interesting variant because, unlike most jurisdictions, the statute of limitation applicable to contracts (three years) is *shorter* than that applicable to torts (four years).<sup>87</sup> In Florida, therefore, the reclassification pressure is from contract to tort, rather than the reverse, as exemplified by our own case of *Barnhoff v. Aldridge*.<sup>88</sup>

### III. ACCRUAL OF THE CAUSE OF ACTION

Before it can be decided whether a given action is barred by the appropriate statute of limitation, it must be determined at what time the statute began to "run." Statutes and judicial decisions have tended to identify one of four events as "triggering" the running of the statute: the moment the defendant commits his wrong (the "wrongful act" test);<sup>89</sup> the moment the plaintiff sustains substantial injury or interference (the "sustainment of injury" test);<sup>90</sup> the moment that plaintiff's damages are substantially complete (the "capable of ascertainment" test);<sup>91</sup> or the

85. *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

86. *Manning v. Serrano*, 97 So.2d 688 (Fla. 1957).

87. F.S.A. § 95.11(4), (5)(e) (1960).

88. 327 Mo. 767, 38 S.W.2d 1029 (1931). See Annot. 80 A.L.R.2d 320 (1961) (collecting cases).

89. See, e.g., *Barnard v. Boulware*, 5 Mo. 454 (1838). Where retained, the "wrongful act" test has been typically limited to the intentional torts. See, e.g., *Fraser v. Atlanta Title & Trust Co.*, 66 Ga. App. 630, 19 S.E.2d 38 (1942). The unfair feature of the "wrongful act" test is that deserving plaintiffs are foreclosed when unaware of their injuries until after the limitations periods have expired. This is similar to those features which attend the notion that "present warranties" are broken when made so that the establishment of a superior title at a point in time outside the limitations period on the warranty leaves the warranty beneficiary with no redress. E.g., *McGraw v. Elkins*, 36 S.W.2d 424 (Spr. Mo. App. 1931); *Frank v. Organ*, 167 Mo. App. 493, 151 S.W. 504 (Spr. Ct. App. 1912).

90. See, e.g., *Kohout v. Adler*, 327 S.W.2d 492 (St. L. Mo. App. 1959). *Contra State ex rel. Barringer v. Hawkins*, 103 Mo. App. 251, 77 S.W. 98 (K.C. Ct. App. 1903). Note, 26 Mo. L. Rev. 80 (1961).

91. See, e.g., § 516.100, RSMo 1959. The Missouri statute has received favorable comment in other jurisdictions. *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1205 (1950); *Allen v. Layton*, 235 A.2d 261, 263 (Del. 1967); *Summers v. Wallace Hospital*, 276 F.2d 831 (9th Cir. 1960). This favorable comment is undeserved because Missouri courts have not given the statute a literal application. See, e.g., *Chemical Workers Union v. Arnold Sav. Bank*, 411 S.W.2d 159, 164 (Mo. En Banc 1966); *Saigh v. Busch*, 403 S.W.2d

moment the plaintiff first becomes aware that he has been aggrieved (the so-called "discovery" test).<sup>92</sup>

The policy established by the Missouri statute adopts the third test. The running of the statute is measured from the time that the damages are complete *and* capable of ascertainment.<sup>93</sup> On its face, this policy appears to be an acceptable compromise between the plaintiff-favoring "discovery" test and the defendant-favoring "wrongful act" test. Yet in application it has spawned decisions of questionable justice.

As a pure matter of interpretation, normal canons of construction would not be offended if the phrase "capable of ascertainment" were construed to mean "capable of ascertainment in the normal course of events by this particular plaintiff in the exercise of reasonable diligence." Thus interpreted, the "complete and capable of ascertainment" test would be almost the equivalent of the "discovery" test, excluding from its protection only those who have been "negligent" in failing to make themselves aware of the injury to their interests for which the defendant was initially responsible. In an early case the St. Louis Court of Appeals rejected this more liberal possibility. It adopted an objective theory that has the effect of foreclosing from recovery all tort victims who, for whatever reason, do not become aware of the nature and extent of their injuries until after the statute of limitations has run.<sup>94</sup>

In the normal tort action no limitation problem of the type described above arises because act, injury, and discovery, are simultaneous events. The punch in the nose and the injury-producing automobile collision are obvious examples. However, where the injury is more subtle (e.g., a forged deed of trust,<sup>95</sup> or a conspiracy to deprive a person of property by procuring false or void judgments);<sup>96</sup> endured over a considerable interval of time (e.g., false imprisonment or continuous acts of medical malpractice);<sup>97</sup> or, although technically discoverable is not readily apparent (e.g., leaving

559 (Mo. 1966) (barring of preemptive rights began with irregular charter amendment and not with the exercise of the power conferred); *Gruenewald v. Wintermann*, 360 S.W.2d 678 (Mo. 1962); *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994 (1945); Note, 12 Mo. L. Rev. 86 (1947).

92. See, e.g., *Allen v. Layton*, 235 A.2d 261 (Del. 1967); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961).

93. See note 91 *supra*.

94. *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771 (St. L. Mo. App. 1933), Note, 1953 WASH. U.L.Q. 336 (case incorrectly identified as a Missouri Supreme Court decision).

95. *Kohout v. Adler*, 327 S.W.2d 492 (St. L. Mo. App. 1959).

96. *Rippe v. Sutter*, 292 S.W.2d 86 (Mo. 1956).

97. *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994 (1945).

a needle or sponge in a surgical incision),<sup>98</sup> it is clear that the "capable of ascertainment" test substantially limits the defendant's tort liability. This is so because in many cases damage may be technically complete long before the plaintiff becomes aware of it. Thus by the time he is moved to sue, the statute of limitation may have run.<sup>99</sup>

The most notorious examples of the types of injustice produced by the "capable of ascertainment" test are provided by malpractice actions. If, following treatment, the abandoned sponge or damaged tissue is objectively capable of being ascertained, the statute begins to run. It does not matter that the plaintiff is actually unaware of the injury, or, at least, unaware of the full extent of the injury.<sup>100</sup> The rule has been softened somewhat by holdings that the damage is not capable of being ascertained until the entire "treatment" of the particular condition for which medical services were sought has been completed.<sup>101</sup> Yet it is only in the unusual case that the exception would withhold the running of the statute for any substantial period. Moreover, Missouri's malpractice statute of limitation specifically states that the action ". . . shall be brought within two years from the date of the act of neglect complained of . . . ."<sup>102</sup> It has been suggested that the general statutory provision which provides that a cause of action does not accrue until the damage is sustained and capable of ascertainment<sup>103</sup> does not apply. This is because the malpractice statute undertakes to make an independent designation of the point of time at which the statute begins to run (" . . . date of the act of neglect complained of . . . .")<sup>104</sup>

That the "end of treatment" exception to the harsh two year rule in malpractice cases is not wholly without some practical advantage is illustrated by the leading case of *Thatcher v. De Tar*.<sup>105</sup> In this action, plaintiff discovered an abandoned needle in a surgical wound more than

98. *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943); *Ingram v. Poston*, 260 S.W. 773 (St. L. Mo. App. 1924).

99. See, e.g., *National Credit Associates v. Tinker*, 401 S.W.2d 954 (K.C. Mo. App. 1966) (patient alleged malpractice undiscovered until after limitations period had expired.)

100. E.g. *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771 (St. L. Mo. App. 1933).

101. *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943).

102. § 516.140, RSMo 1959.

103. § 516.100, RSMo 1959.

104. *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954, 959 (K.C. Mo. App. 1966); *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994 (1945). The notion that the general "capable of ascertainment" test does not apply to malpractice actions was repudiated by the late Dean McCleary and rejected by the Federal Court of Appeals for the Ninth Circuit. See note 59 *supra*.

105. 351 Mo. 603, 173 S.W.2d 760 (1943); Note 9 Mo. L. Rev. 102 (1944).

two years following the surgery, but less than two years following the termination of the defendant's treatment of the condition for which the surgery had been found necessary. The Missouri Supreme Court held that the action was not barred. It cited cases holding that for the "end of treatment" exception to be applicable the continuing treatment must be proximately related to the illness, condition, acts, or medication which allegedly gave rise to the cause of action for malpractice.<sup>106</sup> In other words suppose a doctor makes a faulty cast which produces an impairment of the leg discovered more than two years after the treatment of the leg has been completed. Although plaintiff continued under the defendant's care in connection with a diabetic condition, the statute began to run the moment the treatment of the leg had been completed. Of course it would be otherwise if the doctor had continued to treat the leg, or had been administering, prescribing, or supervising physical therapy for the leg.

On its face, the most inviting escape from the strict Missouri rules relative to the accrual of a cause of action is that applicable to fraud. The statutory provision is as follows:

An action for relief on the ground of fraud, the cause of action in such cases to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.<sup>107</sup>

Other jurisdictions have permitted plaintiffs, who belatedly discover that their aches and pains are the results of medical negligence, to sue the offending physician, despite the expiration of the otherwise applicable statute of limitations, on a theory of fraudulent concealment.<sup>108</sup> Even where the doctor was himself unaware of his negligence, so that fraudulent concealment could not be shown, some courts have been moved to adopt a rule of "constructive" fraudulent concealment.<sup>109</sup> If, in Missouri, the courts could be persuaded to characterize malpractice and other types of actions as actions for "fraud," a considerable opportunity to overcome otherwise applicable statutes of limitation would be available. The Missouri Supreme Court has, however, rebuffed such attempts when the action is

106. *Thatcher v. De Tar*, 351 Mo. 603, 608, 173 S.W.2d 760, 762 (1943).

107. § 516.120 (5), RSMo 1959.

108. See, e.g., *Hinkle v. Hargens*, 76 S.D. 520, 81 N.W.2d 888 (1957); 3 S.D.L. REV. 187 (1958); PROSSER, TORTS 147 (3d ed. 1964).

109. See, e.g., *Allen v. Layton*, 235 A.2d 261, 266 (Del. 1967); 18 W. RES. L. REV. 1002 (1967); 17 VAND. L. REV. 1577 (1964); PROSSER, TORTS 147 (3d ed. 1964).

for malpractice. It has held the "fraud" extensions inapplicable to causes of action arising under special statutes.<sup>110</sup> The Court has also held that the more liberal provisions (permitting a theoretical limitation period of almost fifteen years to run if the plaintiff discovers the defendant's fraud for the first time on the last day of the tenth year following its commission) apply only to "concealed" fraud. Where the fraud is reasonably subject to discovery through the exercise of ordinary diligence, the statute begins to run from the moment it is so discoverable, rather than from the time the plaintiff actually discovers it.<sup>111</sup>

It is clear, therefore, that objective rather than subjective criteria have been utilized by the Missouri courts in their interpretations of these statutes of limitation. Thus, the rule appears to be that the statute of limitation will begin to run, under section 516.100, when the damage is capable of ascertainment in an objective sense, and not when, in view of this particular plaintiff's proclivities and characteristics, it was in fact ascertained.<sup>112</sup> Similarly, even though the statute says that the action for fraud may be commenced any time within five years following ". . . discovery by the aggrieved party . . .,"<sup>113</sup> the courts have in effect construed this phrase to say ". . . discovery by a person in the exercise of due diligence . . ."<sup>114</sup>

It will be recalled that two intermediate positions for determining the time when a cause of action accrues were noted between the defendant-favoring "wrongful act" test and the plaintiff-favoring "discovery" test. One of these positions puts the statute in motion as soon as the plaintiff actually sustains a substantial injury, whether or not complete and whether or not capable of ascertainment. The other position is more liberal. It puts the statute in motion only when the damages are *substantially*

110. *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954 (K.C. Mo. App. 1966); *State ex rel. Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347 (Mo. En Banc 1944); 10 Mo. L. Rev. 302 (1945).

111. *Gruenewald v. Wintermann*, 360 S.W.2d 678 (Mo. 1962); *Scott v. Boswell*, 136 Mo. App. 601, 118 S.W. 521 (K.C. Ct. App. 1909).

112. *Chemical Workers Basic Union v. Arnold Sav. Bank*, 411 S.W.2d 159, 164 (Mo. En Banc 1966); *Rippe v. Sutter*, 292 S.W.2d 86, 90 (Mo. 1956); *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771, 773 (St. L. Mo. App. 1933); *Dennig v. Meckfessel*, 303 Mo. 525, 261 S.W. 55 (1924).

113. § 516.120 (5), RSMo 1959.

114. Cases cited note 111 *supra*. The "due diligence" qualification to the explicit terms of § 516.120 (5), RSMo 1959 is entirely a result of decisional law. The leading case is *Brown v. Irving-Pitt Mfg. Co.*, 316 Mo. 1023, 292 S.W. 1023 (1927). The notion was first transferred into the torts arena as a qualification to the "capable of ascertainment" test of § 516.100, RSMo 1959 by *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 77 (St. L. Mo. App. 1933).

complete and objectively apprehensible by the aggrieved party. The significance of this is illustrated by the case of *Rippe v. Sutter*.<sup>115</sup> Here plaintiff sued for damages allegedly resulting from a conspiracy to maintain spurious actions against her and to obtain false and void judgments. The court held, for purposes of determining when the statute of limitation began to run, that the last act charged resulting in damage to the plaintiff was the critical point. Since the last act charged was the obtaining of the allegedly false judgments, the date of their entry would be the starting point (and conceivably within the period of limitations) rather than alleged earlier activities which were without the statutory period.<sup>116</sup>

Missouri has adopted the most liberal of the two intermediate tests for identifying the starting point of the statute of limitation (the "capable of ascertainment" test). Yet many situations can arise where a plaintiff may understandably delay bringing an action only to find that his action is barred because his damages were "perfected" or "complete" and "capable of ascertainment" at a point in time which is now outside the limitations period. No better illustration of this can be found than the leading Missouri decision, *Allison v. Mo. Power & Light Co.*<sup>117</sup> In 1926 the plaintiff was injured in the course of his employment when struck in the face by a steel bar. His employer immediately took him to a doctor whose examination revealed no permanent injuries. The employee returned to work and suffered no loss of earning power until something more than three years later. Then he reported much pain, indigestion, and other discomfort allegedly resulting from constrictions in the air passages around his nose. Again, the employer had him examined and paid for the subsequent surgery which the condition required. Unfortunately, the surgery did not cure the condition and the employee was unable to return to work. In April of 1932, more than six years after the injury had been sustained, suit was filed. The St. Louis Court of Appeals sustained a demurrer based upon the statute of limitations. The tough question facing the court in the *Allison* case was when the damage was "sustained and . . . capable of ascertainment." The court had to choose between the "defendant-favoring" moment, which was the time at which the actual physical alterations of the body tissues and bone took place, or the "plaintiff-favoring" moment, which was the time when the full physiological consequences of these alter-

115. 292 S.W.2d 86 (Mo. 1956); 22 Mo. L. REV. 343 (1957).

116. *Rippe v. Sutter*, 292 S.W.2d 86 (Mo. 1956). In the *Rippe* case the Supreme Court reaffirmed the "due diligence" qualification to the "capable of ascertainment" test. See text accompanying note 114 *supra*.

117. 59 S.W.2d 771 (St. L. Mo. App. 1933); 1953 WASH. U.L.Q. 336.



ations allegedly first became subject to measure. Rarely has a court had such an opportunity to establish decisive tort law policy through an "interpretation" of a statutory term. The court might have gone either way on the issue, as the precedent was indecisive.<sup>118</sup> Unfortunately the court took the more conservative view. It held that the plaintiff's cause of action accrued at the time when the physical alterations took place. Significantly, however, the court was able to cite only two cases for its view, and neither of these was really in point nor more than remotely analogous.<sup>119</sup>

In another recurring situation, the "capable of ascertainment" test has proved inappropriate and unjust. This involves wrongful confinement in a mental institution. The logical trap from which the courts have been unable to devise a release results because a person who is wrongfully confined is obviously able to ascertain his injury from the moment of confinement. Where the confinement is based upon what the plaintiff claims is a false assertion of insanity, the plaintiff is denied the benefit of the tolling provision applicable to insane persons. To confer it would be in-

---

118. None of the cases cited by the St. Louis Court of Appeals involved a tort action for personal injuries. Factually closest were two cases dealing with whether the failure of an employer to report a workman's injury to the Industrial Commission tolls the statute of limitations applicable to workmen's compensation claims. One case said "yes." *Schraubauer v. Schneider Engraving Product, Inc.*, 224 Mo. App. 304, 25 S.W.2d 529 (St. L. Ct. App. 1930). But this case was overruled by the second case which said "no." *Wheeler v. Missouri Pac. R. Co.*, 328 Mo. 888, 42 S.W.2d 579 (1931). Neither case turned on whether the statute might begin to run at a time before the employee was aware of the injury.

119. *Fichtner v. Mohr*, 223 Mo. App. 752, 16 S.W.2d 739 (St. L. Ct. App. 1929) (claim against bank directors for accepting a deposit while insolvent—statute began to run when liquidation commenced by Missouri Banking Department); *Eoff v. Clay*, 9 Mo. App. 176 (St. L. Ct. App. 1880) (damage action for procuring a void judgment barred by statute which began to run when judgment obtained and for which an alternative remedy lay, viz. attack upon the judgment itself.) It is interesting to note that where the injury is to real property resulting from the discharge of sewage, at least one decision holds that the statute of limitations with respect to the nuisance does not begin to run until the property owner is "aware" of the interference. *Lewis v. City of Potosi*, 317 S.W.2d 623, 628 (St. L. Mo. App. 1958). However, whether the nuisance is permanent or temporary (in determining what measure of damages the landowner recovers) is to be decided on the basis of the state of the technology existing at the time the condition was first created, thus the landowner gets the best of both possible worlds. *Lewis v. City of Potosi*, 348 S.W.2d 577 (St. L. Mo. App. 1961); *Hillhouse v. City of Aurora*, 316 S.W.2d 883, 889 (Spr. Mo. App. 1958). Seemingly contrary to the first *Lewis* case are *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (Mo. En Banc 1939) and *Thompson v. City of Springfield*, 134 S.W.2d 1082 (Spr. Mo. App. 1939), neither of which is referred to by the opinion in the first *Lewis* case, *supra*. However, the different results reached by these two cases may be explainable in terms of the tendency, at that time, to characterize the actions as seeking compensation for the exercise of the power of eminent domain. Cf. *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933).

consistent with the basic theory upon which the action is pressed.<sup>120</sup> Another tolling provision, applicable where the defendant has prevented the commencement of an action by an "improper act," has been held inapplicable to the false imprisonment situation on the rather dubious theory that another provision of the Chapter on Statutes of Limitation withholds from the false imprisonment action the benefits of the "improper act" tolling provision.<sup>121</sup>

In summary it can be said that in Missouri a legislative choice has been made which adopts the "capable of ascertainment" test for determining the point at which the statute of limitations begins to run on a tort cause of action. The "capable of ascertainment" test is not as liberal towards plaintiffs as the "discovery" test, but is more liberal than the "wrongful act" test or the "sustainment of injury" test. The courts, however, have construed the statute in a very conservative and strict manner. They have done this by:

- (1) refusing to apply the "capable of ascertainment" test where a statute independently establishes a period of limitation different from that otherwise prescribed in the general statutes;<sup>122</sup>
- (2) suggesting that the test is inappropriate where a statute arguably or inferentially establishes a point other than that when the damages first became capable of ascertainment as the moment when the statute of limitations should begin to run;<sup>123</sup>
- (3) incorrectly construing an exclusionary provision as denying to claimants the benefits of certain tolling provisions; and<sup>124</sup>
- (4) adopting objective standards for determining whether the damages were "capable of ascertainment" rather than asking whether, under the particular circumstances, the damages were capable of ascertainment by *this particular plaintiff*.<sup>125</sup>

Although the United States Supreme Court has yet to consider the question, and at least one court has rejected the view, the clear weight

120. *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994 (1945); Note, 12 Mo. L. Rev. 86 (1947).

121. *Hellebrand v. Hactor*, 331 F.2d 453 (8th Cir. 1964). See text accompanying notes 178-182 *infra*.

122. *State ex rel. Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347 (Mo. En Banc 1944); 10 Mo. L. Rev. 302 (1945).

123. *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954, 959 (K.C. Mo. App. 1966); See notes 59, 104 *supra*.

124. *Hellebrand v. Hactor*, 331 F.2d 453 (8th Cir. 1964).

125. *E.g. Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771 (St. L. Mo. App. 1933); 1953 WASH. U.L.Q. 336.

of authority is that in actions under the federal tort claims act the accrual point is determined according to federal law, even though state law otherwise determines the substantive validity of the claim.<sup>126</sup> The same rule appears to hold under the Federal Employers Liability Act—that is, the time at which the action is deemed to accrue is determined by federal law.<sup>127</sup>

#### IV. SUSPENSION AND EXTENSION OF THE STATUTORY PERIOD

It is generally recognized that certain circumstances (*e.g.* incapacity of the plaintiff, fraud on the part of the defendant, or absence of the defendant from the jurisdiction) justify either suspending the running of the statute, or extending the period during which an action may be brought. This insures that the plaintiff will not be unduly prejudiced by the special circumstances which have otherwise foreclosed maintenance of his action.

Historically, precedent for such suspension or extension has come from both law and equity. The suspension of the running of the statute during times when either plaintiff or defendant is outside the jurisdiction was known as the “beyond the seas” rule.<sup>128</sup> Incorporated as a provision of the original English statute, the “beyond the seas” rule was extended and refined by subsequent enactments.<sup>129</sup> Equity jurisdiction accepted, at an early date, the notion that a limitations period ought not to run during a period in which the failure of the plaintiff to assert his rights was a direct result of the “fraud” or other wrongful act of the defendant.<sup>130</sup>

126. 60 STAT. 842 (1946), 28 U.S.C. § 1346 (1964). *Kossick v. United States*, 330 F.2d 933 (2d Cir. 1964); *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962); *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962). *Contra* *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959); *United States v. Reid*, 251 F.2d 961 (5th Cir. 1958) (dictum).

127. 45 U.S.C. §§ 51-60 (1964). *Urie v. Thompson*, 331 U.S. 163 (1949). As a result of the rule that federal law controls the date of accrual of the cause of action under FELA, a recovery is possible under this statute when the same action would be barred if brought as a tort action under Missouri law. Compare *Urie v. Thompson*, *supra*, with *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771 (St. L. Mo. App. 1933).

128. The term was first employed by the early English statute establishing the exception. 4 Anne, c.16. § 19 (1705). It was carried to the U.S. See Act of July 4, 1807, 1 MO. TERR. LAWS 144 (“... or beyond sea . . .”). See also *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530 (1855).

129. The term “beyond the seas” was apparently eliminated in 1857. § 12, at 78, RSMo 1856. It does not appear in today's statute. § 516.200, RSMo 1959.

130. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); 1 WOOD, LIMITATIONS 266-67 (4th ed. 1916); Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591, 597-606 (1933); 17 R.C.L. LIMITATION OF ACTIONS § 214 (1917).

Today, the sources of the different rules which would suspend or extend the limitations periods have only a historical significance. In Missouri, as in most states, the rules governing suspension and extension of the otherwise applicable statutes of limitation have been codified, or, at least, enacted into statutory law.<sup>131</sup> In Missouri ten independent provisions establish circumstances under which statutes of limitation are either suspended or extended. Those ten provisions may be grouped into five categories.

1. *Outside of the State*, provision is made for suspension of the period of limitations during such times as the defendant, who is a resident of the State, shall be outside the state;<sup>132</sup>

2. *Personal Disabilities*, provision is made for suspension of the period of limitations during such periods as the plaintiff may be disabled from suing by reason of minority, insanity, incarceration, or an enemy alien;<sup>133</sup>

3. *Related Judicial Proceedings*, where the maintenance of the suit has been stayed by injunction provision is made for a suspension of the period of limitations, and, similarly, provision is made for a one year extension if plaintiff should suffer a "nonsuit, reversal, or arrest of judgment";<sup>134</sup>

4. *Defendant's Improper Act*, provision is made for suspending the running of the statute where the defendant by his own act or acts prevents the plaintiff from instituting action;<sup>135</sup>

5. *Death*, since many actions now survive, provision is made for extending the time during which any action may be brought for a period of one year from the death of the party otherwise entitled to sue but unable to do so because under one of the disabilities of section 516.170. Similarly, if suit has been brought and the plaintiff dies, a one year extension of the statute is automatically granted, regardless of whether the statute would run within a lesser period. The same one year extension is granted where there must be a substitution of defendants because of the death of the primary defendant.<sup>136</sup>

---

131. See notes 132-136 *infra*.

132. § 516.200, RSMo 1959.

133. § 516.170, RSMo 1959.

134. § 516.230, RSMo 1959 (nonsuit, arrest of judgment, reversal of judgment); § 516.260, RSMo 1959 (commencement stayed by injunction).

135. § 516.280, RSMo 1959. The statutory language, if taken literally, would suspend the running of the statute where the plaintiff is prevented from suing because of actions by persons other than the defendant ("If any person . . ."). This has been construed, however, to mean only the defendant. *Wells v. Halpin*, 59 Mo. 92 (1875).

136. §§ 516.180, .240, .250, RSMo 1959.

These five categories will be considered in the order presented above.

### A. *Outside the State*

Although Missouri has a specific provision suspending the running of the statute of limitation during such times as the defendant is outside the state it has been held that, even in the absence of such a statute, suspension would ensue as a matter of common law.<sup>137</sup> Unlike the limitation provision for wrongful death actions, which suspends the running of the limitation for defendants who are absent from the state irrespective of residency,<sup>138</sup> the general suspension statute applies only to *residents* who depart from or who are absent from the state. Thus, a defendant who is not a resident of Missouri at the time the cause of action accrues is not subject to the suspension provision. The applicable statute of limitation will run in his favor although he is not present within the State of Missouri.<sup>139</sup> Similarly, in the case of a resident, if a residence is retained in Missouri the statute is not suspended even though the resident acquired a "domicile" outside the state. The theory is that so long as an opportunity to obtain service upon the defendant within the state is available the tolling provision of the statute is inapplicable.<sup>140</sup> It follows, a fortiori, that temporary or episodic absences from the state will not toll the statute.<sup>141</sup>

Owing to the increased facility by which in personam jurisdiction can now be acquired over extra-territorial persons and entities, the "outside the state" suspension provision has not created any significant problems in recent years. With respect to the parallel limitation that applies to actions for wrongful death, but which is made applicable to residents and nonresidents alike, it has been recently held that the statute of limitation is not suspended if the plaintiff may obtain service on the nonresident by virtue of the provision of the Missouri nonresident motorist statute.<sup>142</sup> Although the decision is consistent with earlier interpretations of the general provision suspending the running of the statute during times when the defendant is "outside the state," the Kansas City Court of Appeals

---

137. *Cobb v. Houston*, 117 Mo. App. 645, 94 S.W. 299 (St. L. Ct. App. 1906). But see *Airy v. Swinford*, 154 Mo. App. 728, 136 S.W. 728 (K.C. Ct. App. 1911).

138. § 537.100, RSMo 1967 Supp.

139. *Carter v. Burns*, 332 Mo. 1128, 61 S.W.2d 933 (1933).

140. *Bensley v. Haerberle*, 20 Mo. App. 648 (St. L. Ct. App. 1886).

141. *Garth v. Robards*, 20 Mo. 523 (1855). See 12 WHEATON AND BLACKMAR, MISSOURI PRACTICE 687-90 (1965).

142. §§ 516.210-320, RSMo 1959; *Haver v. Bassett*, 287 S.W.2d 342 (K.C. Mo. App. 1956).

conceded that there is a split of authority on this point among the various states.<sup>143</sup>

### B. *Personal Disabilities*

It would be unfair if statutes of limitation were permitted to run in favor of defendants during periods when the persons aggrieved were physically or legally unable to proceed against such defendants. Accordingly there are a number of statutory conditions which cause the suspension of the running of the limitations period during such intervals of physical or legal incapacity.<sup>144</sup>

A relatively anachronistic provision was transparently designed to protect those who had supported the insurgents during the Civil War, or who were resident in rebel states during that period. It provides that when the United States is at war with another "country" the time during which such war ensues shall not be deemed a part of any of the general limitation periods with respect to causes of action held by aliens, subjects, or citizens of the "country" at war with the United States.<sup>145</sup> It is not certain whether enemy aliens during World Wars I and II ever sought the protection of this statute. The only reported cases concern causes of action pressed by citizens of States in rebellion against the United States between 1861 and 1866.<sup>146</sup>

One of the disabilities which operates to suspend the normal protection accorded by the statute of limitation is that of "infancy." Although an infant may maintain a tort action through a duly appointed guardian, curator, or next friend, the cases uniformly hold that the period of limitation applicable to his claim does not begin to run until he reaches majority.<sup>147</sup> Thus, in an action for loss of consortium resulting from an injury sustained by plaintiff's husband before plaintiff attained her majority, the statute of limitation did not begin to run on the claim until the wife

143. *Id.* at 345.

144. §§ 516.170, .120, RSMo 1959.

145. § 516.210, RSMo 1959. The statute was construed not to apply where both parties lived in states whose governments were disloyal to the United States. *Smith v. Charter Oak Life Ins. Co.*, 64 Mo. 330 (1876). Nor was it construed applicable to causes of action accruing before the government of the state in which they accrued formerly declared itself in revolt. *Hammond v. Johnston*, 93 Mo. 198, 6 S.W. 83 (1887).

146. *Ibid.* See also *McMerty v. Morrison*, 62 Mo. 140 (1876).

147. The provisions which enable infants to maintain actions through guardians, curators, or "next friends" are found in §§ 507.110-220, RSMo 1959. See *State v. Vossbrink*, 333 S.W.2d 298 (St. L. Mo. App. 1960) (infant, not the guardian, real party in interest.)

reached her majority even though there appeared to be alternative methods by which the claim might have been litigated before that time.<sup>148</sup>

The statute does not run while the plaintiff is imprisoned on a criminal charge, or serving sentence from a criminal court, for a *less term* than his natural life.<sup>149</sup> The period of limitation is tolled even though the prisoner may arguably maintain an action through a trustee appointed pursuant to Missouri statutes for the purpose of managing a convict's estate during periods of confinement.<sup>150</sup> One anomalous result of this is that a convict has a much greater interval within which to press a tort claim than the ordinary citizen.

The statutory requirement that the confinement be for a ". . . less term than for his natural life . . ." has harsh consequences for persons whose life sentences are subsequently commuted. The statute is not tolled for such persons. The Supreme Court has reluctantly held that the strict words of the statute apply where a person imprisoned under a life sentence, which is later commuted, attempts to recover from those who have allegedly deprived him of his inheritance.<sup>151</sup>

Insanity is specifically enumerated as a ground for tolling the statute of limitation, but plaintiffs' attempts to bring themselves within the protection of this tolling provision have not proved successful. Where a person has been confined under an allegedly incorrect certification of insanity, the Missouri Supreme Court has refused to rule that the statute was suspended during the confinement period. This is because the plaintiff's theory (that the confinement was wrongful because plaintiff was *not* insane) is inconsistent with the condition for suspension (insanity).<sup>152</sup> If there is evidence in the record that is inconsistent with the plaintiff's claim of insanity the court, as a matter of law, may rule against the plea and hold that the statute of limitation has run.<sup>153</sup>

148. *Nelson v. Browning*, 391 S.W.2d 881 (Mo. 1965).

149. § 516.170, RSMo 1959.

150. §§ 460.010-.250, RSMo 1959. This provision is a considerable qualification to another enactment purporting to suspend all civil rights. § 222.010, RSMo 1959. The latter has been narrowly construed. The former was liberally construed by a decision in effect holding that a convict has a *right* to the appointment of a trustee to act for him in civil matters. *McLaughlin v. McLaughlin*, 228 Mo. 635, 129 S.W. 21 (Mo. 1910); *Nelson, The Effect of State Statutes on the Civil Rights of Convicts*, 47 MINN. L. REV. 835, 841 (1963). For a discussion of problems arising as to the point in time at which a convict's disability begins, and concerning whether it subsists during periods when the prisoner is free on bond, see English, *Civil Disability—When Does It Begin?*, 16 Mo. L. REV. 136 (1951).

151. *Hunter v. Hunter*, 361 Mo. 799, 237 S.W.2d 100 (1951).

152. *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994 (1945).

153. *Kern v. Tri-State Insurance Co.*, 260 F. Supp. 378 (E.D.Mo. 1966).

C. *Related Judicial Proceedings*

One statutory provision suspends the running of the statute where a suit on a cause of action is stayed by injunction. The other statutory provision creates a period of "grace" where plaintiff suffers a nonsuit or arrest or reversal of a judgment in his favor where the statute of limitation would otherwise prevent a new action from being instituted.<sup>154</sup>

The provision suspending the running of the statute during the interval where the prosecution of the action has been stayed by injunction is not controversial. The only problem is its applicability where the prosecution has been stayed by a writ of prohibition, rather than by injunction. The Missouri Supreme Court has held that the original action is not continued by the issuance of a writ of prohibition challenging reinstatement of the case on the trial court's docket subsequent to a dismissal for failure to prosecute.<sup>155</sup> In that case the Court also held that the running of the statute was not tolled during the period in which the prohibition proceedings took place.

*Example 13:* Four years and nine months following an accident plaintiff's personal injury action based thereon is dismissed by the trial court for failure to prosecute. One month later plaintiff's motion to reinstate the cause on the circuit court's docket is granted. One month following the reinstatement (still within the five year limitation applicable to the cause) the defendant seeks an original writ of prohibition in the Missouri Supreme Court challenging the jurisdiction of the trial court to reinstate the action under these circumstances. Eighteen months later the writ of prohibition is affirmed and made final. Plaintiff cannot begin a new action although he might have done so at any time within one year following the initial dismissal by the trial court for failure to prosecute. Thus, plaintiff should have instituted a new action instead of merely moving for reinstatement. Similarly, he would have been able to begin a new action had the restraint on the trial court been in the form of an injunction rather than a writ of prohibition, although whether an injunction might have been appropriate is open to question.

The other provision permits a new action to be brought within a period of one year following the dismissal of an action that was timely begun but which was terminated because of a nonsuit, arrest of judgment,

154. § 516.230, RSMo 1959 (nonsuit, arrest of judgment, or reversal of judgment); § 516.260, RSMo 1959 (stay by injunction).

155. *Myers v. Union Electric Light & Power Co.*, 233 Mo. App. 730, 125 S.W.2d 950 (K.C. Ct. App. 1939).



1968]

or reversal of judgment rather than on the merits.<sup>156</sup> Such a statute has been designated a "saving statute," a "renewal statute," or an "extension statute."<sup>157</sup>

It is clear that the purpose of the statute is to extend and not to shorten the statutory period.

*Example 14:* Six months following the accident, A brings an action against B for personal injuries. Six months after the action is brought (one year following the accident) A suffers an order of nonsuit. Two years following the order of nonsuit, A files a new action against B. A's action is not barred, even though he has failed to commence a new action within one year after suffering the nonsuit. The reason A's action is not barred is that the new action has been brought within the five-year period applicable to his personal injury claim.<sup>158</sup>

The provision "extends" the statutory period even though the nonsuit or arrest of judgment has been suffered at a time outside the limitations period.

*Example 15:* four years following the accident, A brings action against B for personal injuries. Eighteen months later A suffers a nonsuit or arrest of judgment. A has one year within which to bring a new action even though the limitations period had expired at the time of the nonsuit.<sup>159</sup>

An independent provision, identical to the provision in Chapter 516, covers actions for wrongful death which, as has been noted earlier, are not otherwise eligible for the general savings provisions of Chapter 516.<sup>160</sup> Without a specific provision to provide for an interval of "grace" following a nonsuit, however, a statutory cause of action containing its own limitation period cannot be revived following such nonsuit. This produces the following anomaly:

156. § 516.230, RSMo 1959.

157. See, e.g., Annot., 6 A.L.R.3d 1043, 1045 (1966).

158. Valley Farm Dairy Co. v. Horstmeier, 420 S.W.2d 314 (Mo. 1967).

159. See, e.g., Scanlon v. Kansas City, 325 Mo. 125, 28 S.W.2d 84 (Mo. En Banc 1930) (injury in 1900; dismissal in 1915; action begun again within one year in 1916; judgment in 1930: action not barred.)

160. § 537.100, RSMo 1967 Supp. The ineligibility of the wrongful death action for the tolling provisions of §§ 516.100-290, RSMo 1959 was made clear in the leading case of Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958); Note, 24 Mo. L. REV. 397 (1959); Note, 35 N.D.L. REV. 171 (1959). See also, Comment, *First Catch Your Defendant—Limitation and the Unknown Tortfeasor*, 29 MOD. L. REV. 366 (1966).

*Example 16:* an action against a sheriff and his surety company on the sheriff's bond is covered by section 516.130, RSMo 1959, which establishes a limitation period of three years. Action is begun within the three year period, but is terminated by the plaintiff through a voluntary nonsuit at a point in time over three years after the cause of action accrued. Plaintiff has one year within which to institute a new action.<sup>161</sup>

*Example 17:* same facts as in example "16" except that the suit is against a surety on a constable's bond. Plaintiff's action is barred because a special statute governs such suits and they are not encompassed by the "savings" provisions of section 516.230, RSMo 1959.<sup>162</sup>

Venue is a waivable requirement and, at least in that sense, "nonjurisdictional."<sup>163</sup> Therefore a nonsuit entered against a plaintiff who sued defendant in a county where venue requirements were absent should qualify for the savings provision. In that case the plaintiff would have twelve months within which to begin anew in the correct county. While most of the cases in Missouri have permitted this, it is subject to the requirement that the mistake be in good faith.<sup>164</sup> *Krueger v. Walters*,<sup>165</sup> one of several cases holding the other way, has been explained in terms of the failure of the plaintiff to offer an explanation for the mistaken venue, thus justifying an inference that the action was "knowingly" brought in violation of the

161. *State v. Litzinger*, 417 S.W.2d 126 (St. L. Mo. App. 1967).

162. *State v. Harter*, 188 Mo. 516, 87 S.W. 941 (1905). *Contra*, *State v. Weathers*, 396 S.W.2d 746 (St. L. Mo. App. 1965). The *Weathers* case turned, however, on the existence of a special statute governing bonds for constables of St. Louis City. Unlike the general statutory provision governing constables' bonds, the provision dealing with St. Louis City contained no special period of limitation. It was therefore considered eligible for the tolling provisions of Chapter 516, RSMo 1959. See note 32 *supra*.

163. *Hutchinson v. Steinke*, 353 S.W.2d 137 (St. L. Mo. App. 1962). *But see* *State v. Higgins*, 352 S.W.2d 35 (Mo. En Banc 1961), following a line of cases declaring that failure to comply with a venue requirement is a jurisdictional defect. The distinction that the cases fail to draw is that between subject matter and person. The former cannot be waived and is truly jurisdictional. The latter can be waived and is jurisdictional only in the sense that "in personam" jurisdiction has not been obtained. WRIGHT, FEDERAL COURTS 16 (1963).

164. *State v. Litzinger*, 417 S.W.2d 126 (St. L. Mo. App. 1967); *Ellmaker v. Goodyear Tire & Rubber Co.*, 372 S.W.2d 650 (K.C. Mo. App. 1963); *Tice v. Milner*, 308 S.W.2d 697 (Mo. 1957); *Slater v. Kansas City Terminal R. Co.*, 271 S.W.2d 581 (Mo. 1954); *Wente v. Shaver*, 350 Mo. 1143, 169 S.W.2d 947 (1943).

165. 238 Mo. App. 340, 179 S.W.2d 615 (K.C. Ct. App. 1944). See also *Jackson v. Whitaker*, 386 S.W.2d 657 (K.C. Mo App. 1964); *Phillips v. Whitton*, 354 Mo. 964, 192 S.W.2d 856 (1946); *Mertens v. McMahon*, 115 S.W.2d 180 (St. L. Mo. App. 1938); *Conrad v. McCall*, 205 Mo. App. 640, 226 S.W. 265 (Spr. Ct. App. 1920); *Hardin v. Cass County*, 42 Fed. 652 (W.D. Mo. 1890).

venue requirements. Why the eligibility of an action for the savings provisions of sections 512.230 and 537.100 should depend upon the state of mind of the attorneys is a mystery to the author. Other sanctions are available against causing intentional inconvenience through persistent actions in counties without venue.<sup>166</sup> The truth is that in these cases Missouri courts have not distinguished between venue and jurisdiction. They have been misled into equating a venue defect with absence of jurisdiction over the subject matter.

Recent cases suggest a more charitable attitude on the part of the courts. The benefit of a savings provision probably will not be denied a plaintiff nonsuited because of a venue defect, and otherwise barred by the statute of limitation, if the plaintiff can offer a reasonable explanation for the error.<sup>167</sup>

Whether a cause of action having its origin in another state qualifies for this saving provision depends upon how the action and the limitation are classified by the other State.

*Example 18:* A negligence action is instituted in Missouri based upon personal injuries sustained in Kansas. Kansas has a two year statute of limitation on such actions. It is clear that under its "borrowing" statute, Missouri will apply that limitation. Action is brought within the two year period but terminates in a nonsuit outside the two year period. Section 516.230, RSMo 1959 applies and the plaintiff has twelve months within which to begin a new action.<sup>168</sup>

*Example 19:* Same facts as in Example "18" except that the action is for wrongful death. Missouri has a twelve months savings period specifically applicable to the nonsuited wrongful death action. No comparable provision exists in Kansas. Since Kansas regards the limitation period applicable to the wrongful death action as "built in" the substantive right, the Missouri "savings" clause cannot apply, and the action is barred.<sup>169</sup>

There is an overlooked difficulty which occasionally arises in connection with this "savings" provision. A failure to clear the docket may result

---

166. *E.g.*, abuse of process. *White v. Scarritt*, 341 Mo. 1004, 111 S.W.2d 18 (1937); *Moffett v. Commerce Trust Co.*, 283 S.W.2d 591 (Mo. 1955) (dictum); *Thompson v. Farmers' Exchange Bank*, 333 Mo. 437, 62 S.W.2d 803 (1933) (dictum); *PROSSER, TORTS* 876-78 (3d ed. 1964).

167. *E.g.*, *Emanuel v. Richards*, 426 S.W.2d 716 (St. L. Mo. App. 1968). Compare *Ellmaker v. Goodyear Tire & Rubber Co.*, 372 S.W.2d 650 (K.C. Mo. App. 1963) with *Jackson v. Whitaker*, 386 S.W.2d 657 (K.C. Mo. App. 1964).

168. *Turner v. Missouri-Kansas-Texas R. Co.*, 346 Mo. 28, 142 S.W.2d 455 (1940).

169. *Toomes v. Continental Oil Co.*, 402 S.W.2d 331 (Mo. 1966).

in the resurrection of a cause of action as long as thirty years following its presumed demise. In *Scanlon v. Kansas City*,<sup>170</sup> for example, an action arising in 1900 was revived over twenty-five years later. It resulted in a judgment entered in 1930.

Probably the most liberal case decided under this section is *Slater v. Kansas City Terminal Ry. Co.*<sup>171</sup> The case originally began as a death action under the Federal Employers' Liability Act. It was discovered, after the one year statute of limitation had run, that the deceased was not an employee of the defendant. The court held that the widow had twelve months following the dismissal of the FELA action to begin an action for wrongful death, even though under FELA she sued in a representative capacity (owing to the "survival" features of the FELA action) while under the Missouri Wrongful Death Statute she must sue as a direct beneficiary.

#### D. Defendant's Improper Act

The Missouri statutes provide that if a defendant ". . . by absconding or concealing himself, or by any other improper act, prevent the commencement of an action . . ." then the limitation period shall begin to run only after the maintenance of the action "shall have ceased to be so prevented."<sup>172</sup> This rather broad mandate for suspending the statutes of limitation has been conservatively construed. In the vast majority of the cases in which plaintiffs have sought its protection, it has been held inapplicable. An early case held that the failure of an employer to report an accident to Industrial Commission was a "wrongful act" which tolled the otherwise applicable six month period within which an injured employee must file his claim.<sup>173</sup> However this decision was subsequently overruled. Such failure to report is no longer considered a "wrongful act" within the meaning of the statutory provision suspending the operation of the limitation period

170. 325 Mo. 125, 28 S.W.2d 84 (Mo. En Banc 1930).

171. 271 S.W.2d 581 (Mo. 1954). *Contra*, *Bodine v. Lloyd*, 5 N.E.2d 108 (Ill. App. 1936). Under the Federal Employers' Liability Act one suit is maintained for both the survival and wrongful death claims. 45 U.S.C. § 51 (1964). In Missouri the actions are mutually exclusive. In the event of wrongful death the widow sues in her own right for wrongful death, and not as a personal representative. § 537.080 (1), RSMo 1967 Supp. (wrongful death—who sues); § 537.020, RSMo 1959 (if wrongful act produces death, action does not survive).

172. § 516.280, RSMo 1959.

173. *Schrabauer v. Schneider Engraving Product, Inc.*, 224 Mo. App. 304, 25 S.W.2d 529 (St. L. Ct. App. 1930), *overruled*, *Wheeler v. Missouri Pac. R. Co.*, note 174 *infra*.

on that account.<sup>174</sup> Similarly, some earlier cases held that the fraud of a notary public that prevented an aggrieved person from obtaining the knowledge which would have permitted prompt action for relief was a "wrongful act" that suspended the period of limitation applicable to an action on the notary's bond.<sup>175</sup> A more recent case repudiated this notion. It held that since the action on the bond is pursuant to a special statute the wrongful act exception is inapplicable because this exception applies only to "general" statutes of limitation and not to those special statutes which create their own periods of limitations.<sup>176</sup>

The foregoing cases illustrate a clear reluctance to give the "wrongful act" tolling provision a literal effect. Whether the courts are fearful that a literal application of the exception would provide too easy an escape from the statutes of limitation, or whether this is simply another manifestation of the modern tendency to give such statutes a strict application<sup>177</sup> is not clear. However, none of them go so far as the Federal Court of Appeals for the Eighth Circuit. In a decision of questionable accuracy it virtually nullified all of the statutory provisions suspending or extending the running of the limitations periods where plaintiff is under one or more of the disabilities discussed in this section. *Hellebrand v. Hoctor*<sup>178</sup> was a diversity action for false imprisonment in which the Missouri law controlled. The action was not brought within the two year period as required in Missouri. The plaintiff alleged that the statute was suspended because the defendant had prevented his commencement of the action by his "improper act" (presumably his unlawful detention of the plaintiff). The logic of the plaintiff's argument seems beyond cavil—a defendant ought not to be permitted physically to bar the plaintiff from the courthouse for two years and then plead the running of the two year statute of limitations. The Court of Appeals, however, did just that in the *Hellebrand* case by holding that the "wrongful act" provision did not apply to suspend the running of

174. *Wheeler v. Missouri Pac. R. Co.*, 328 Mo. 888, 42 S.W.2d 579 (1931).

175. *State v. American Surety Co.*, 254 S.W. 561 (St. L. Mo. App. 1923); *State v. American Surety Co.*, 203 Mo. App. 71, 217 S.W. 317 (St. L. Ct. App. 1920); *State v. Hawkins*, 103 Mo. App. 251, 77 S.W. 98 (K.C. Ct. App. 1903).

176. *Kohout v. Adler*, 327 S.W.2d 492 (St. L. Mo. App. 1959); Note, 26 Mo. L. Rev. 80 (1961).

177. See, e.g., *Woodruff v. Shores*, 354 Mo. 742, 746, 190 S.W.2d 994, 996 (1945): "But, while statutes of limitations were formerly regarded with little favor and courts devised numerous theories and expedients for their evasion, latterly they are considered as beneficial, as resting upon the sound public policy, and as not to be evaded except by the methods provided therein." Note, 12 Mo. L. Rev. 86 (1947).

178. 331 F.2d 453 (8th Cir. 1964).

that statute of limitation applicable to actions for false imprisonment. Why was the running of the statute not suspended by the manifestly improper act of the defendant? Because of another statute which reads as follows:

The provisions of section 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.<sup>179</sup>

The court reasoned as follows: (1) the "improper act" provision (516.280) is within the spectrum of exclusion; and (2) since 516.140 is a statute which limits the time within which an action for false imprisonment may be brought, it is an ". . . action which is . . . otherwise limited by . . . statute." Therefore, the suspension provision applicable where defendant is guilty of improper acts which prevent the plaintiff from maintaining his action within the statutory period does not apply.

The critical words, of course, are "otherwise limited by any statute." Under the interpretation applied in *Hellebrand* the improper act suspension provision would never apply because all (or almost all) limitation periods are imposed by statute. Under the court's reading they would, by definition, be ineligible for many of the savings provisions set forth in Chapter 516. A more reasonable interpretation of the phrase "otherwise limited by any statute" is that it identifies limitations specifically imposed by statutes "otherwise" than in Chapter 516, as, for example, the independent limitation created on the action for wrongful death.<sup>180</sup> The legislature sometimes has seen fit to establish a limitation period on a given right of action that is independent from the general limitations established under Chapter 516 (E.g., wrongful death actions and actions on notary bonds).<sup>181</sup> It has been held that only where this is done may the legislature be presumed to have intended that the limitation period not be subject to the various savings provisions found in Chapter 516.<sup>182</sup> The same reasoning is appropriate to the foregoing problem. For these reasons the interpretation of section 516.300 made by the federal court in *Hellebrand* seems erroneous.

179. § 516.300, RSMo 1959.

180. § 537.100, RSMo 1967 Supp.

181. *Ibid.*, § 486.050, RSMo 1959. *Kohout v. Adler*, 327 S.W.2d 492 (St. L. Mo. App. 1959); Note, 26 Mo. L. REV. 80 (1961).

182. *Turner v. Missouri-Kansas-Texas R. Co.*, 346 Mo. 28, 142 S.W.2d 455 (1940) (defendant's argument that the saving provision in the event of nonsuit was inapplicable because the action was "otherwise limited" by the Kansas limitation made applicable under § 516.190, RSMo 1959 was clearly rejected.)

A more logical but equally unfair refusal to extend application of the "improper act" provision may be found in the case of *Fraze v. Partney*<sup>183</sup> discussed above.<sup>184</sup> That case involved an action for wrongful death. It was over a year after the collision before the plaintiff, despite unremitting efforts, was able to identify the operator of the motor vehicle who had allegedly caused the death of plaintiff's wife. Because the wrongful death action carries its own "built in" statute of limitation, the Missouri Supreme Court held that it did not qualify for the "improper act" savings provision of Chapter 516, and that the action was therefore barred.<sup>185</sup>

#### E. Extensions in Case of Death

Three statutory provisions deal with three different limitations problems which arise in connection with death. At least one of these provisions (the third one to be discussed) presents difficult questions of interpretation and application.

Section 516.180, RSMo 1959 is designed to guard against the loss to the estate of a decedent of a cause of action that survives the decedent's death but which could not previously have been maintained because of some disability that disqualified the decedent from suing during his lifetime. The effect of the statute is to give the personal representative at least one year following the death of such a decedent to bring an action on such claim or claims as survive, regardless of whether the limitation period would have expired during some lesser interval following death.

Three points seem noteworthy. First, the statute apparently applies only to claims which the decedent could not have pressed during his lifetime because of the disabilities specified in section 516.170, RSMo 1959. Second, while the statute may extend the limitation period on a given cause of action for one year following the death of the person otherwise disabled from pressing it, it also seems to foreclose suit after that point, even though the normal limitations period would establish a latter point.<sup>186</sup> Third, the extension period runs from the time of death, and not from the point at which an administrator is appointed or an executor qualifies.<sup>187</sup>

183. 314 S.W.2d 915 (Mo. 1958); cf. authorities cited note 160 *supra*.

184. See text accompanying notes 52 and 53 *supra*. See also State *ex rel.* Bier v. Bigger, 352 Mo. 502, 178 S.W.2d 347 (Mo. En Banc 1944); Note, 10 Mo. L. REV. 302 (1945).

185. *Fraze v. Partney*, 314 S.W.2d 915 (Mo. 1958); Note, 24 Mo. L. REV. 397 (1959); Note, 35 N.D.L. REV. 171 (1959). See also Comment, *First Catch Your Defendant—Limitation and the Unknown Tortfeasor*, 29 Mo. L. REV. 366 (1966).

186. *Smith v. Settle*, 128 Mo. App. 379, 107 S.W. 430 (K.C. Ct. App. 1908).

187. § 516.180, RSMo 1959. *Clubine v. Frazer*, 346 Mo. 1, 139 S.W.2d 529 (1940).

*Example 20:* Four years and six months after sustaining personal injuries as the result of D's negligence, A dies from causes unrelated to these injuries. Five years and four months after the injuries were inflicted, and ten months following the death of A, A's administrator sues D. The administrator's action is barred because brought more than five years after the action accrued.

*Example 21:* Same facts as in Example "20," except that A dies one year after the injuries were inflicted. A's administrator would appear to have four years within which to bring the survival action.<sup>188</sup>

*Example 22:* Same facts as in Example "20," except that A was insane both at the time of injury and at the time of death. The administrator's action is not barred.

The second statutory provision, section 516.250, RSMo 1959 deals with the problems which can arise when the plaintiff dies after an action has been begun. In such an event the action must be begun anew by the executor or administrator if it would otherwise survive. He or she has one year from the time of the decedent's death in which to institute the new action in the name of the representative. Although there are no cases dealing with the question, it appears that this provision can result in an abbreviation of the cause of action.

*Example 23:* Four years and six months following a motor vehicle collision, A sues D for damages for personal injuries resulting therefrom. Nine months following the filing of suit A dies from causes unrelated to the motor vehicle collision. A's executor or administrator has one year from the time of A's death within which to begin an action on the claim, even though more than five years has elapsed from the time of injury.

*Example 24:* Same facts as in Example "23" except that A begins his action within six months of its accrual and dies six

---

188. These examples are submitted to illustrate the point that the normal period of limitation is altered by death only where (1) the plaintiff was statutorily disabled from suing during his lifetime, § 516.180, RSMo 1959; or (2) where the plaintiff had initiated suit and thereafter died, § 516.250, RSMo 1959; or plaintiff had initiated suit and defendant thereafter died, § 516.240, RSMo 1959. Where defendant dies before suit is brought, or where plaintiff dies from causes unrelated to those upon which a cause of action is subsequently pressed by his personal representative, the limitations period is unaltered. §§ 537.010-.020, RSMo 1959. However, even though the normal period of limitation is unaltered, where the defendant has died, plaintiff may not be able to execute a judgment against the estate of the decedent if he fails to comply with the nonclaim statute. § 473.360, RSMo 1959.



months thereafter. It appears that A's executor or administrator has only one year from the date of A's death (two years from the date of injury) within which to begin a new action, even though the normal period of limitations would have been five years.

The statute also provides for the event of the death of the executor or administrator. The personal representative who succeeds to that office shall have at least one year from the time of the first representative's death in which to begin an action.

*Example 25:* Four years and six months following a motor vehicle collision John Smith sues D for damages resulting therefrom. Nine months following the filing of suit John Smith dies from causes unrelated to the motor vehicle collision. Mary Smith, his wife, is executrix under John Smith's will and six months following his death institutes a new action against D. One month thereafter Mary Smith dies. Since John Smith made no provision for a succeeding executor in his will, and, since Mary Smith has no will, it is another six months before Jones is appointed administrator d.b.n.c.t.a. Five months thereafter Jones institutes a new action against D. The action is not barred even though it is begun 21 months after the time when the statute of limitations would have normally barred the claim and 18 months after the death of the original plaintiff.

The statute is in exactly the same words as it existed in the 1835 Revised Statutes,<sup>188a</sup> except for a clause appended in 1857. That clause reads as follows:

... or, if no executor or administrator be appointed within that time, then within one year after letters testamentary or of administration shall have been granted to him.<sup>189</sup>

The intention of the 1857 amendment seems plain enough—to save the cause of action in situations where there is more than a year's delay in the qualification or appointment of a personal representative. However, the clause is ambiguous. Placed in the position as it is, it could be construed to apply only to the situation where the first personal representative dies and there is a lapse of more than a year before a successor qualifies or is appointed. Assuming, however, that it would cover the situation where

188A. § 5 at —, RSMo 1835.

189. § 5 at p. 80, RSMo 1857 (Volume sometimes dated "1856").

there is a delay of more than a year before a personal representative qualifies or is appointed, the following anomaly results:

*Example 26:* Four years and six months following the collision John Smith sues D for damages and dies from unrelated causes nine months thereafter. Mary Smith, his wife, qualifies as executrix exactly 364 days after John Smith's death. Mary Smith has one day in which to begin a new action against D. Otherwise the action is barred.

*Example 27:* Same facts as in Example "26," except that Mary Smith qualifies 380 days following John Smith's death. Mary Smith has a full year within which to begin the new action.

The only significant case interpreting this rather ambiguous provision dealt with its applicability to a wrongful death action. There, owing to the failure of other named statutory beneficiaries, the action had to be brought by the administrator of the decedent's estate. The court held, quite properly, that these provisions did not apply when the administrator or executor becomes the person qualified to sue under the wrongful death statute.<sup>190</sup> This is because the action for wrongful death in Missouri is not a survival statute, but an independent cause of action created by statute.<sup>191</sup>

The third statutory provision, section 516.240, RSMo 1959 provides for a nine months suspension of the statute of limitation for actions which survive the death of the defendant, and with respect to which the statute might otherwise run. Analytically read, this statute authorizes an abbreviation of the limitations period, although the only case dealing with the question does not so assume.<sup>192</sup> This abbreviation would result from the substitution of new alternative periods of limitation—one year within which to bring the new action against the heirs, devisees or assigns of the defendant, or nine months following the first publication of notice of letters testa-

190. *Pyle v. University City*, 279 S.W. 217 (St. L. Mo. App. 1925).

191. § 537.080, RSMo 1967 Supp.; *Wallace v. Bounds*, 369 S.W.2d 138 (Mo. 1963); *Spencer v. Bradley*, 351 S.W.2d 202 (Mo. 1961).

192. *Doerge v. Heimenz*, 1 Mo. App. 238 (St. L. Ct. App. 1876) (Plaintiff failed to renew his action against the administrator within one year from the death of the original defendant. The court held the action barred, but emphasized that the general statute of limitations had run on the claim.) See also *City of Springfield v. Clement et al.*, 296 Mo. 150, 246 S.W. 175 (1922) (City sought indemnity from legatees of decedent some years following payment of sidewalk tort claim. Claim was held barred—not because of a failure to comply with the predecessor of § 516.240, RSMo 1959, but because at that time tort actions of this type did not survive, and city could not avoid this rule by classifying the claim as one for indemnity.)

mentary or of administration, in the event that an executor or administrator is appointed.<sup>193</sup>

A logical question arises with respect to the disposition of any survival action which may have been reinstated against an heir, devisee, or assign within one year after the death of the tortfeasor but prior to the appointment of an executor or administrator. Several cases, by way of dicta, indicate that the heirs may be liable under such circumstances, at least to the extent of their distributive shares.<sup>194</sup> The question is academic however. Even if the subsequently appointed administrator or executor were not held to be a necessary party to any such survival action previously instituted, since the heirs, devisees, or assigns would appear to be jointly liable,<sup>195</sup> the results would be the same. No apparent advantage accrues to the plaintiff from following the rather circuitous procedure of proceeding against the heirs, devisees, or assigns, and waiting until the assets are formally transferred to them before executing on his judgment.

The existence of alternative periods within which to begin the action is, however, the important characteristic of the statutory provision.

*Example 28:* X commits a tort against P which is subject to a five year limitation period. Four years and nine months after the cause of action accrues, P sues X. Six months thereafter (five years and three months after the cause of action accrued) P renews his action against X's heirs, devisees or assigns. P's action is not barred, although it would be barred were he to wait more than one year after X's death before suing X's heirs, devisees or assigns.

*Example 29:* Same facts as in Example "28" except that P does nothing about renewing his action for fifteen months following X's death. Notice of letters testamentary are published thirteen months following X's death. Although P's action against the heirs, devisees or assigns is barred, he has nine months from the date upon which the letters testamentary were first published within which to renew the same action against X's personal representative.

193. § 516.240, RSMo 1959. The alternative period of nine months following the publication of notice of letters testamentary or administration was no doubt added so as to make this provision conform with the nonclaim statute. § 473.360, RSMo 1959. See *Clarke v. Organ*, 329 S.W.2d 670, 679 (Mo. En Banc 1959).

194. *City of Springfield v. Clement et al.*, 296 Mo. 150, 246 S.W. 175 (1922) (semble); *Beekman v. Richardson*, 150 Mo. 430, 51 S.W. 689 (1899) (dictum); *Walker v. Deaver*, 79 Mo. 664 (1883) (dictum).

195. § 516.240, RSMo 1959 ("... plaintiff may commence a new action against the heirs, devisees, assigns, executors or administrators of such defendant, as the case may require . . .") (Emphasis added.)

It would be deceptive not to mention that section 516.240 means nothing if it is not considered in connection with section 473.360, the so-called "nonclaim" statute. This statute forecloses a claimant from recovering any *judgment* against an executor, administrator, distributee, or any other person receiving assets administered by the probate court unless written notice of the action instituted or revived is filed in the probate court within nine months from the date upon which letters testamentary are first published.

It is no coincidence that the nine month interval for filing corresponds with the nine month interval during which the statute of limitation is deemed tolled.<sup>196</sup> Before 1959 the statute barred the *action*, rather than prohibiting *recovery of judgment* from administered assets.<sup>197</sup> The amendment was seemingly moved by the case of *Clarke v. Organ*.<sup>198</sup> A recovery on behalf of two orphans for the wrongful death of their parents was defeated because of a failure to comply with the nonclaim statute as it was then worded. What made that case so objectionable was that the administratrix in that case had been served in the action and had in fact filed an answer. Nevertheless, the failure to comply with the nonclaim statute was deemed fatal. The effect of the amendment of 1959 is to permit the claimant to recover from an insurance company which is otherwise obliged to discharge the liability of an assured even though he may not execute judgment against the "administered assets" of the estate.<sup>199</sup>

A final question, for which there appears to be no answer, is whether, irrespective of the nonclaim statute, the statute of limitation normally applicable is attenuated by the alternative periods described in section 516.240.

*Example 30:* X has an automobile liability insurance policy with the M Company. He operates the covered vehicle in a negli-

196. See note 193 *supra*.

197. § 473.360, RSMo 1957 Supp., repealed Mo. Laws 1959, S.B. No. 305 § 1, and § 473.360 RSMo 1959 enacted in its place.

198. 329 S.W.2d 670 (Mo. En Banc 1959).

199. For a discussion of the amendment to the nonclaim statute and its transparent purpose see Fratcher, *Trusts and Succession in Missouri*, 25 Mo. L. Rev. 417, 432 (1960). The amendment has been held not to be retroactive, thereby foreclosing recovery from a decedent's insurer with respect to a preamendment claim which had not been filed with the Probate Court within the required time. *State v. Hall*, 358 S.W.2d 845 (Mo. En Banc 1962). *But see* *Wentz v. Price Candy Co.*, 352 Mo. 1, 175 S.W.2d 852 (1943); 9 Mo. L. Rev. 376 (1944). The latter case held an amendment to the Workmen's Compensation Law which extended the filing period to twelve months reached back and revived a claim otherwise barred because not filed within the previous limitation period of six months. The court held that the alteration of the period in question went to the remedy and not to the right.

gent. fashion and injures P. Three months later X dies. An executor is appointed, the estate is probated, and the executor discharged. Four years following the collision and two years and six months following the discharge of the executor, P sues X's heirs and legatees for damages. It is clear that P may not recover any judgment which he may win from assets of the estate in the hands of the defendants because of his failure to comply with the non-claim statute. It is not clear whether the M Insurance Company can escape its contractual obligation to assume the liability of X. In this respect it should be noted that section 516.240, RSMo 1959 uses the permissive "may" rather than the mandatory "must."

In reviewing the circumstances under which the death of either the plaintiff or the defendant may alter the normal application of the statute of limitation applicable to a tort cause of action, it may seem illogical not to include a discussion of the action for wrongful death. However, as pointed out earlier, the action for wrongful death is an independent tort cause of action created by statute and carrying its own period of limitation as well as its own extension provisions in the event of such things as non-suit.<sup>200</sup> It is not considered here because its existence is *dependent* upon death and therefore not logically within a discussion of how statutes of limitation applicable to other causes of action are *affected* by death.

One critical observation may be made with respect to a problem illustrated by the case of *Clarke v. Organ*.<sup>201</sup> The action in that case was for wrongful death. The defendant died so we have the not unusual situation where a guardian sues a personal representative. The legislature has specifically provided that the action for wrongful death shall survive the death of the defendant.<sup>202</sup> However, if cases such as *Hellebrand v. Hoctor*<sup>203</sup> and *Frazee v. Partney*<sup>204</sup> are correct, and if section 516.300, RSMo 1959<sup>205</sup> is given a literal interpretation, neither the limitations nor the extensions

200. See cases and statute cited note 191 *supra*.

201. 329 S.W.2d 670 (Mo. 1959).

202. § 537.020 (1), RSMo 1959; Comment, *The Missouri Wrongful Death Statute* (1963) WASH. U.L.Q. 125, 137. Even though the tortfeasor dies before the victim for whose death the wrongful death action is brought, the suit may be maintained. *Harrison v. Weisbrod*, 358 S.W.2d 277 (Spr. Mo. App. 1962).

203. 331 F.2d 453 (8th Cir. 1964). See text accompanying notes 178-182 *supra*.

204. 314 S.W.2d 915 (Mo. 1958); see note 185 *supra*.

205. § 516.300, RSMo 1959. The nonclaim statute specifies its own independent period of limitations. Therefore it is not qualified by or subject to the general tolling provisions of Chapter 516 by virtue of the foregoing section. Thus, a claim against a decedent's estate is barred even though the executrix deliberately leaves the state so as to make it impossible for service to be made within the statutory period. *Zuckerman v. McCulley*, 78 F. Supp. 380 (E.D. Mo. 1948).

implicit in section 516.240, RSMo 1959 apply where the action is for wrongful death.

*Example 31:* X negligently causes the death of P's child. One month later X dies. In order to obtain an enforceable judgment against the assets of the estate, P must comply with the nonclaim statute. But P would have twenty-three months from the date of X's death to bring action against the appropriate defendant for wrongful death, regardless of when the notices of letters testamentary are published under section 516.240, RSMo 1959.<sup>206</sup>

## V. CONFLICTS OF LAW AND THE BORROWING STATUTE

Two rather simple situations provide the basis for a number of complex problems traditionally dealt with under the heading of "Conflict of Laws." These two situations are exemplified by what follows:

*Example 32:* P suffers injuries in State A, which has a two year limitation period on normal negligence actions. Three years after the cause of action accrued, P sues D in State B, which has a five year limitation on such actions. If State A classifies its limitation period as "procedural," and if State B has no statute requiring otherwise, the common law rule allows the action to be maintained.<sup>207</sup>

*Example 33:* Same facts as in Example "32" except that P suffers the injuries in State B and brings suit in State A. At common law P's action is barred. Even if State B has altered the rule by legislation the action is, by the overwhelming weight of authority, barred.<sup>208</sup>

The major complication arises with respect to the classification made by the state where the cause of action accrues. It is frequently impossible to establish whether any given state considers, for all purposes, the limitation period as "substantive" or "procedural." However, the significant aspect of the common law rule is that it permits recovery on an otherwise barred claim if the forum period is longer than that of the originating State. Thus, in *In re Goldsworthy's Estate*,<sup>209</sup> a contract claim, barred in Missouri,

206. Cf. cases cited note 43 *supra*.

207. *E.g.*, Barrett v. Boston & M.R.R., 104 N.H. 70, 178 A.2d 291 (1962); Davison v. Sasse, 72 S.D. 199, 31 N.W.2d 758 (1948); *In re Goldsworthy's Estate*, 45 N.M. 406, 115 P.2d 627 (1941).

208. *E.g.* Jackson v. Shuttleworth, 42 Ill. App.2d 257, 192 N.E.2d 217 (1963).

209. 45 N.M. 406, 115 P.2d 627 (1941).

was enforced in New Mexico. New Mexico had both the common law rule and a longer limitations period than Missouri applicable to such claims.

Many jurisdictions have adopted so-called "borrowing statutes."<sup>210</sup> Missouri's statute bars the enforcement of a foreign claim in Missouri if such claim is barred where it accrued.<sup>211</sup> The Missouri statute would prohibit a result such as that reached in the *Goldsworthy* case.

*Example 34:* P and D are Missouri residents whose cars collide in Iowa. Three years following the collision P sues D in Missouri for personal injuries arising from the Iowa collision. The Iowa statute of limitations is two years, the Missouri limitation, five. Even though Iowa classifies the limitations as "procedural," under the Missouri "borrowing" statute P's claim is barred.<sup>212</sup>

It might seem logical, by analogy to the rule that "what is sauce for the goose is sauce for the gander," that if the borrowing statute requires application of a foreign limitation *shorter* than the forum's, it would also require the forum to apply a foreign limitation *longer* than the forum statute.<sup>213</sup> Except for one jurisdiction,<sup>214</sup> however, the general rule has always been the other way.

*Example 35:* D commits a tort against P in Illinois. Twelve years later P sues D in Missouri. Even though the action is not barred in Illinois, the five year statute bars it in Missouri.<sup>215</sup>

Unlike a number of other "borrowing" statutes, the Missouri statute does not make distinctions based upon whether either party was a non-

210. See Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287 (1960); Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33 (1962).

211. § 516.180, RSMo 1959.

212. *Girth v. Beaty Grocery Co.*, 407 S.W.2d 881 (Mo. 1966).

213. Where the limitation period is "built in" to the foreign cause of action there is authority that an action brought within the "built in" period may be maintained even though the law of the forum would bar the claim. *Martinez v. Mo. Pac. R.R.*, 296 S.W.2d 90 (Mo. 1956); *Lang v. J. C. Nichols Inv. Co.*, 227 Mo. App. 1123, 59 S.W.2d 63 (K.C. Ct. App. 1933); *Newell v. Harrison Eng'r. & Const. Corp.*, 149 Kan. 838, 89 P.2d 869 (1939); RESTATEMENT (SECOND), CONFLICT OF LAWS, Reporter's Note § 143 at 497 (Proposed Official Draft 1967) (cases collected.) By analogy, a "borrowing" statute could be said to be "built in" the limitation applicable in the jurisdiction of accrual, but this position has been rejected. See notes 214, 215 *infra*.

214. Kentucky has always been the celebrated "hold out" against the rule that the shorter forum statute prevails over a longer statute otherwise "borrowed" by the forum's borrowing statute. See, e.g. *Koeppe v. Great Atl. & Pac. Tea Co.*, 250 F.2d 270 (6th Cir. 1957). However, even Kentucky has now capitulated to the majority rule, making it, for all practical purposes, unanimous. *Seat v. Eastern Greyhound Lines, Inc.*, 389 S.W.2d 908 (Ky. App. 1965).

215. *Farthing v. Sams*, 296 Mo. 442, 247 S.W. 111 (1922).

resident;<sup>216</sup> whether a particular party had a residence at the time the action accrued;<sup>217</sup> whether a particular party had a residence at the time the bar became effective;<sup>218</sup> or whether either party has had a minimum period of residence in the forum state.<sup>219</sup> The permutations and combinations of the different borrowing statutes are masterfully described in an article by Dean David Vernon,<sup>220</sup> but are beyond the scope of the present discussion. Because it does not make distinctions of the type mentioned above, Missouri's statute has the virtue of simplicity. Few inconsistencies can be found in the decisions applying it.

A recurring problem in the interpretation and application of the forum's borrowing statute is the extent to which the "tolling" or "extension" provisions of the jurisdiction in which the cause of action accrues should be taken into account by the forum jurisdiction in determining whether, for the purposes of the forum jurisdiction, the action would be barred by the accrual state. The rule is that if the accrual state would recognize the tolling or extension provision a forum state applying a "borrowing" statute must also recognize it. The language of a Missouri Appeals Court sums up the rule, nicely:

But when such statute is so borrowed, it is not wrenched bodily out of its own setting, but taken along with it are the court decisions of its own state which interpret and apply it, and the companion statutes which limit and restrict its operation. This we think is the general law.<sup>221</sup>

It is frequently said, therefore, that in applying the "borrowing" statute the case-law interpreting the statute must also be borrowed.

*Example 36:* D commits a tort against P in Kansas and returns to his residence in Missouri. P, a resident of Kansas, sues D in Missouri three years after the cause of action accrued. The Kansas period of limitations is two years, the Missouri limitation, five. Under the Kansas law the Kansas period of limitations is tolled when the defendant departs from the state. Having departed from Kansas, the Kansas period is tolled with respect to D. The claim

---

216. *E.g.* Ore. Rev. Stat. § 12-260 (1967 Repl. Part). Oklahoma, which formerly limited its borrowing statute to persons who were nonresidents, recently repealed the limitation. OKLA. LAWS 1967 c.98, § 1.

217. *E.g.*, IOWA CODE ANN. § 614.7 (1950).

218. *E.g.*, TENN. CODE ANN. § 28-114 (1955).

219. *E.g.*, ARIZ. REV. STAT. § 12-507 (1956).

220. See articles cited note 210 *supra*.

221. *Devine v. Rook*, 314 S.W.2d 932, 935 (Spr. Mo. App. 1958); *accord* *Young v. Hicks*, 250 F.2d 80 (8th Cir. 1957). But see *State of Kansas v. Hartford Acc. & Indem. Co.*, 426 S.W.2d 720 (K.C. Mo. App. 1968) (Kansas statute defining commencement date of suit rejected, although Kansas limitations period applicable.)



not being barred by Kansas, suit can be maintained in Missouri by P.<sup>222</sup>

An extremely important qualification to the foregoing proposition must be noted. Where the defendant leaves the State of accrual or "absconds," as it is sometimes put in the tolling statutes, but in personam jurisdiction may still be acquired by way of service upon his actual or constructive agent (e.g., the Secretary of State), the statute in the accrual state may not be considered "tolled" by that State. Therefore, the Missouri borrowing statute would bar the claim.<sup>223</sup>

*Example 37:* Same facts as in Example "36" except that the tort is committed with an automobile. Since, under the Kansas law, P could have obtained jurisdiction over D and begun an action against him by service upon the secretary of state, the statute is not tolled and claim is barred in Kansas. Therefore, under the borrowing statute, suit cannot be maintained in Missouri by P.<sup>224</sup>

Another important qualification is that the "borrowing" statute does not apply to foreign causes of action which have their own built in limitations.<sup>225</sup> Although the result is the same as though the limitation period was in effect borrowed, the theory is quite different.

Application of such a foreign statute by the forum is not dependent upon a "borrowing" statute. The time for filing of the action being substantive, the forum applies it under general principles of conflicts of laws governing the application of substantive law.<sup>226</sup>

Moreover, the difference is not entirely theoretical. Thus, whether the action is covered by the forum's tolling or extension provisions depends entirely upon whether the bar is applicable as result of substantive conflicts principles, or applicable because of the borrowing statute.<sup>227</sup>

*Example 38:* P sues D in Missouri for wrongful death occurring in Kansas. The action is instituted within the two year period

222. *Ibid.*

223. *Strickland v. Kay*, 426 S.W.2d 746 (K.C. Mo. App. 1968); *Haver v. Bassett*, 287 S.W.2d 342 (K.C. Mo. App. 1956); *Young v. Hicks*, 250 F.2d 80 (8th Cir. 1957).

224. *Bond v. Golden*, 273 F.2d 265 (10th Cir. 1959). See *Smith v. Forty Million, Inc.*, 64 Wash. 2d 912, 395 P.2d 201 (1964) (surveying the different jurisdictions which have dealt with whether the statute is tolled where service on a nonresident motorist is vicariously available through the secretary of state.)

225. *Owens v. Estate of Saville*, 409 S.W.2d 660 (Mo. 1966).

226. *Toomes v. Continental Oil Co.*, 402 S.W.2d 321, 323 (Mo. 1966).

227. Compare *Toomes v. Continental Oil Co.*, *supra* note 226, with *Turner v. Missouri-Kansas-Texas R.R.*, 346 Mo. 28, 142 S.W.2d 455 (1940).

established by the Kansas wrongful death statute, but dismissed without prejudice following the expiration of the two year limitation. Since under Kansas law the limitation period is built in to the wrongful death statute itself, the Missouri nonsuit provision does not save the action and it is barred.<sup>228</sup>

*Example 39:* Same facts as in Example "38" except that the action is for negligence. In this situation the borrowing statute applies. Even though the Kansas statute has run, it is a "Missouri" limitation for the purpose of the new action. Plaintiff would have one year within which to begin such new action.<sup>229</sup>

The exemption from the "borrowing" statute to which "built in" foreign limitations are subject may some times work to the plaintiff's advantage. In a wrongful death action, which would have been barred had the Missouri wrongful death limitations period been applied, the action was maintainable in Missouri because still maintainable in Louisiana. The Louisiana "built in" statute was "tolled" by the initiation of a federal court suit on the same cause of action.<sup>230</sup>

It is also established that a foreign nonclaim statute is not a statute of limitations for the purposes of the Missouri borrowing statute.<sup>231</sup>

*Example 40:* Iowa has a nonclaim statute which requires claims against a decedent's estate to be filed within six months or be barred. Eighteen months following the first published notice, and six months after the executor of an Iowa decedent's estate has been discharged, assets are discovered in Missouri and an administrator d.b.n. appointed. An Iowa creditor presents a claim in the Missouri proceeding. Even though the claim is barred in Iowa, the borrowing statute does not comprehend the nonclaim statute and the claim is not, for that reason, barred in Missouri.<sup>232</sup>

The borrowing statute disposes, in most cases, of the need to make a distinction between "procedural" and "substantive" statutes of limitation. However it does not dispose of the "accrual" question, which typically must be determined according to the rules in force in the jurisdiction where the

228. *Toomes v. Continental Oil Co.*, 402 S.W.2d 321 (Mo. 1966).

229. *Turner v. Missouri-Kansas-Texas R.R.*, 346 Mo. 28, 142 S.W.2d 455 (1940).

230. *Martinez v. Mo. Pac. R.R.*, 296 S.W.2d 90 (Mo. 1956). See also RESTATEMENT (SECOND), CONFLICT OF LAWS, Reporter's Note § 143 at 497 (Proposed Official Draft 1967) (cases collected); note 213 *supra*.

231. *Lipperd v. Lipperd's Estate*, 181 Mo. App. 106, 163 S.W. 934 (St. L. Mo. App. 1914).

232. *Owens v. Estate of Saville*, 409 S.W.2d 660 (Mo. 1966).

claim arises.<sup>233</sup> Thus, in one leading case involving an action to recover for eye injuries attributable to defective drugs, the Missouri borrowing statute was held applicable. Nevertheless the claim was saved because, under Kansas law, the cause of action was held to have accrued at a time much later than when the plaintiff first noticed a "yellow glow."<sup>234</sup> However, where a Missouri action in federal court for malicious prosecution was based upon false garnishments made in Kansas, the borrowing statute made the Kansas limitation applicable and the action was barred, the claim having "accrued" in Kansas.<sup>235</sup>

A wrongful death claim was generated by a collision in Missouri, and a diversity action brought in Missouri by a Florida resident against the personal representative of the deceased (the allegedly negligent driver). Both the deceased and the personal representative were Kansas residents. The Kansas nonclaim statute was not applied even though it would have been applicable had the suit been brought in Kansas.<sup>236</sup> This result was reached because the cause of action was deemed to have accrued in Missouri.

Similarly, in the exceptional case of *Williams v. Illinois Cent. R.R. Co.*,<sup>237</sup> one of the few cases in which the Missouri Supreme Court was moved to reclassify a cause of action in order to bring it under a longer limitations period,<sup>238</sup> the cause of action (breach of contract) was held to have accrued in Missouri where the railroad ticket was purchased, and not in Louisiana where the train wreck occurred.

A provision in the Workmen's Compensation law provides that the provisions of the Chapter shall govern injuries received outside the state pursuant to contracts of employment made in Missouri<sup>239</sup> (unless the contract provides otherwise). Nevertheless the shorter Kansas limitations were held to govern the action against the allegedly negligent third-party. The Missouri Supreme Court emphasized that the original workmen's compensation claims were filed in Kansas.<sup>240</sup>

---

233. See, e.g., *Giambelluca v. Thompson*, 283 S.W.2d 531 (Mo. 1955) (when workmen's compensation claim accrued under Texas law); *Brooks v. Nat'l. Bank of Topeka*, 251 F.2d 37 (8th Cir. 1958) (whether wrongful death claim against estate accrued in Missouri or Kansas); *Brown v. Westport Finance Co.*, 145 F. Supp. 265 (W.D. Mo. 1956) (whether claim based upon wrongful garnishments accrued in Kansas or Missouri).

234. *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966).

235. *Brown v. Westport Finance Co.*, 145 F. Supp. 265 (W.D. Mo. 1956).

236. *Brooks v. Nat. Bank of Topeka*, 251 F.2d 37 (8th Cir. 1958).

237. 360 Mo. 501, 229 S.W.2d 1 (1950).

238. See text accompanying notes 80-84 *supra*.

239. § 287.110, RSMo 1959.

240. *McLendon v. Kissick*, 363 Mo. 264, 250 S.W.2d 489 (1952).

Acquiescence in a status conferred by a foreign jurisdiction does not always preempt protections otherwise available under Missouri law. In *Nelson v. Browning*<sup>241</sup> the plaintiffs, minors at the time, were persuaded to secure an Arkansas court order which removed the disability of minority. Following this proceeding the plaintiffs then entered into a settlement. They released the insurance company of the driver of the vehicle that had injured them in Missouri. The Missouri Supreme Court had no trouble disposing of the technical arguments advanced by the defendants in support of the contention that the statute of limitation had run.<sup>242</sup>

Where an action is brought to recover damages under federal law, the state statutes of limitation control unless there is a special limitation provided by the federal law itself.<sup>243</sup>

*Example 41:* An action in Federal Court in Missouri is brought under the Clayton Act for treble damages allegedly resulting from D's violation of the Sherman Act. The statutes of limitation of the state where the acts took place will apply under Missouri's borrowing statute, although the Federal Court will not be bound by state decisions classifying federal antitrust actions as actions for "penalties or forfeitures."<sup>244</sup>

The Federal Tort Claims Act<sup>245</sup> has its own period of limitations (two years). This prevails over conflicting state law.<sup>246</sup> Moreover, it is seemingly established that federal law determines when the cause of action accrues. This rule is capable of producing widespread inconsistencies. This is especially true in the malpractice field where the state rules for determining accrual points are so varied.<sup>247</sup>

It is possible for a given cause of action, which accrues in a foreign jurisdiction, to be protected by both the foreign and the Missouri tolling provisions.

241. 391 S.W.2d 873, 881 (Mo. 1965) (2 cases).

242. *Id.* at 880, 884.

243. *Goodfriend v. Kansas City Star*, 158 F. Supp. 531 (W.D. Mo. 1958); accord, *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961); Annot., 90 A.L.R.2d 265 (1963) (cases collected).

244. *Electric Theater Co. v. Twentieth Century-Fox*, 113 F. Supp. 937 (W.D. Mo. 1953).

245. 60 Stat. 845 (1946), 28 U.S.C. § 2401 (b) (1964).

246. *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962); Annot., 21 A.L.R.2d 1464 (1952) (collecting cases).

247. Cases cited note 126 *supra*; Annot., 7 A.L.R.3d 732 (1966). For a critical appraisal of the varying state approaches to the accrual problem in malpractice cases see *Allen v. Layton*, 235 A.2d 261 (Del. 1967).

*Example 42:* D commits a non-automobile tort against P in Tennessee, and leaves the state of Tennessee. P sues D in Missouri four years and eight months hence. He suffers a nonsuit six months after initiating the action. Even though Tennessee has a one year statute of limitation covering such actions, it is not picked up and made applicable by the Missouri borrowing statute because the defendant's absence from the state "tolls" the action under Tennessee law. However, the action is covered by the Missouri borrowing statute. It is, therefore, also governed by the one year savings or extension provision applicable in cases of nonsuit. P has one year from the dismissal in which to bring a new action in Missouri.<sup>248</sup>

It will be recalled that the Federal Court of Appeals for the Eighth Circuit took a very peculiar view of the Missouri statutory provision which limits the tolling and extension provisions of Chapter 516. That provision reads as follows:

The provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.<sup>249</sup>

In *Hellebrand v. Hochter*,<sup>250</sup> the Eighth Circuit, in effect, held that the tolling and extension provisions of Chapter 516 *never* apply to an action governed by a limitation period of specific duration, whether that limitation is found in Chapter 516 or elsewhere.

Similarly, with respect to actions accruing in other jurisdictions, it has been argued that an action governed by a foreign statute of limitation is an "action which . . . , is otherwise limited by . . . statute." Therefore the tolling provisions within the sections designated as "not extending" to such an action, including that which extends the time for rebeginning an action in the event of a nonsuit or dismissal, are not applicable to actions whose limitation periods are governed by a specific foreign period made applicable by virtue of the borrowing statute.<sup>251</sup> Fortunately the Missouri Supreme Court has not been misled by such sophistry. It held that the extension provisions apply in a case where the plaintiff suffers a nonsuit even though the action, under the borrowing statute, is limited by a specific foreign statute.<sup>252</sup>

248. *Young v. Hicks*, 250 F.2d 80 (8th Cir. 1957); cf. *Gaston v. Wabash Ry. Co.*, 322 S.W.2d 865 (Mo. En Banc 1959).

249. § 516.300, RSMo 1959.

250. 331 F.2d 453 (8th Cir. 1964). See text accompanying notes 178-182 *supra*.

251. Compare § 516.190, RSMo 1959, with § 516.300, RSMo 1959.

252. *Turner v. Missouri-Kansas-Texas R. Co.*, 346 Mo. 28, 142 S.W.2d 455 (1940).

This case was decided in 1940, but was apparently not considered by the Eighth Circuit at the time it decided *Hellebrand*. Had the 1940 case been considered controlling, a different result might have followed in *Hellebrand*.

*Example 43:* P sues D in Missouri on a tort committed in Kansas. The action is begun within the period prescribed by Kansas law. P suffers a nonsuit at a point in time outside the limitation of Kansas law applicable under the Missouri borrowing statute. The one year period of grace within which P may renew his action (section 516.230) is applicable and P is not barred even though the action is "otherwise limited by . . . statute."<sup>253</sup>

*Caveat:* this result would not follow if the Kansas tort were one created by statute and carrying its own period of limitation (E.g. wrongful death).<sup>254</sup>

Apparently the same rules applicable to *causes of action* accruing in foreign jurisdictions apply to *judgments* of foreign courts when enforcement of such judgments is sought in Missouri.

*Example 44:* P secures a valid default judgment in a tort action against D in Mississippi, and two years thereafter "registers" this judgment in Missouri. Mississippi bars enforcement of judgments any time later than seven years after entry of the judgment in Mississippi. Eight years following the entry of such judgment in Mississippi, and six years after its registration in Missouri, P seeks execution against D in Missouri. P is barred even though the Missouri limitation on the enforcement of Missouri judgments (ten years) has not expired.<sup>255</sup>

*Example 45:* P secures a valid default judgment against D in Wisconsin where there is a twenty year period within which to seek execution thereon. Twelve years thereafter P seeks enforcement of this judgment in Missouri. P's action is barred by the Missouri ten year limitation on the enforcement of judgments, even though the Wisconsin period is longer. This bar does not offend the full faith and credit clause of the Constitution.<sup>256</sup>

253. *Christner v. Chicago, R.I.&P. Ry. Co.*, 228 Mo. App. 220, 64 S.W.2d 752 (K.C. Ct. App. 1933).

254. *Toomes v. Continental Oil Co.*, 402 S.W.2d 321 (Mo. 1966).

255. § 516.350, RSMo 1959. See *Stanford v. Utley*, 341 F.2d 265, 267-68 (8th Cir. 1965) (referring to unreported decision).

256. § 516.350, RSMo 1959. *Northwestern Brewers Supply Co. v. Vorhees*, 356 Mo. 699, 203 S.W.2d 422 (1947).

The Supreme Court has avoided ruling upon whether a state statute which prescribes a shorter period within which to seek execution upon foreign judgments than the period available to the holders of forum judgments offends the Constitution. However it has indicated that application of the shorter forum period governing forum judgments to a foreign judgment is not prohibited on that account alone.<sup>257</sup>

The situation is a little different under the terms of the federal law governing interdistrict registration of federal judgments. State statutes of limitation ordinarily determine the periods during which such judgments are enforceable. However it has been held that once registered in the forum district, a judgment entered by another District Court assumes (by virtue of a federal provision which goes beyond being "ministerial") the characteristics of a judgment of the state in which the forum court is sitting. For this reason a judgment entered under these circumstances may be enforceable during a more extensive period than would have been authorized by the laws of the state where the judgment was first entered by the federal court sitting therein.

*Example 46:* Same facts as in Example "44" except that the default judgment is entered by a Federal District Court in Mississippi and subsequently registered, pursuant to federal statute, in a Federal District Court in Missouri. Under the interpretations given to the federal statute this judgment is now a "Missouri" judgment, and enforcement is limited only by the more liberal time limitations of Missouri law.<sup>258</sup>

Perceptive followers of the nuances of federal jurisdiction may note that the enforceability of an "extra-district" judgment by a federal court sitting in a state which would otherwise bar such enforcement represents a departure from the so-called "outcome" test which is supposed to govern interpretations of *Erie v. Tompkins*.<sup>259</sup> In this sense it represents an exception to the usual rule, and is consistent with the view that, despite *Erie*, there is a rising tide of "federal common law."<sup>260</sup> It is also interesting to note that this exception on behalf of extra-district judgments was established

---

257. *Watkins v. Conway*, 385 U.S. 188 (1966).

258. *Stanford v. Utley*, 341 F.2d 265 (8th Cir. 1965).

259. 304 U.S. 64 (1938).

260. See Friendly, *In praise of Erie—and the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Morgan, *The Future of a Federal Common Law*, 17 ALA. L. REV. 10 (1964).

some time before the case of *Hanna v. Plumer*,<sup>261</sup> widely hailed as a turning-point case in this area.<sup>262</sup>

## VI. APPRAISAL

Six rather significant observations about the Missouri statutes of limitation and their application in Torts cases are in order.

The first observation concerns the unnecessarily strict application of the "capable of ascertainment" test in actions for malpractice. Legitimate objections may doubtless be made to the extremely liberal "discovery" test, which many jurisdictions have recently adopted.<sup>263</sup> However, an intermediate position between the discovery test and the particular "capable of ascertainment" test applied by the Missouri Courts is logically and socially defensible. Such an intermediate position would establish the cause of action as accruing at that point when the injury was first reasonably capable of ascertainment by this particular plaintiff under the circumstances existing at the time of the alleged negligence and thereafter. The intermediate position would thus avoid exposing physicians and surgeons to unduly stale claims at what may be described as the arbitrary "discovering" prerogative of the plaintiff.<sup>264</sup> On the other hand such an intermediate position would avoid foreclosing a deserving plaintiff from a recovery solely because he failed to detect or fully to understand the source of the injury at an early stage, even though it was technically "capable of ascertainment" at such earlier time.<sup>265</sup> After all, judges must wrestle with the "ordinarily careful

261. 380 U.S. 460 (1965).

262. See, e.g., Comment, *Hanna v. Plumer: An Expanded Concept of Federal Common Law—A Requiem for Erie?* (1966) DUKE L.J. 142; Note, 40 TUL. L. REV. 202 (1965). For a highly critical analysis of the *Hanna* case see Stason, *Choice of Law Within the Federal System: Erie versus Hanna*, 52 CORNELL L.Q. 377 (1967).

263. See, e.g., *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967); *Allen v. Layton*, 235 A.2d 261 (Del. 1967). The objections to the discovery rule are well summarized in *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1203 (1950) (but the authors argue in favor of the discovery rule) and in *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277, 286-90 (1961) (dissenting opinion).

264. The authors of the comment, *Developments in the Law—Statutes of Limitations*, note 263 *supra*, have suggested that the malpractice statute might well begin to run at the point where the plaintiff should "reasonably . . . learn of the harm." *Id.* at 1204. Missouri apparently has no difficulty in applying such a rule where it is a question of an interference with a property right, and the question at what point the statute begins to run relative to the "nuisance." *Lewis v. City of Potosi*, 317 S.W.2d 623 (St. L. Mo. App. 1958).

265. See, e.g., *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771 (St. L. Mo. App. 1933). The Supreme Court of Texas has characterized the rule which would bar a plaintiff from recovery when he is unable to learn of the wrongful act until after the limitations period has expired as "shocking." *Gaddis v. Smith*, 417 S.W.2d 577, 581 (Tex. 1967).



and prudent man" notion whenever a negligence case is tried to the court.<sup>266</sup> It is not unreasonable to ask them to apply a similar test in order to determine the point at which the particular injury first became capable of ascertainment. Moreover, the intermediate position is more consistent with the general statutory provision specifically *rejecting* the notion that an action should accrue at the time the wrong is done or the breach of duty occurs.<sup>267</sup> The argument that the phrase ". . . shall be brought within two years from the date of the act of neglect complained of . . .,"<sup>268</sup> as applied to the malpractice action, indicates a legislative intent to save the otherwise rejected test and apply it exclusively to the malpractice action is not persuasive.<sup>269</sup> More specific statutory language should be necessary to resurrect a rule elsewhere discredited in the statutes. In fact, most of the cases, including the one establishing the "end of treatment" rule,<sup>270</sup> although accepting a harsh "capable of ascertainment" theory, have not gone so far as to measure the limitation period all the way back to the actual moment of the alleged misdoing.<sup>271</sup>

The second observation concerns what may be called the "Hellebrand Heresy."<sup>272</sup> Although strictly not a Missouri case, the Eighth Circuit's incredible interpretation of a statutory provision obviously intended for a limited application,<sup>273</sup> would render all of the tolling and extension provisions of Chapter 516 inapplicable to almost every action at law. The hold-

266. § 510.310, RSMo 1959. Since, in Missouri, the appellate courts exercise a greater responsibility for factual review when there is an appeal from a non-jury case, the argument against confiding responsibility for resolving such delicate fact questions to judges seems even weaker. See, e.g., *Schmitt v. Pierce*, 344 S.W.2d 120 (Mo. En Banc 1961) (trial court's decision not binding, but cannot be set aside unless clearly erroneous—factual question of survival in a common disaster situation); *Rentfro v. Wheelock Bros., Inc.*, 364 S.W.2d 55 (K.C. Mo. App. 1962).

267. § 516.100, RSMo 1959. Missouri has been given credit for a "liberal" position which is not deserved. Compare, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1205 (1950) with *National Credit Associates, Inc. v. Tinker*, 401 S.W.2d 954, 959 (K.C. Mo. App. 1966).

268. § 516.140, RSMo 1959. The phrase which arguably substitutes a different accrual test for that established by § 516.100, RSMo 1959 was included in the special statute passed in 1921. It was apparently designed to resolve the controversy over whether such actions are *ex contractu* or *ex delicto*. Mo. LAWS 1921, S.B. 335, § 1919a. at 198.

269. See McCleary, *Malpractice—When Statute of Limitations Commences in Malpractice Actions*, 9 Mo. L. REV. 102, 106 (1944).

270. *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943); McCleary, *supra* note 269.

271. See, e.g., *Sterling Drug Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966).

272. *Hellebrand v. Hoctor*, 331 F.2d 453 (8th Cir. 1964). See text accompanying notes 178-182 *supra*.

273. § 516.300, RSMo 1959. See, e.g., *Turner v. Missouri-Kansas-Texas R. Co.*, 346 Mo. 28, 142 S.W.2d 455 (1940).

ing is inconsistent with earlier Missouri authority.<sup>274</sup> The Federal Court of Appeals, at that time concerned only with the immediate problem before it, was probably not aware of the implications of the holding.<sup>275</sup>

The third observation is that Missouri is reluctant to accord an unusual classification to a cause of action in order to extend to it the benefit of lengthier statute of limitations. Even one of the more notable exceptions to this practice (personal injuries in a train wreck actionable as breach of contract of carriage)<sup>276</sup> can be harmonized with the other cases in terms of a few precedents classifying passenger actions against common carriers as deriving fundamentally from contract.<sup>277</sup>

The fourth observation is a caveat about special statutory actions which carry their own "built in" statutes of limitation (E.g., wrongful death.)<sup>278</sup> Such actions are not subject to the normal "tolling" and extension provisions of Chapter 516. Many of the assumptions which can be innocently made about such statutes of limitation may prove to be wrong.<sup>279</sup>

The fifth observation concerns the "borrowing" statute<sup>280</sup> and the warning that it does not reach foreign limitations which are "built in" the foreign cause of action.<sup>281</sup> It should be remembered that an action brought in Missouri on a foreign cause of action with a "built in" limitation will not receive, even though it is a Missouri action, the protection of the tolling and extension provisions of Chapter 516.

The sixth observation concerns the absence of any official or objective reappraisal of Missouri's limitations picture. These statutes of limitation establish a limited time during which an aggrieved party may seek redress from an alleged tortfeasor. They must necessarily attempt to strike a balance

274. *Ibid.*

275. *Hellebrand v. Hoctor*, 331 F.2d 453, 455 (8th Cir. 1964). Since the Court of Appeals indicated that the complaint did not sufficiently invoke the "improper act" tolling provision of § 516.280, RSMo 1959 in the first place, its observations concerning the reach of § 516.300, RSMo 1959 can be regarded as dicta.

276. *Williams v. Illinois Cent. R. Co.*, 360 Mo. 501, 229 S.W.2d 1 (1950).

277. Cases allowing passenger recoveries for mental suffering and/or humiliation unaccompanied by physical contact are frequently explained in terms of the contractual, as opposed to tort, nature of the action. See, e.g., *Gebhart v. Pub. Service Coordinate Transport*, 48 N.J. Super. 173, 137 A.2d 48 (1957) (dictum); *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S.W. 557 (1899).

278. § 537.100, RSMo 1967 Supp. (two years).

279. See, e.g., *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958); Note, 24 Mo. L. REV. 397 (1959); Note 35 N.D.L. REV. 171 (1959); text accompanying notes 52-53 *supra*.

280. § 516.390, RSMo 1959.

281. See, e.g., *Toomes v. Continental Oil Co.*, 402 S.W.2d 321 (Mo. 1966). For a discussion of the practical consequences which derive from the theoretical rule that the "borrowing" statute does not apply to foreign causes of action with "built in" limitations, see text accompanying notes 225-230 *supra*.

between the social need to insulate men from the harassment of stale claims and the needs of deserving claimants for reasonable periods of time within which to bring to the courts the demands, which our traditions say they should be permitted to bring.

Striking such balances is not easy. One may well question whether the particular balances struck in Seventeenth Century England,<sup>282</sup> even if accurate at that time, can be justified today. In this respect, disparities between adjoining states with arguably similar socio-economic structures suggest that the present limitations system may not be as rational as one would like it to be.

## LIMITATIONS PERIODS (in years)

Actions	One	Two	Three	Four	Five
Negligence		Okla. Kansas Iowa Illinois		Nebraska	Missouri
Libel & slander— assault & battery etc.	Illinois (libel & slander) Okla. Kansas Nebraska	Missouri Iowa Illinois (assault & battery)			
Malpractice		Illinois* Iowa Okla. Kansas Nebraska Missouri			
Oral contracts			Kansas Oklahoma	Nebraska	Missouri Iowa Illinois

\*Illinois will reclassify as a contract action in order to avoid short statute. See *Doerr v. Villate*, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

*Chart Showing Different Limitations Periods in Missouri and in Five Bordering Midwestern States<sup>283</sup>*

While some rule may be better than no rule, the very arbitrariness of the statutes of limitation presents an almost insurmountable barrier to even

282. 21 Jac. I., c.16 (1623). For a review of this statute and its present day influence on Missouri law see *Woodruff v. Shores*, 354 Mo. 742, 745, 190 S.W.2d 994, 995 (1945); 12 Mo. L. Rev. 86 (1947).

283. ILL. REV. STAT. ch. 83, §§ 15-16 (1957); Iowa Code Ann. § 614.1 (1950); KSA 60-512, 513 (1963); NEB. REV. STAT. of 1943 §§ 25-206-208 (1964 Revision); 12 OKLA. STAT. ANN. § 95 (1960); §§ 516.120, .140, RSMo 1959.

the most ingenious of judges.<sup>284</sup> However logical the defenses and the explanations marshalled in support of arbitrary periods of limitation, they may well be as out of phase with the present goals of our legal system as the defense of "contributory negligence" appears to be.<sup>285</sup>

The statutes of limitation of any jurisdiction comprise an elaborate and intricate system of rules which can challenge the analytical techniques of the best lawyers. Until a sufficiently broad empirical study is made of the consequences and attitudes generated within these varying systems<sup>286</sup> we cannot know how desirable a balance any given limitations system presently strikes. A few of the decisions herein discussed suggest that in Missouri, at least, the balance may not be particularly well struck.<sup>287</sup>

284. Under Professor Llewellyn's "rule skepticism" theory competent judges are supposedly capable of fulfilling the "essential intent" of the law while simultaneously paying homage to the formal precepts of the system. LLEWELLYN, *THE COMMON LAW TRADITION* 191-94 (1960). See also Rumble, *Rule Skepticism and the Role of the Judge: a Study of American Legal Realism* 15 J. PUB. L. 251 (1966). In the shift from the "capable of ascertainment" to the "discovery" test in actions for malpractice, one can observe Professor Llewellyn's theory in action. See, e.g., *Allen v. Layton*, 235 A.2d 261 (Del. 1967). Whether this theory could overcome the one year obliteration of the battery action in a situation where "wrongful act" and "discovery" are simultaneous would seem to be of some doubt. *But see Stricklin v. Parsons Stockyard Co.* 192 Kan. 360, 388 P.2d 824 (1964) (injury resulting from "horseplay" characterized as "negligence" in order to grant plaintiff the benefit of the more liberal limitations period). See chart and authorities accompanying note 283 *supra*.

285. See, e.g., *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).

286. Two superb examples of the type of scholarship seriously exploring the extent to which statutory changes or programs in fact produce the results intended are MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* (1966); and ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964).

287. See, e.g., *Girth v. Beaty Grovery Co.*, 407 S.W.2d 881 (Mo. 1966) (all parties are Missourians, but claim barred by the Iowa statute where the accident happened to take place); *Toomes v. Continental Oil Co.*, 402 S.W.2d 321 (Mo. 1966) (renewal of action barred solely because Kansas regards its wrongful death limitation as "built in"); *National Credit Associates v. Tinker*, 401 S.W.2d 954 (K.C. Mo. App. 1966) (malpractice limitation begins to run from time of act and not time of discovery); *Hellebrand v. Hoctor*, 331 F.2d 453 (8th Cir. 1964) (statute ran even though plaintiff allegedly physically restrained from maintaining action); *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958) (statute ran even though plaintiff unable to determine identity of tortfeasor); *Hunter v. Hunter*, 361 Mo. 799, 237 S.W.2d 100 (1951) (statute ran because plaintiff was imprisoned for life, rather than for a lesser term—hence claim barred after pardon and release); *State ex rel. Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347 (En Banc 1944) (no probate of will fraudulently concealed by undertaker); *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994 (1945) (statute ran from moment of confinement under allegedly false certification of insanity); *Krueger v. Walters*, 238 Mo. App. 340, 179 S.W.2d 615 (K.C. Ct. App. 1944) (mistaken venue cannot support a new action under the saving statute); *Allison v. Mo. Power & Light Co.*, 59 S.W.2d 771 (St. L. Mo. App. 1933) (in personal injury action statute begins to run at moment injury is objectively capable of ascertainment, and *not* when discovered by victim).