1936

Mistake and Statutes of Limitation

John P. Dawson

MISTAKE AND STATUTES OF LIMITATION

By JOHN P. DAWSON*

THE suspension of statutes of limitation for claims founded on mistake presents peculiar difficulties. These difficulties arise in part from confusion as to the theory and purpose of relief on the ground of mistake. The recognition of mistake as a ground for attack on formally valid transactions has come late in the history of most legal systems. The consequences of mistake cannot be described in any simple formula, since mistakes can occur at various stages in transactions of the most diverse types. But even when a variety of remedies for mistake have been developed in the maturity of a legal order, the problem of limitation of actions remains a troublesome one. The essence of mistake is ignorance, and ignorance, so long as it persists, is an effective obstacle to the prosecution of a claim. If such ignorance is so far excusable that legal remedies are available to the mistaken party, it would seem that the statute of limitations should not commence to operate until this obstacle is removed. On the other hand, it is seldom possible in cases of mistake to point to any fault in the opposite party which should deprive him of statutory protection. It was the element of fault in the opposite party, rather than any special solicitude for the credulous and unwary, that led to the development of the "fraud" and "fraudulent concealment" exceptions in American law.[1] Deprived in mistake cases of this persuasive reason for suspension of the statute, courts can look for guidance only to the underlying purposes and broader social policies of limitation legislation.

The problem would be simplified if the purposes and policies of limitation acts were anywhere clearly defined. Some time limitations on judicial remedies are imperatively required, as the most superficial observation will reveal. Practical considerations demand at some point the elimination of "stale" claims, with their attendant risks of perjured or fabricated testimony. A

*Associate Professor of Law, University of Michigan Law School, Ann Arbor, Michigan.

[1]These two grounds for suspension of statutes of limitation are discussed by the writer in "Undiscovered Fraud and Statutes of Limitation," (1933) 31 Mich. L. Rev. 591, and "Fraudulent Concealment and Statutes of Limitation," (1933) 31 Mich. L. Rev. 875.

broader social interest as well requires protection for the expectations gradually built up through lapse of time. Conduct becomes adjusted to the supposed finality of transactions long since closed. It is dangerous to uproot or arrest the incessant processes of growth and change. "We must get on."

Such considerations as these amply justify the general policy of limiting actions within more or less arbitrary periods. But they are met by countervailing considerations of policy where practical difficulties obstruct the normal processes of litigation—for example, where the defendant is a non-resident or eludes service of process, where war or internal disturbance cuts off access to the courts, or where the claimant is justifiably ignorant that his cause of action exists. Furthermore, the social interest behind the limitation of actions varies greatly in different types of cases. Three years may be thought a long enough period for the reclaiming of personal property, twenty years for land; two years' delay may bar an action for malpractice and six years may be allowed in actions for breach of contract. Differences such as these are expressed in the texts of limitation acts, and the statutes also grant some exemptions to litigants who have been handicapped. But the distinctions drawn by statute do not begin to reflect the diversity of human situations within the scope of such legislation. Nor is it practicable to record all these diversities in legislation that cut across the whole range of judicial remedies. From the brief and generalized language of limitation acts there results a strong temptation for courts to create "implied exceptions" and to fill gaps in the statutory scheme by purely verbal manipulation.[2]

In actions for relief on the ground of mistake the need for free judicial activity is increased by the absence in most states of express legislative provision. In only twelve states are there express exceptions for cases of mistake, suspending the statute until "discovery" as in cases of fraud.[3] In other states claims based on

[2]For example, in the wide scope of the concept "fraud" in states recognizing a fraud exception. See Dawson, Undiscovered Fraud and Statutes of Limitation, (1933) 31 Mich. L. Rev. 591, especially pp. 607-623. Similarly, the concept of "fraudulent concealment" has been shaped (more or less consciously) so as to conform to the complex factors of policy which cut across its fields of operation. See Dawson, Fraudulent Concealment and Statutes of Limitation, (1933) 31 Mich. L. Rev. 875.

[3]Arizona, Rev. Code (1928) sec. 2060; California, Code Civ. Proc. (1931) sec. 338 (4); Idaho Comb. Stats. (1932) 5-218 (4); Iowa Code (1931) sec. 11010; Kentucky Statutes (1930) sec. 2519; Montana, Rev. Code (1921) sec. 9033 (4); Nevada, Rev. Laws (1929) sec. 8524; New

mistake receive no special treatment and are controlled by the general provisions for equitable actions, actions based on "contract, express or implied," etc. In these states, where no express exception exists, the problem is most acute, and some significant results have been reached in the modern cases. After discussing them an attempt will be made to describe briefly the effects of express legislative provision for cases of mistake and to compare them with the results reached in most states without the aid of statute.

1. In the Absence of Statutory Provision.

An "implied exception" for actions based on mistake first appeared in England as a rule of equity, applicable only to actions brought in the chancery.[4] The most persuasive reason suggested at this stage for a "mistake" exception was the difficulty of distinguishing mistake from fraud, which had already been recognized as a ground for extending the period of limitation in equitable actions.[5] That there was some room for a distinction between fraud and mistake was suggested, however, by the unspoken assumptions of Lord Mansfield in *Bree v. Holbech*.[6] Here, in an action at law, Lord Mansfield indicated that fraud might be allowed to suspend the statute, but no similar indulgence was suggested for claims based on mistake.[7]

Mexico, Ann. Stats. (1929) 83-123; North Carolina Code (1929) sec. 441 (9); Oregon, Ann Code (1930) sec. 6-103; Utah, Comb. Laws (1933) 104-2-24 (3). The Oregon act applies only to suits in equity. The Kentucky act provides an absolute 10-year limitation from the date of the "making of the contract," no matter how long discovery may have been postponed.

It will be observed that most of this legislation is in force in the far western states, where the influence of the California Code has been strong. As early as 1872 the Field Code in California placed mistake beside fraud as a ground for suspending statutes of limitation. California Code of Civil Procedure (1872) sec. 338 (4).

[4]Brooksbank v. Smith, (1836) 2 Y. & C. (Exch.) 58 J. P. D. 6 L. J. Ex. Eq. 34. This was an action brought by trustees for specific restitution of stock transferred by them to persons who were thought to be entitled under the will of the original owner, in ignorance of the claim to a 1/6 share of the grandchildren of the original owner. See also Harris v. Harris, (1861) 29 Beav. 110.

[5]Particularly in the case of Booth v. Lord Warrington, (1714) 4 Brown's Parl. Cases 63. See Dawson, Undiscovered Fraud and Statutes of Limitation, (1933) 31 Mich. L. Rev. 591, 597-8.

[6](1781) 2 Doug. 654.

[7]The action was in assumpsit for money paid to defendant seven and a half years before the action was brought. The theory of the action was breach of warranty, the warranty consisting in defendant's assertion that one W.H., of whose estate defendant was administrator, owned a mortgage of £1200, which defendant purported to assign to plaintiff on payment of the money now sued for by plaintiff. Defendant demurred to plaintiff's

In early American cases the "mistake" exception was quite generally described as a creature of equity. The recognition of an implied exception for cases of mistake was chiefly due to the influence of Mr. Justice Story, who declared it to be the settled rule of equity that in cases of mistake the statute ran only from discovery.[8] In several equity cases, governed not by general statutes of limitation but by the more flexible doctrine of laches, this language of Story was accepted at face value and the period of unjustified delay was computed only from the date of discovery.[9] The contrast between law and equity was sharpened by the growing body of decisions which refused to suspend the statute in law actions based on mistake.[10]

A sharp division between legal and equitable actions was made to seem artificial by the code mergers of law and equity and by the increasing fusion of law and equity doctrines. As the nineteenth century progressed, appellate courts were presented with a choice between extending the equitable rule to various types of law actions and rejecting entirely this dubious product of the chancellor's indulgence. The choice, when reduced to these simple terms, was a difficult one. The equity tradition was still strong,

---

replication alleging no discovery until within six years. Lord Mansfield, in discussing the effect of the demurrer, made the suggestion which was taken up in American cases and became the foundation for an "implied exception" in cases of fraud: "There may be many cases where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent. . . . There may be cases too, which fraud will take out of the statute of limitations." This suggestion was not merely dictum, for leave was then given to the plaintiff to amend, "in case upon inquiry the facts would support a charge of fraud." But on the facts as alleged it was held that the statute of limitations was not suspended, since no fraud was shown.

Bree v. Holbech did not directly involve a claim based on mistake, but it would have been easy to find the elements of remediable mistake if the court had considered this a sufficient ground for suspending the statute. The effect of the case is somewhat weakened by Lord Mansfield's further remark that "It was incumbent on the plaintiff to look to the goodness of the title." But this statement, taken in conjunction with the rest of the opinion, may be taken as an indication that non-discovery by the plaintiff would be excused only if there was direct misrepresentation in the case.

[8]Story, Equity Jurisprudence, sec. 1521a.

[9]Stone v. Hale, (1850) 17 Ala. 557, 52 Am. Dec. 185; Ormsby v. Longworth, (1860) 11 Oh. St. 653; Emerson v. Navarro; (1868) 31 Tex. 335, 98 Am. Dec. 534; Harris v. Ivey, (1897) 14 Ala. 363, 21 So. 422; Hall v. Otterson, (1894) 52 N. J. Eq. 522, 28 Atl. 907. See also the earlier cases of Crane v. Prather, (1830) 4 J. J. Marsh. (Ky.) 75, and Frankfort Bank v. Markley, (1833) 1 Dana (Ky.) 373.

[10]Ely v. Norton, (1822) 6 N. J. L. 187; Bishop v. Little (1825) 3 Me. 405; Gatlin v. Darden, (1835) 21 N. C. 72; Bank of the United States v. Daniel, (1838) 12 Pet. (U.S.) 32, 9 L. Ed. 989; Sturgis v. Preston (1883), 134 Mass. 372; Schultz v. Board of Commissioners (1883), 95 Ind. 322; and other cases cited below, note 41.

and it permitted suspension of the statute in some cases that were clearly meritorious. The development in judicial decision and the recognition by statute of a "fraud" exception, available in both legal and equitable actions, provided a persuasive analogy.[11] On the other hand, an inclusive exception for all cases of mistake was not recognized by express legislation in most states and on grounds of policy was not easy to justify. Serious conflict developed in judicial decision. The historic distinction between legal and equitable actions continued to play some part and has not yet completely disappeared,[12] but the problem evidently called for treatment along new and original lines.

Judicial experience with other mistake problems pointed increasingly to a distinction, not between law and equity, but between various types of mistake. This distinction of types is nowhere formulated in any clear or organized way. Even now it is impossible to point to the decisions of any single state that explicitly

[11]The early history of the "fraud" exception is discussed by the writer in Undiscovered Fraud and Statutes of Limitation, (1933) 31 Mich. L. Rev. 591, 597-606. As is there pointed out, the cases were about evenly divided as to the propriety of extending the equitable rule to law actions, but a considerable body of decisions had done so in advance of express legislation. At the present time only four states preserve the wholly artificial distinction between legal and equitable actions, and in one of these (Iowa) its effect is largely nullified by recognition of an "implied exception" for cases of fraudulent concealment. See (1933) 31 Mich. L. Rev. 626-636.

[12]In England the distinction between law and equity is still preserved, but the tendency in twentieth century cases has been to restrict the field of operation of the equitable rule. Baker v. Courage and Co., [1910] 1 K. B. 56, 79 L. J. K. B. 313, 101 L. T. 854; In re Robinson, [1911] 1 Ch. 502, 80 L. J. Ch. 381, 104 L. T. 331.

In Virginia apparently no distinction was drawn between legal and equitable actions in a series of decisions. Craufurd v. Smith, (1896) 93 Va. 623, 23 S. E. 235; Hull v. Watts, (1897) 95 Va. 10, 27 S. E. 829; Hall v. Graham, (1911) 112 Va. 560, 72 S. E. 105. But dicta in Grove v. Lemley, (1912) 114 Va. 202, 76 S. E. 305, revived the historic distinction between law and equity in the application of the statute.

In Texas the early cases limited the mistake exception to actions in equity. Smith v. Fly, (1859) 24 Tex. 345, 76 Am. Dec. 109 (dicta); Emerson v. Navarro, (1868) 31 Tex. 335, 98 Am. Dec. 534. But later cases have extended it to both legal and equitable actions. Oldham v. Medearis, (1897) 90 Tex. 506, 39 S. W. 919; Hohertz v. Durham, (Tex. Civ. App. 1920) 224 S. W. 549; Ray v. Barrington, (Tex. Civ. App. 1927) 297 S. W. 781.

The state of the Massachusetts cases is now uncertain. Gould v. Emerson, (1894) 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501, suspended the statute in an equity action for the correction of a partnership accounting. In State Nat'l Bank v. Beacon Trust Co., (1929) 267 Mass. 355, 166 N. E. 837, no attempt was made to overrule Gould v. Emerson, but strong language was used to the effect that the statute is not suspended either at law or in equity in cases of payment of money through mistake.

recognizes such a distinction. It is a typical product of common law empirical methods, which have played so large a role in developing the remedies for mistake in American law. The result, as in so many instances for judicial empiricism, is confusion, uncertainty, and a distressing vagueness of contour. But it is believed that the lines which have slowly emerged in modern law have begun to reflect the social interests which limitation acts are intended to protect.

The main line of distinction lies between actions to reform written instruments and actions for restitution of money paid. These classes of actions will be first considered, and attention will then be directed to a variety of other cases not so readily classified.

A. *Actions to Reform Written Instruments.*—The theory and purpose of actions to reform written instruments suggest strong reasons for extension of the period of limitation. The purpose of such actions may be described briefly as the enforcement of an intention defectively expressed. In the normal case the mistake in expression is "mutual," in the sense that the instrument fails to correspond with the intentions of *both* parties. In abnormal cases, where one of the parties was aware of or responsible for the discrepancy, the purpose of reformation will still be the enforcement of their common intention, and the party resisting reformation will from a moral point of view be in an even weaker position, since he seeks deliberately to take advantage of an error for which he is responsible.[13] It is true that difficulties arise in defining the outer limits of the reformation field, particularly where the writing accurately expresses the agreement but would have been drafted otherwise if all the facts had been known.[14] But in the mine-run of reformation cases the real controversy is concentrated on questions of evidence, and the attention of courts is chiefly directed to securing satisfactory proof of the mistake, which, it is said, must be "clear and convincing." Once this requirement is met, reformation goes almost as a matter of course.

A remedy given for such a purpose and with such qualifications will not ordinarily undermine the security of completed transactions. On the contrary, its effect ought in theory to be the

[13]Palmer v. Hartford Fire Ins. Co., (1887) 54 Conn. 488, 9 Atl. 248; Dazey v. Binkley, (1918) 285 Ill. 513, 121 N. E. 165; and cases cited by Williston, Contracts, sec. 1525.

[14]See, for example, Central Nat. Bank v. First Nat'l Bank, (1930) 158 Miss. 93, 130 So. 99, discussed in (1931) 29 Mich. L. Rev. 386; and see further Williston, Contracts, sec. 1548.

reinforcement of justifiable expectations. The longer these expectations have existed unchallenged, the more entitled they should be to judicial protection. Especially should this be true where the conduct of the parties through the intervening period supplies corroborating proof of the original mistake and thus reduces the risks of "stale" and trumped-up evidence.

This approach to the reformation problem may be best illustrated by cases where the title to real property is in dispute. Here the state of the possession will often provide important evidence, either contradicting or corroborating the plaintiff's claim of mistake in the chain of title. If the party resisting reformation has been in undisturbed possession for a considerable period, a claim of mistake will be entitled to little credence. In such cases two other safeguards may likewise exist. The opposite party's possession would ordinarily suggest the existence of an adverse claim, and thus lead either to "discovery" or suspicion of the claimed mistake.[15] In addition, even in the absence of discovery or suspicion, doctrines of adverse possession might operate independently to safeguard a possession that was open and adverse for the requisite period.[16]

---

[15]Even the most lenient rules for the limitation of actions require that lapse of time be computed from the "discovery" of the mistake. This is true whether limitation is accomplished by express statutory provision or by the more flexible rule of laches in equity. But "discovery" is uniformly construed to mean not merely actual knowledge of the mistake but the existence of avenues through which the mistake *could have been* discovered through the exercise of reasonable diligence. Ewin v. Ware, (1841) 41 Ky. 65; Dye v. Holland, (1868) 67 Ky. 635; Smith v. Fly, (1859) 24 Tex. 345; Durham v. Luce, (Tex. Civ. App. 1911) 140 S. W. 850; Grove v. Lemley, (1912) 114 Va. 202, 76 S. E. 305; Craig v. Gauley Coal Land Co., (1914) 73 W. Va. 624, 80 S. E. 945. Even under statutes expressly postponing the accrual of the cause of action until "discovery," the same interpretation is everywhere adopted. Shain v. Sresovich, (1904) 104 Cal. 402, 38 Pac. 51; West v .Fry, (1907) 134 Ia. 675, 112 N. W. 184; Nave v. Price, (1900) 108 Ky. 105, 55 S. W. 882; Peacock v. Barnes, (1906) 142 N. C. 215, 55 S. E. 99; Stancill v. Norville, (1932) 203 N. C. 457, 166 S. E. 319; Weight v. Bailey, (1915) 45 Utah 584, 147 Pac. 899; Reese Howell Co. v. Brown, (1916) 48 Utah 142, 158 Pac. 684.

In cases of "fraud" and "fraudulent concealment" the broader purposes of limitation acts have similarly enlarged the definition of "discovery" to include the possession of information through which the cause of action *could have been* discovered through reasonable diligence. There, as in cases of mistake, the result has been to introduce an important element of judicial discretion in assessing the reasonableness of the plaintiff's delay. See Dawson, Undiscovered Fraud and Statutes of Limitation, (1933) 31 Mich. L. Rev. 591, 619-620; Fraudulent Concealment and Statutes of Limitation, (1933) 31 Mich. L. Rev. 875, 886.

[16]As in Craven v. Craven, (1914) 181 Ind. 553, 103 N. E. 41, and McKinney v. Beattie, (1926) 157 Ark. 356, 248 S. W. 280.

On the other hand, if the party *seeking* reformation has been in undisturbed possession and this possession is consistent with his claim of a prior mistake in expression, the acquiescence of the opposite party will of itself corroborate the claim of mistake. Furthermore, to grant the remedy of reformation will actually tend to stabilize relationships that have, from lapse of time, derived the look of permanence.

In the relatively early case of *Ormsby v. Longworth*,[17] such reasoning was used to justify reformation after a delay by the plaintiffs of nearly 35 years. The action was brought January 30, 1854, to reform a deed executed by defendant's ancestor, February 3, 1819. The plaintiffs sought to have words of inheritance inserted in place of language conveying merely a life estate, and also to secure the execution of a valid certificate of acknowledgment. The plaintiffs had gone into possession, had sold some parts of the tract in question, and had leased others. The grantor in conversation, in letters, and through other deeds executed by himself, had indicated his own belief that a fee simple title had been effectively transferred to the plaintiffs. The court, in affirming a decree for the plaintiffs, emphasized the fact that no statute of limitations was in force applying to equitable actions, so that in applying the doctrine of laches the court was perfectly free to look only to the date of discovery in computing the period of unreasonable delay. On the facts of the particular case the court could see no reason why mistake should not be treated on the same basis as fraud, since "mistake is as much 'a secret thing' as fraud" and it would be just as unconscionable for the defendants to set up the statute here as if they had been guilty of fraud. The court acknowledged that it was going a long way in permitting relief after so long a delay and concluded as follows:

"We therefore take occasion to add a word of caution, that this case may not be drawn into precedent, except in cases like this, where the correcting of the mistake involves no change of possession, disturbs no investment, and leaves the future enjoyment of the property involved to go in harmony with the prior acts of the parties in interest."

In other states where general statutes of limitation had not as yet been extended to include actions in equity, this type of reasoning was freely used to justify reformation in favor of

[17](1860) 11 Oh. St. 653.

grantees in actual possession.[18] But the freedom of equity in its treatment of lapse of time had been greatly curtailed in most states by the end of the nineteenth century. Either by express reference to equitable actions or by omnibus provisions for "actions not otherwise provided for," a maximum time limit has very commonly been fixed.[19] To insert an implied exception for reformation cases in the structure of modern limitation acts, courts in most states found it necessary to employ some technical device consistent with express statutory provisions.

The principal device used for the suspension of the statute, in cases of mistake as in cases of fraud, is a redefinition of the phrase "cause of action." This phrase is widely used in modern limitation acts but is left essentially undefined. In most cases courts have assumed that the "cause of action" accrues when the fact elements of liability exist, and have refused to postpone its accrual where there are practical obstacles to the start of suit. But this formula clearly has no uniform and consistent meaning; it is used for a variety of purposes besides the limitation of actions; and in each case its content should depend on the purposes for which it is employed.[20] Where express legislation permits an extension of the period of limitation for claims based on mistake, the usual method is merely to declare that the "cause of action" in such cases does not accrue until discovery.[21] Even under statutes which fix a definite time limit on equitable actions a majority of the

[18]McIntosh v. Saunders, (1873) 68 Ill. 128 (plaintiff in possession from 1823, date of deed, to 1869, start of suit); Harris v. Ivey, (1897) 114 Ala. 363, 21 So. 422 (plaintiff and his grantor in possession for more than 10 years). See also Hall v. Otterson, (1894) 52 N. J. Eq. 522, 28 Atl. 907.

The case of Ainsfield v. More, (1890) 30 Neb. 385, 46 N. W. 828, involved a misdescription in a deed of brush and timber land of which no one was in actual possession, though plaintiff's predecessors in interest had occasionally sent persons onto the tract to cut timber for firewood. The court relied in part on the express exception in the Nebraska statute for cases of fraud, declaring that "fraud, accident, and mistake have always been classed together as the three great fountains of equity jurisprudence." It chiefly relied, however, on the reasoning of Ormsby v. Longworth, (1860) 11 Ohio St. 653, pointing out that, as in that case, reformation would not involve any change of possession or any disturbance of investments by the party resisting reformation, but would "leave the property to go in harmony with the prior acts of all the parties in interest."

[19]See, for example, N. Y. Civil Practice Act (1920) sec. 53, the section applied in Treadwell v. Clark, (1907) 190 N. Y. 51, 82 N. E. 505; also the statutory provisions applied in Barnes v. Barnes, (1928) 157 Tenn. 332, 8 S. W. (2d) 481, and Hoester v. Sammelmann, (1890) 101 Mo. 619, 14 S. W. 728.

[20]This question is more fully discussed in connection with claims based on fraud in (1933) 33 Mich. L. Rev. 591, 602-606.

[21]See the statutes cited above, note 3.

modern cases postpone the accrual of the cause of action in suits to reform title deeds, brought by plaintiffs who can show an undisturbed possession consistent with their claim of mistake.[22] The three decisions in which an opposite result has been reached could all have been placed on other grounds.[23]

A second device has also been used to suspend the statute where the conduct of the parties tends strongly to corroborate the claim of mistake in expression. This device is the use of reformation for purely *defensive* purposes, even where an action for affirmative relief would be barred. It is possible to justify this step by strict construction of statutory language, which usually applies in terms to *actions* but not to *defenses*.[24] But this strict construction, if pressed to its logical conclusion, will undermine, to an important extent, the statutory policies,[25] and it is by no

[22]Pinkham v. Pinkham, (1900) 60 Neb. 600, 83 N. W. 837; Duvall v. Simpson, (1894) 53 Kan. 291, 36 Pac. 330; Jackson-Walker Coal Co. v. Miller, (1913) 88 Kan. 763, 129 Pac. 1170; Harris v. Flowers, (Tex. Civ. App. 1899) 52 S. W. 1046; Louisiana Oil Refining Co. v. Gandy, (1929) 168 La. 37, 121 So. 183.

[23]For example, in Regier v. Amerada Petroleum Corp., (1934) 139 Kan. 177, 30 P. (2d) 136, there was not only insufficient evidence of the original mistake but actual knowledge by the plaintiff many years before. The court, however, took the opportunity to declare that it would no longer admit an exception for claims based on mistake, that it would not follow the earlier Kansas cases (cited in the preceding note) which recognized such an exception in reformation cases, and that the matter was controlled by the sweeping language of other Kansas cases to the effect that exceptions to limitation acts could only be created by legislation.

In Barnes v. Barnes, (1928) 157 Tenn. 332, 8 S. W. (2d) 481, the plaintiffs sought to reform a deed by striking out the name of the wife in a conveyance made jointly to husband and wife. The husband had remained in possession of the tract conveyed for 21 years, until his death in 1923, so that the state of the possession did not reinforce the plaintiffs' claim of mistake. Nor did it appear that the delay in discovering the mistake was not due to the plaintiffs' own neglect. The court did declare, however, that no new exceptions to the statute of limitations could now be recognized without express statutory provision.

Hoester v. Sammelmann, (1890) 101 Mo. 619, 14 S. W. 736, might have been disposed of merely on the ground that plaintiff's complaint failed to allege the mistake with the requisite certainty. But there is language to the effect that actions for reformation are barred in 10 years under the clause for "actions . . . not herein otherwise provided for" and the court apparently treats the "cause of action" as accruing at the time the mistake occurred.

[24]Compare cases of fraud, where this reasoning has very commonly been used to admit defenses of fraud after affirmative actions were barred. See Dawson, Undiscovered Fraud and Statutes of Limitation, (1933) 33 Mich. L. Rev. 591, 624-6.

[25]It has been held, for example, that a claim for money overpaid through mistake cannot be used as a set-off or counterclaim in an action brought on a wholly independent cause of action. Richardson v. Bales, (1899) 66 Ark. 452, 51 S. W. 321; Montgomery's Appeal, (1879) 92 Pa. 202; Baker v. Courage and Co., [1910] 1 K. B. 56, 79 L. J. K. B. 313, 101 L. T. 854.

means clear that "defensive" reformation can always be secured if an affirmative action would be barred.[26] This reasoning has been used chiefly where defendant has remained in continuous, undisturbed possession of land, in ignorance of the claim of title on which the plaintiff's action was based. In such cases there are the same reasons for admitting a *defense* of mistake as there are for redefining the "cause of action" in an action for affirmative relief. Several courts have held that an attempt to dispossess the defendant can be resisted by showing a mistake in the deeds on which the plaintiff's title depends. This conclusion is usually reinforced by the suggestion that the "cause of action" for reformation does not accrue to the defendant until he receives notice of the plaintiff's adverse claim.[27]

But the policy which justifies suspension of the statute in such cases may operate with equal force in situations where a long-continued possession of real estate does not lend support to the claim for reformation. In some of the cases already referred to, the "possession" was somewhat shadowy; for example, in cases of waste land where occasional entries were the only index of the

[26]In Bradbury v. Higginson, (1914) 167 Cal. 553, 140 Pac. 254, an action was brought by a lessor for rent, and defendant counterclaimed for reformation of the lease to insert a covenant to supply water. The counterclaim was rejected because the mistake could have been discovered by the lessee sooner than the statutory period before the counterclaim was filed. In Sanders v. Sanders, (1931) 117 Cal. App. 231, 3 P. (2d) 599, the husband's counterclaim for reformation of his agreement to pay alimony was rejected, since the mistake in the written contract was discovered more than the statutory period before the action was brought. To the same effect, Bennett Jellico Coal Co. v. East Jellico Coal Co., (1913) 152 Ky. 838, 154 S. W. 922.

Buck v. Equitable Life Assurance Society, (1917) 96 Wash. 683, 165 Pac. 878, reached the opposite result. There the plaintiff sued on a life insurance policy issued in 1901 and containing a cash surrender clause in which the cash surrender value was through mistake stated to be $1000 instead of $408. In 1904 defendant wrote plaintiff notifying him of the mistake, but nothing further was done. In plaintiff's action brought some years later it was held that the defense of mistake was available so long as plaintiff was in a position to sue on the policy.

[27]Bartlett v. Judd, (1860) 21 N. Y. 200; DeForest v. Walters, (1897) 153 N. Y. 229, 47 N. E. 294; Pinkham v. Pinkham, (1900) 60 Neb. 600, 83 N. W. 837, (1901) 61 Neb. 336, 85 N. W. 285; Mask v. Tiller, (1883) 89 N. C. 423; Stith v. McKee, (1882) 87 N. C. 389; Newborn v. Gould, (1933) 162 Okla. 82, 19 P. (2d) 157; Newman v. J. J. White Lumber Co., (1932) 162 Miss. 581, 139 So. 838. In the case last cited defendant and her predecessor in title had been in possession of the tract in question from the date of the deed of which reformation was sought. The court treated defendant's claim as primarily defensive, although it was necessary for defendant to file a cross-bill with a prayer for affirmative relief, since the joinder of new parties was necessary for a reformation. See also the dicta in the early case of Gatlin v. Darden, (1835) 21 N. C. 72.

parties' assumptions as to the state of the title.[28] Where the mistake relates to interests in land which would not ordinarily carry with them a right to immediate and exclusive possession, other acts (such as payment of taxes) can perform the same function in supplying evidence of the attitudes of the interested parties.[29]

In the cases discussed up to this point the factor chiefly discussed has been the conduct of the party *seeking* reformation; the party resisting reformation has merely stood by in passive acquiescence. Still stronger reasons for suspension of the statute appear where the party resisting reformation has by his own conduct misled the plaintiff and helped to conceal the mistake. This conduct may go so far as to involve a "fraudulent concealment" and thus provide an independent ground for suspension of the statute.[30] More often it will indicate merely that the defendant,

[28]As in the case of Ainsfield v. More, (1890) 30 Neb. 385, 46 N. W. 828. In De Forest v. Walters, (1897) 153 N. Y. 229, 47 N. E. 294, the suit involved a parcel of land which was submerged at high tide but was left dry at low tide. The court found the "possession" to have been with defendant town, through evidence that one Walters had leased it from plaintiff's ancestor from 1886 to 1888, but had leased it from defendant in subsequent years until the start of suit in 1892. The lessee had used the land only to float an oyster scow above it at high tide and to rest the scow on the bottom at low tide.

In Burlingham v. Hanrahan, (1931) 140 Misc. Rep. 512, 251 N. Y. S. 55, the plaintiff agreed with other adjoining land-owners on the cancellation of certain building restrictions, with the express exception that no fish market, public garage, gasoline station, or stable for animals should be maintained in the district for 20 years from May 15, 1915. The plaintiff sued to reform this exception so that it should operate only for ten years from Jan. 1, 1920, claiming that all the parties had intended it to operate for this shorter period. The court held that since the plaintiff had remained in possession of his own tract of land, the statute of limitations would not operate against his claim until discovery of the mistake, although clearly the plaintiff's possession on these facts would have no probative value whatever as to the presence or absence of the mistake claimed.

[29]Jackson-Walker Coal Co. v. Miller, (1913) 88 Kan. 763, 129 Pac. 1170. Here a vendor of land sued to reform his conveyance by inserting a reservation of the coal and mineral rights in the land conveyed. The grantee had gone into possession of the tract, but the taxes on the mineral rights had been paid by the plaintiff from the date of the deed for five years.

See also Luginbyhl v. Thompson, (Tex. Civ. App. 1928) 11 S. W. (2d) 380, where a vendor of land likewise sought to insert a reservation of oil, gas, and mineral rights in part of the tract. The land when sold was already subject to a ten-year lease of the oil, gas, and mineral rights, and the lessee continued to pay the rent due under this lease to the plaintiff, without objection from the defendant.

[30]Manufacturers' Nat'l Bank v. Perry, (1887) 144 Mass. 313, 11 N. E. 81; and Cole v. Charles City Nat'l Bank, (1901) 114 Iowa 632, 87 N. W. 671, both being actions for restitution of money over-paid through mistake. Compare with these cases, International Bank v. Bartalott, (1882) 11 Ill. App. 620. On the "fraudulent concealment" exception in general, see Dawson, Fraudulent Concealment and Statutes of Limitation, (1933) 33 Mich. L. Rev. 875.

like the plaintiff, had proceeded on the assumption that the written instrument expressed their original intention. The absence of a deliberate purpose to mislead would probably prevent the use of the "fraudulent concealment" exception in most states. The effect of defendant's conduct might nevertheless be to lull the plaintiff into a sense of security and to justify his belief that the writing had accomplished the intended purpose. Such cases are sometimes analysed in terms of estoppel, which constitutes an established ground for suspension of statutes of limitation.[31] Without express reliance on estoppel, courts in such situations have held that the statute applicable to mistake cases did not operate so long as defendant's conduct gave reasonable grounds for believing that the writing had achieved the intended effect.[32]

If neither "fraudulent concealment" nor estoppel is available, there remains the elastic concept of "fraud." By statute or judicial decision in more than half the states fraud has been recognized as a ground for suspending statutes of limitation.[33] The boundaries between mistake and fraud for this purpose have never been

[31]The subject of estoppel to plead statutes of limitation is discussed by the writer in (1935) 34 Mich. L. Rev. 1. For a case involving reformation of a deed in which estoppel was invoked by the court, see Depuy v. Selby, (1919) 76 Okla. 307, 185 Pac. 107.

Especially interesting is Swinebroad v. Wood, (1906) 123 Ky. 664, 97 S. W. 25, where the plaintiff sued to partition land conveyed in 1893 by one Bright to his daughter Kate and her two children jointly in fee. The plaintiff, the daughter of Kate, joined her mother and brother as defendants in the action. The son in his answer set up that the original grantor had intended Kate to receive a life estate in the whole tract with the two children taking the remainder in fee jointly. The chief obstacle to reformation, as prayed for by the son, was the Kentucky statute of limitations, which was expressly made to operate only from discovery in actions founded on mistake, but which provided an absolute ten-year limitation from "the making of the contract." Since plaintiff's action was not brought until 1904 and the deed had been executed in 1893, a claim for reformation appeared to be clearly barred. But the court said that since the plaintiff did not dispute her mother's right to all the rents and profits and to exclusive possession, and allowed her mother to make valuable improvements over a period of years, she lulled her mother and brother into the belief that she acquiesced in their construction of the deed and thus became estopped to invoke the ten-year limitation.

[32]Barrows v. Alford, (1928) 129 Okla. 265, 264 Pac. 628, an action by a grantee of land to strike out a reservation of one-half the gas, oil, and mineral rights in favor of the grantor, who received and paid over to the plaintiff for several years the rentals accruing under an existing oil and gas lease of the property; Manatt v. Starr, (1887) 72 Iowa 677, 34 N. W. 784, an action to reform a mortgage executed by one Brown so as to include a tract of land subsequently purchased by defendant Starr, who frequently declared that he was bound to pay the mortgage and actually paid interest thereon for a number of years.

[33]Dawson, Undiscovered Fraud and Statutes of Limitation, (1933) 31 Mich. L. Rev. 591.

clearly marked; in many cases they provide alternative grounds for relief.[34] In the reformation cases now considered there has been a noticeable tendency to extend the definition of "fraud" to include undiscovered mistake in expression. This extension usually has occurred where the relations of the parties created justifiable expectations of good faith—e. g., in cases involving parent and child,[35] husband and wife,[36] or even principal and agent.[37] How far this process will be carried cannot be predicted with certainty. As in other cases where the "fraud" exception is used to enforce high standards of personal morality, an important factor of

[34]Especially where a vendor of land or goods expressly (though perhaps innocently) misrepresents the quantity or quality of the subject-matter sold. Young v. Three for One Oil Royalties, (Cal. App. 1933) 24 P. (2d) 894; Wedge v. Security-First National Bank, (1933) 219 Cal. 113, 25 P. (2d) 411; Edwards v. Sergi, (1934) 137 Cal. App. 369, 30 P. (2d) 541; Gillespie v. Gray, (Tex. Civ. App. 1921) 214 S. W. 730, 230 S. W. 1027; Ray v. Barrington, (Tex. Civ. App. 1927) 297 S. W. 781; Beaty v. Cruce, (1918) 200 Mo. App. 199, 204 S. W. 119; Taylor v. Edmunds, (1918) 176 N. C. 325, 97 S. E. 42. See also Girod v. Barbe, (La. App. 1934) 153 So. 326, and Evert v. Tower, (1909) 51 Wash. 514, 99 Pac. 580.

[35]Day v. Day, (1881) 84 N. C. 408, an action brought to reform a deed of gift from plaintiff to his son, by inserting a reservation of a life estate. The son had drawn up the deed in accordance with instructions from the plaintiff. The court declared that it would be "fraud" for the son either to omit intentionally the life estate which the grantor had intended to reserve, or to enforce the deed contrary to the intentions of both parties.

[36]Olinger v. Schultz, (1898) 183 Pa. St: 469, 38 Atl. 1024, where a husband had paid the purchase price for land with funds of his wife and had taken title in his own name, apparently through mistake.

[37]Ulman v. Newman, (1914) 161 App. Div. 708, 146 N. Y. S. 696, appeal dismissed, (1915) 213 N. Y. 700. Here the plaintiff had taken out a twenty-year endowment policy of life insurance on the life of her husband, and by mistake the agent of the company had made it payable to the husband in the event that he survived for the twenty-year period. The court declared that it would be "fraud" for the agent to draw up the policy in violation of the plaintiff's instructions, so that the statute of limitations would operate only from discovery.

In Welles v. Yates, (1871) 44 N. Y. 525, the court declared that it would be fraud for a grantee of land merely to accept a deed with knowledge of the grantor's mistake in failing to reserve the timber rights on the land conveyed. The omission of this reservation was discovered by the plaintiff shortly after the execution of the deed, but the court said that he was not shown to have discovered the "fraud," which consisted of the grantee's *knowledge* of the mistake.

Compare Newbern v. Gould, (1933) 162 Okla. 82, 19 P. (2d) 157, where the plaintiff, agent for a vendor of land, drew up a deed which purported to reserve one-half the oil, gas, and mineral rights in the land conveyed. The plaintiff subsequently purchased the land from the grantee and then asserted that the reservation was void because no surface rights or easement of entry were expressly reserved. Without relying on the "fraud" exception, the court held that since defendant's claim for reformation was used merely as a defense, the statute did not operate until plaintiff asserted an adverse claim which would make reformation necessary for defendant's protection.

judicial discretion is introduced in the arithmetical processes of statutory limitation.[38]

From this brief review of the cases it appears that courts, without direct aid from statute, have shown a remarkable willingness to suspend the statute in actions to reform written instruments. There is some authority declaring that in general the statute does not operate on claims for reformation until discovery of the mistake.[39] But most of the decisions reaching this result are put on narrower grounds, which sometimes appear to have little in common though they lead to the same result. It is only from the cumulative effect of all these decisions together that one derives the impression of uniform liberality toward claims for reformation on the ground of mistake.[40]

B. *Actions for Restitution of Money Paid.*—A very different attitude has consistently been shown toward claims for restitution of money paid through mistake. Some of the earliest cases refusing to suspend the statute of limitations for claims based on mistake were cases of this type. Modern decisions, in the absence of express statutory provision, have usually held that the "cause of action" accrues at the date of payment and that the operation of the statute will not be affected even by ignorance that is in other respects excusable.[41]

[38]The extreme limits to which this reasoning may be carried are illustrated by Welles v. Yates, (1871) 44 N. Y. 525. There the court declared that it would be "fraud" for a grantee of land merely to accept a deed with knowledge of the grantor's mistake in failing to reserve the timber rights on the land conveyed. The omission of this reservation was discovered by the grantor shortly after the execution of the deed, but the court said that he was not shown to have discovered till later the grantee's "fraud," which consisted of his knowledge of the mistake at the time the deed was accepted.

[39]Carter v. Leonard, (1902) 65 Neb. 670, 91 N. W. 574; Luginbyhl v. Thompson, (Tex.Civ.App. 1928) 11 S. W. (2d) 380; Harris v. Flowers. (1899) 21 Tex. Civ. App. 669, 52 S. W. 1046; dicta in Craig v. Gauley Coal Land Co., (1914) 73 W. Va. 624, 80 S. E. 945.

[40]The indulgence shown by courts in this class of cases is further indicated by their refusal to hold that a public record of the instrument affected by the mistake will charge the mistaken party with notice, so that the statute will commence at once to operate. Jackson-Walker Coal Co. v. Miller, (1913) 88 Kan. 763, 129 Pac. 1170; Olinger v. Shultz, (1898) 183 Pa. St. 469, 38 Atl. 1024; American Mining Co. v. Basin and Bay State Mining Co., (1909) 39 Mont. 476, 104 Pac. 525; Lillis v. Silver Creek & Panoche Land & Water Co. (1913) 21 Cal. App. 234, 131 Pac. 234. But compare the effect of public records in Stancill v. Norville, (1932) 203 N. C. 457, 166 S. E. 319, where the plaintiff sought subrogation to a first mortgage paid off with money loaned by the plaintiff, as against an intervening judgment creditor whose judgment had been docketed and had become a lien against the mortgaged land.

[41]Ely v. Norton, (1822) 6 N. J. L. 187; Bank of the United States v.

This attitude toward the problem of limitation is not to be explained as the reflection of hostility toward this type of claim in general. On the contrary, restitution of money paid through mistake is given with remarkable freedom, if sought within the period prescribed by statute for such relief. And restitution of money paid through mistake is justified by considerations very similar to those which explain the willingness of courts to reform written instruments. Such restitution does not ordinarily involve the rescission of the entire transaction on which the relations of the parties depend. The mistake usually occurs in the attempt to perform the obligations created by the antecedent relations between the parties. It is usually immaterial whether the mistake consists in a miscalculation of the amount due on an existing obligation or in the discharge of an obligation which is in fact non-existent. In either case the prior relations between the parties provide a standard, and the correction of the mistake will place the parties in the position in which they had intended to place themselves.[42]

Daniel, (1838) 12 Pet. (U.S.) 32, 9 L. Ed. 989; Leather Manufacturers' Bank v. Merchant's Bank, (1888) 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342; Richardson v. Bales, (1899) 66 Ark. 452, 51 S. W. 321; Montgomery's Appeal, (1879) 92 Pa. St. 202; State Hospital for the Insane v. Philadelphia County, (1903) 205 Pa. St. 336, 54 Atl. 1032; McNeely v. Philadelphia Nat'l Bank, (1934) 314 Pa. St. 334, 172 Atl. 111; Lancey v. Maine Central R. R. Co., (1881) 72 Me. 34; Evert v. Tower, (1909) 51 Wash. 514, 99 Pac. 580; State Nat'l Bank v. Beacon Trust Co., (1929) 267 Mass. 355, 166 N. E. 837; Weston v. Jones, (1924) 160 Minn. 32, 199 N. W. 431; International Bank v. Bartalott, (1882) 11 Ill. App. 620; Baker v. Courage & Co., [1910] 1 K. B. 56, 79 L. J. K. B. 313, 101 L. T. 854; In re Robinson, [1911] 1 Ch. 502, 80 L. J. Ch. 381, 104 L. T. 331. To these cases should be added the following decisions, where suspension of the statute was refused primarily because no excuse was shown for the plaintiff's non-discovery of the mistake. Steele's Adm'r v. Steele, (1855) 25 Pa. St. 154; Jones v. School District, (1881) 26 Kan. 490; Schultz v. Board of Commissioners, (1883) 95 Ind. 322; School Directors v. School Directors, (1883) 105 Ill. 653; Maxwell v. Walsh, (1903) 117 Ga. 467, 43 S. E. 704; Wright v. Johnson, (1923) 149 Tenn. 647, 261 S. W. 662.

Suspension of the statute until discovery was allowed in Knickerbocker Fuel Co. v. Mellon, (D.C. N.Y. 1926) 18 F. (2d) 128; Chestertown Bank v. Perkins, (1927) 154 Md. 456, 140 Atl. 834; and Frankfort Bank v. Markley, (1833) 31 Ky. 373. Suspension of the statute was held permissible in equitable actions in Gould v. Emerson, (1894) 160 Mass. 438, 35 N. E. 1065; Craufurd v. Smith, (1896) 93 Va. 623, 23 S. E. 235; and Grove v. Lemley, (1912) 114 Va. 202, 76 S. E. 305.

In Girod v. Barbe, (La. App. 1934) 153 So. 326, the "fraud" exception was invoked by holding that the payee's mere non-disclosure of the mistake, of which the payee was aware, was a fraud preventing the payor's discovery. But cf. on this point Evert v. Tower, (1909) 51 Wash. 514, 99 Pac. 580.

[42]See Talbot v. National Bank, (1880) 129 Mass. 67, 37 Am. Rep. 302; Rohn v. Gilmore, (1923) 37 Idaho 544, 217 Pac. 602; Gould v. Emerson, (1894) 160 Mass. 438, 35 N. E. 1065; Meeme Mutual Home Protec-

The mistake in performance which is usually involved in cases of overpayment of money has important elements in common with the mistake in integration which appears in the reformation cases. There are difficulties, it is true, with too complete an assimilation of these two classes of mistake. As Professor Williston has pointed out, restitution of money paid through mistake involves a complete or partial rescission of the *payment*, even though the purpose of relief may be the re-establishment of the original obligation which the parties had attempted to perform.[43] Furthermore, it is not always possible to correct the error by mere arithmetical additions or subtractions, and the final result may often be an important modification of the original transaction.[44]

These general considerations, however, have little bearing on the problem of limitation. Through lapse of time some wholly new factors are introduced. For suspension of statutes of limitation it is not enough that actions for restitution of money paid and actions for reformation of written instruments are nearly related in theory and purpose. Attention must rather be directed to the consequences of judicial relief on expectations built up during the passage of time. It is here that reasons are found for caution in extending the period of limitation on claims for restitution of money paid through mistake.

The payment of money is peculiarly the type of transaction which stimulates new expectations and new courses of action. Since its utility consists cheifly in its power to attract goods and services, money is apt to be promptly exchanged for other forms of wealth. If not immediately spent, the acquisition of money is apt to have other, psychological, results for the recipient, in preparation for later expenditure.

This reasoning finds support in the familiar doctrine of "change of position," which constitutes a defense in quasi-contractual actions for restitution on the ground of mistake.

tive Fire Inc. Co. v. Lorfeld, (1927) 194 Wis. 322, 216 N. W. 507; and cases cited by Williston, Contracts, sec. 1574.

[43]Williston, Contracts, sec. 1545.

[44]This is particularly true in the cases of mistake as to quantity of land conveyed, where a correction of the price is often allowed to compensate for excesses or deficiencies due to mistake. The terms of the bargain may be modified substantially as a result, and the question arises whether the defendant in such cases should not at least be offered the alternative of an outright rescission. See Lawrence v. Staigg, 8 R. I. 256 (1866); Henn v. McGinniss, (1917) 182 Iowa 131, 165 N. W. 406; Grundy's Heirs v. Grundy, (1851) 51 Ky. 269.

Developed chiefly in connection with transfers of money, this doctrine is an explicit recognition of the social interest in the finality of money payments. An attempt recently has been made to exorcise this whole doctrine, as a phantom produced from the vapors of a transcendental equity.[45] To the present writer the quasi-contract doctrines of "change of position" represent a realistic and intelligent effort to express important factors of social policy, not the less important because they elude definition by mechanistic legal method. These doctrines, it is true, do not stress the element of lapse of time; nevertheless they seem to represent an effort to safeguard the same interests that would be jeopardized by the suspension of limitation acts on claims for money paid through mistake.[46]

The considerations here suggested cut across the usual classifications of mistake cases and introduce some added sources of confusion. It is perfectly possible, for example, that the reformation of written instruments will have as an incidental consequence the enforced restitution of money paid. But it happens that most of the reported cases in which reformation has been allowed after a considerable lapse of time have involved disputes over title to real property. It is no accident that in those cases the chief element emphasized by courts has been the conduct of the parties, consistent with and founded upon the intentions defectively expressed.[47]

Actions for restitution of money paid may also aim at the *rescission* of the entire transaction between the parties, for underlying mistake in its formation. Here one would expect quite as much resistance to the granting of relief after long delay as in cases of mere over-payment resulting from mistake in "performance." Few cases of this type have appeared, however, and no clear tendency in judicial decision is discernible.[48]

---

[45]Cohen, Change of Position in Quasi-Contract, (1932) 45 Harv. L. Rev. 1333. For a recent and more temperate discussion of the cases on this question see Langmaid, Change of Position by Receipt of Money in Satisfaction of a Pre-existing Obligation, (1933) 21 Cal. L. Rev. 311.

[46]This is essentially the position taken in the comment, Limitation of Actions to Recover Money Paid Under Mistake, (1928) 41 Harv. L. Rev. 105.

[47]See above, section 1(a).

[48]Refusing to suspend the statute: Bishop v. Little, (1825) 3 Mc. 405, and Clapp v. Township of Pinegrove, (1890) 138 Pa. 35, 20 Atl. 836, 12 L. R. A. 618; allowing suspension of the statute until discovery, on the analogy of the "fraud" exception: Beaty v. Cruce, (1918) 200 Mo. App. 199, 204 S. W. 553.

Midway between the cases of mistake in performance and mistake in formation lie the cases of mistake as to the quantity of real estate conveyed. Ordinarily relief is freely given in such cases, with the aid of a strong presumption that the price of land is computed on the basis of quantity, so that an excess or deficiency can be corrected by mere addition to or subtraction from the price.[49] For limitation purposes one would expect in this as in other cases that the effects of judicial relief on established habits and expectations would be the decisive test. Thus, in the common case of a purchaser's action for an abatement of the price on account of deficiency in quantity, the effect of a judgment against the vendor would ordinarily be merely to enforce repayment of money received. The money payments involved would seem to deserve as much finality as in the cases already considered. A majority of the decisions, however, have allowed the limitation statute to operate only from the discovery of the mistake and have sometimes forced the vendor after considerable delay to repay the excess.[50] These decisions have occurred in states where the equity doctrine, suspending the statute until discovery, has become firmly entrenched and has been extended uncritically to all types of mistake. A different conclusion may be expected in other states, particularly in those that have spoken so strongly against suspension of the statute in other cases of over-payment of money.

C. *Transfers of Property Other Than Money.* Very few reported cases have dealt with the problem of limitation in transfers of personal property other than money. These cases have discussed the problem merely in terms of the willingness or unwillingness of courts to adopt the traditional equity formula suspending the statute until discovery. Nor is there a sufficiently clear and uni-

[49]Lawrence v. Staigg, (1866) 8 R. I. 256; Paine v. Upton, (1882) 87 N. Y. 327, 41 Am. Rep. 371; Edmundson v. Mullen, (1926) 215 Ala. 297, 110 So. 391; Black, Rescission and Cancellation, sec. 144.

[50]Crane v. Prather, (1830) 27 Ky. 75; Hull v. Watts, (1897) 95 Va. 10, 27 S. E. 829; Hall v. Graham, (1911) 112 Va. 560, 72 S. E. 105; Emerson v. Navarro, (1868) 31 Tex. 335; Gillispie v. Gray, Tex. Civ. App., (1921) 214 S. W. 730, 230 S. W. 1027; Hohertz v. Durham, (Tex. Civ. App. 1920) 224 S. W. 549; Ray v. Barrington, (Tex. Civ. App. 1927) 297 S. W. 781. Contra, Sturgis v. Preston, (1883) 134 Mass. 372.

In Massie's Admr. v. Heiskell's Trustee, (1885) 80 Va. 789, and Grundy's Heirs v. Grundy, (1851) 51 Ky. 269, *vendors* were allowed recovery of the value of *excess* land conveyed and the statute was held to operate only from discovery of the mistake.

form course of decision to indicate that courts are influenced by the factors suggested above.[51]

The social interests and psychological factors involved in transfers of personal property can scarcely be described in general terms, since they must vary considerably with different types of personal property. In the case of corporate securities liquidity has been achieved to such a degree as to make such securities for many purposes equivalent to money. A horse, an automobile, or a chair, could be somewhat less readily transferred or consumed, but their physical possession over a period of time would create expectations and entail adjustments that would give such transfers a claim to judicial protection. An approach to the problem along the lines here suggested would not supply a clear guide to future judicial behavior. It would have the virtue, however, of permitting courts to examine the facts of particular cases, and to suspend the statute of limitations only where broader social interests would not be jeopardized.

Again it should be pointed out that claims for reformation of written instruments do not form a class wholly independent of claims for restitution of tangible property. The possession or ownership of tangible property is usually the subject matter of dispute in actions for reformation, and a decree may have the effect of enforcing restitution of property already transferred. The discussion of the reformation cases should have indicated, however, that reformation will be allowed only where possession or other indicia of ownership have consistently supported the claim of the party seeking reformation. In other words, restitution of land (the chief subject of litigation in the cases there

[51]In Thomas v. Thomas, (1920) 69 Colo. 282, 194 Pac. 606, the statute was held to be inoperative until discovery, in an action for specific restitution of corporate stock transferred to defendant through mistake. In Craufurd v. Smith, (1896) 93 Va. 623, 23 S. E. 235, the same result was reached in an action for the value of slaves transferred. In Stone v. Hale, (1850) 17 Ala. 557, there were dicta to the effect that the equitable doctrine of laches would not apply until discovery of the mistake which induced a transfer of slaves. But the still earlier case of Gatlin v. Darden, (1835) 21 N. C. 72, had refused to suspend the statute in an equitable action for specific restitution of slaves transferred through mistake.

[52]See the cases discussed above, section 1(a). At this point should be cited, however, the case of Oldham v. Medearis, (1897) 90 Tex. 506, 39 S. W. 919, where suspension of the statute was allowed in an action for repartition of land. which had been assigned to defendant under a partition agreement between the parties more than 20 years before, and possession of which defendant had since retained. It seems unlikely that any other state would go so far in the absence of statute.

discussed) will not be enforced where the transfer has been translated into conduct, reflecting a belief in its finality.[52]

2. Under Legislation Expressly Excepting Claims Founded on Mistake.

The conflict disclosed in the cases so far considered is largely eliminated in the twelve states where claims founded on mistake are expressly excepted from general limitation provisions. In none of these states is any distinction drawn between various types of mistake. In only one of them (Oregon) is a distinction drawn between legal and equitable actions.[53] In all of them the statutory period is made to commence on the date of "discovery," which is uniformly interpreted to mean either the date of actual discovery or the date when discovery would have been possible through the exercise of reasonable diligence.[54]

Some problems of interpretation are left by such legislation. Of these the most serious is the problem of determining what actions are founded on "mistake" within the statutory meaning. The line between "mistake" and "fraud" is sufficiently close so that some confusion would surely have resulted, if it were not for the fact that in all the states with an express exception for cases of mistake there is also an express exception for cases of fraud, postponing the statute in the same way until discovery.[55] More serious is the problem of marking the boundaries between actions founded on mistake and those in which some element of mistake appears but defendant's liability is based on some other theory. For example the negligence of a court clerk in failing to docket a judgment in the proper index of judgment liens might be attributable to his "mistake;" but if his liability is analysed as a mere negligent breach of official duty, no discovery clause will

[52]See the statutes cited above, note 3. For a period of 10 years in North Carolina the suspension of the statute was allowed only in actions "solely cognizable in equity." The act of 1879 (North Carolina Statutes, 1879, ch. 251) was amended in 1889 (North Carolina Statutes, 1889, ch. 269) and the provision now in force was adopted, allowing suspension until discovery in all actions for relief on the ground of mistake. The Iowa statute also was construed for a brief period so as to apply only to equitable actions. Higgins v. Mendenhall, (1879) 51 Iowa 135. For later Iowa cases extending the statute to both legal and equitable actions, see below, notes 58 and 61.

[54]See the cases cited above, note 15.

[55]Statutes recognizing an exception for cases of "fraud" are cited in (1933) 33 Mich. L. Rev. 591.

be available to suspend the statute.[56] A similar problem is presented by deficiencies in quantity or complete failure of title in sales of land. The vendor's liability to the purchaser can be analysed as based on breach of warranty so as to preclude any extension of the statutory period, though most of the cases have extended the concept of mistake so as to include this situation.[57] In cases where creditors have accepted *less* than was due in satisfaction of simple money debts, it might be possible to describe their actions to recover the balance due as actions based on the original debt and thus to ignore the element of mistake. The cases have chosen to emphasize the mistake in the settlement, however, and thus to make the "discovery" clause available.[58]

In most of the situations where the "mistake" exception has been advanced as a ground for suspension of limitation acts, its applicability has not been open to serious question. It clearly applies in general to actions for reformation of title deeds to land. Under express statutory exceptions courts have suspended the statute both where the party seeking reformation could show long-continued possession consistent with the title asserted,[59] and where the possession had been surrendered along with the legal title.[60] At this point the express statutory exception has produced

[56]Lougee v. Reid, (1907) 133 Iowa 48, 110 N. W. 165.

See also Bennett v. Meeker, (1921) 61 Mont. 307, 202 Pac. 203, and Havird v. Lung, (1911) 19 Idaho 790, 115 Pac. 930, holding that actions of claim and delivery for animals lost were based at most on "conversion" and did not come within the mistake exception.

[57]Henofer v. Realty Loan and Guaranty Co., (1919) 178 N. C. 594, 101 S. E. 265, where an action for "damages" for a deficiency in acreage of land sold was first described as being based on breach of contract and then brought within the "mistake" clause for the purposes of the statute of limitations. Likewise, in Burton v. Cowles Admr., (1913) 156 Ky. 100, 160 S. W. 782, where a purchaser's action for abatement of the price on account of a deficiency in acreage was brought within the "mistake" clause. In Edwards v. Sergi, (1934) 137 Cal. App. 369, 30 P. (2d) 541, there was evidence of innocent misrepresentation by the vendor's agent as to his title to part of the tract, and the action (described as one for "damages") was said to come either within the "mistake" or the "fraud" exception.

But cf. Barden v. Stickney, (1903) 130 N. C. 62, 40 S. E. 842, (1903) 132 N. C. 416, 43 S. E. 912, where the court refused to apply the mistake exception to an action for recovery of money paid by a purchaser of land, brought after complete failure of the vendor's title.

[58]Alexander v. Owen County, (1910) 136 Ky. 420, 124 S. W. 386; Cole v. Charles City Nat'l Bank, (1901) 114 Iowa 632, 87 N. W. 671; Bacon v. Bacon, (1907) 150 Cal. 477, 89 Pac. 317.

[59]Pelletier v. Interstate Cooperage Co., (1912) 158 N. C. 403, 74 S. E. 112; Hart v. Walton, (1908) 9 Cal. App. 502, 99 Pac. 719.

[60]Taylor v. Edmunds, (1918) 176 N. C. 325, 97 S. E. 42; Breen v. Donnelly, (1887) 74 Cal. 301, 15 Pac. 845; American Mining Co. v. Basin and Bay State Mining Co., (1909) 39 Mont. 476, 104 Pac. 525. Other

results different from those reached by judicial decision unaffected by statute. This is true likewise of actions for restitution of money paid, both where the mistake lay in computing the sum due on a pre-existing debt[61] and where the purpose of the plaintiff was rescission of the contract between the parties for underlying mistake in formation.[62] In both these situations suspension of the statute has been allowed, although the opposite result has been reached in most states in the absence of statute.[63]

The distinctions between the various types of mistake make themselves felt chiefly in the strictness or leniency with which the mistaken party is required to "discover" the mistake. Long delay will be excusable in the case of a party who has remained in undisturbed possession of land, in ignorance of a defect in title which was due to a mistake in integration.[64] Similarly, a failure

reformation cases in which the statute was likewise suspended until discovery: Saylor v. Helton, (1922) 194 Ky. 195, 238 S. W. 405; McKimmon v. Caulk, (1915) 170 N. C. 54, 86 S. E. 809; American Savings Bank v. Borcherding, (1927) 205 Iowa 633, 216 N. W. 719.

[61]Baird v. Omaha and Council Bluffs Ry. and Bridge Co., (1900) 111 Iowa 627, 82 N. W. 1020; City of Louisville v. Anderson, (1881) 79 Ky. 334; Peacock v. Barnes, (1906) 142 N. C. 215, 55 S. E. 99; Barton v. Jones, (1924) 206 Ky. 238, 267 S. W. 214; Burton v. Cowles' Admr., (1913) 156 Ky. 100, 160 S. W. 782. See also the cases cited above, note 58.

[62]Hayes v. County of Los Angeles, (1893) 99 Cal. 74, 33 Pac. 766; Storm Lake Bank v. Buena Vista County, (1885) 66 Iowa 128, 24 N. W. 239; Young v. Three for One Oil Royalties, (Cal. App. 1933) 24 P. (2d) 894; Wedge v. Security-First Nat'l Bank, (1933) 219 Cal. 113, 25 P. (2d) 411.

[63]Above, section 1(b).

[64]Pelletier v. Interstate Cooperage Co., (1912) 158 N. C. 403, 74 S. E. 112; Hart v. Walton, (1908) 9 Cal. App. 502, 99 Pac. 719.

In Hart v. Walton, the court revealed another device by which the intervening conduct of the interested parties could be taken into account in the application of limitation acts. The earlier California cases had been thrown into a state of confusion through competition between the "fraud" and "mistake" exceptions on the one hand, and the absolute limitation of five years of actions "for the recovery of real property." Breen v. Donnelly, (1887) 74 Cal. 301, 15 Pac. 845, had applied the "mistake" exception to an action for the recovery of land which had been assigned to defendant through mistake in a partition agreement, in spite of the fact that defendant had gone into possession. But in Goodnow v. Parker, (1896) 112 Cal. 436, 44 Pac. 738, the court had held on similar facts that the action was essentially for the "recovery of real property," even though mistake was the substantive ground for relief. In the latter instance the court was merely adopting the reasoning which had been used in California and other states in cases of "fraud." See Dawson, Undiscovered Fraud and Statutes of Limitation, (1933) 31 Mich. L. Rev. 591, 608; and compare Louisiana Oil and Refining Co. v. Gandy, (1929) 168 La. 37, 121 So. 183. When the court in Hart v. Walton, supra, returned to the earlier view and held the action in that case to be essentially founded on "mistake," it was unwilling to overrule Goodnow v. Parker and the "fraud" cases that had been similarly decided. Instead, the court in Hart v. Walton pointed to the fact that

to discover the mistake will be excusable where there has been a long-continued course of conduct acquiesced in by the opposite party and consistent only with the rights asserted by the plaintiff in the action for reformation.[65] On the other hand, where the possession of land by the party seeking reformation does not support the title he asserts, a higher degree of diligence probably will be required.[66] And finally, where an over-payment of money occurs through mistake, a still higher standard of vigilance probably will be imposed in detecting the error.[67]

It appears, then, that underlying factors of policy do have some effect on the application of express statutory exceptions for cases of mistake. It is believed, nevertheless, that the sweeping

the plaintiff's grantor had regularly paid the taxes on the unimproved timber land which was involved in the action, evidently treating this as equivalent to continuous possession. A reformation of the title deeds, as sought by plaintiff, would thus give formal sanction to a title evidenced by conduct. The implication is clear that if *defendant* had paid the taxes or remained in actual possession, the claim would have been analyzed as one for the "recovery of real estate."

[65]In Lillis v. Silver Creek and Panoche Land and Water Co., (1913) 21 Cal. App. 234, 131 Pac. 344, the plaintiff sued for reformation of a written contract for the supply of water for irrigation purposes. The contract as written called for 75 cubic inches of water, but plaintiff's vendor and plaintiff had regularly used 75 miners' inches (a considerably larger quantity) for a period of years. It was held that defendant's acquiescence in this course of conduct prevented plaintiff from being charged as a matter of law with notice of the mistake.

[66]In Jefferson v. Railroad and Lumber Co., (1914) 165 N. C. 146, 80 S. E. 882, the action aimed at reformation of a deed in which defendant reserved the privilege of cutting timber for a period of ten years on land conveyed to plaintiff's ancestor. Plaintiff claimed that the reservation clause had been drafted through mistake, so as to omit a provision that the land was to be cut over only once and that when defendant had ceased its timber-cutting operations its rights in the timber would cease. The court held that no excuse was shown for the delay in discovery, and pointed out that the case did not come within the doctrine which made the statute inoperative against a party in possession of land, since that doctrine applies only where "the occupation of the property or the enjoyment of the right is hostile to the adverse claim or in some way antagonizes it." It "should not prevail when the occupation or possession is uniformly consistent with the other's interest, or the invasion at most only amounts to occasional and wrongful interferences with it."

[67]See, for example, Shain v. Sresovich, (1904) 104 Cal. 402, 38 Pac. 51. In the remarkable case of School District v. School District, (1904) 123 Iowa 455, 99 N. W. 106, the court went to extreme lengths in its effort to prevent recovery of money paid through undiscovered mistake. The action was brought by plaintiff school district to recover tax monies collected within its boundaries and erroneously paid by the county treasurer to defendant school district. The court declared that the mistake of the treasurer was merely an "incident" of the plaintiff's cause of action for money had and received, that it merely "serves to explain how it came about that the monies now sought to be recovered reached the hands of the defendant district," and that the mistake exception was not available to extend the period of limitation.

provisions of modern legislation leave insufficient room for distinctions between various classes of mistake, the distinctions that have slowly emerged in judicial decision unaffected by statute. As a matter of policy it is by no means clear that all classes of claims based on "mistake" should be saved from the operation of limitation acts. One suspects that the "mistake" exception has been copied into modern legislation for no stronger reason than the resemblance between mistake and "fraud." But that resemblance cannot be carried far, as some of the earliest cases in the field have recognized.[68] At some points "mistake" and "fraud" overlap as substantive grounds for relief; historically they were both evolved from the shadowy twilight-zones of chancery morality. But it is believed that the complex factors of policy involved in the limitation of actions can better be assessed by more flexible rules which leave wider room for judicial discretion and which emphasize the distinctions between various classes of mistake.

[68]See, for example, the early case of Crane v. Prather, (1830) 27 Ky. 75.