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known risk is the New Mexico Case of *Los Alamos Medical Center v. Coe*⁷ In that case, the plaintiff was allowed to take morphine at home for relief of pain as needed. The defendant-doctor assured the plaintiff and her family not to worry and to give the plaintiff morphine whenever she wanted it. Relying on this instruction, they administered the drug and the plaintiff became addicted. The court held that the plaintiff did not assume the risk, as she was justified in relying on the superior knowledge of her doctor. The plaintiff was under no duty to distrust her physician or to set her judgment against his.

It is the very disparity in knowledge between a patient and his doctor that makes assumption of risk an unlikely defense in malpractice litigation. Given this disparity, the assumption of a known risk becomes virtually impossible. It is evident that in following a physician's directions, a peculiar set of circumstances would have to arise before a plaintiff could be said to have assumed a known risk. It is probable that an express warning would be required, or that the facts be such that an ordinary man would know the consequences. It is the very peculiarity of the necessary fact situation, combined with the availability of contributory negligence as a defense, that has resulted in assumption of risk being virtually forgotten in cases of medical malpractice.⁸

MERRILL C. HOYT

THE STATUTE OF LIMITATIONS AS A BAR IN MEDICAL MALPRACTICE LITIGATION

When the statute of limitations is pleaded as a bar to a malpractice claim, three problems peculiar to this kind of litigation arise. These problems are: (1) Which section of the statute is applicable? (2) When does the statute begin to run? and (3) What kind of acts constitute the fraud that tolls the statute?

WHICH SECTION OF THE STATUTE IS APPLICABLE?

In Illinois, there are three possible solutions to the problem of which statute applies. Chapter 83, § 15 of the Illinois Revised Statutes places a two year limitation on actions for personal injuries¹; Chapter 83, § 16 places

⁷ 58 N.M. 686, 257 P.2d 175 (1954).

⁸ In *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (2d Dist. 1967), the Appellate Court for the Second District held that the doctrine of contributory negligence as a complete bar to recovery would be abandoned and that the doctrine of comparative negligence would henceforth be used. If the holding of the *Maki* case is accepted by the other appellate districts or by the Illinois Supreme Court, it can readily be predicted that defense attorneys will attempt to make more use of the assumption of risk defense, since it is a complete defense while comparative negligence is not.

¹ Ill. Rev. Stat. ch. 83, § 15 (1965). [*Personal injuries, penalties, etc.*] Action for dam-

a five year limitation on actions for breach of oral contracts;² and Chapter 83, § 17 places a ten year limitation on actions for breaches of written contracts.³ The problem is that the doctor-patient relationship rests upon an express or implied contract, while the damages recoverable in a malpractice action are generally for personal injuries that flow from the physician's want of due care.

Implicit within the contract between doctor and patient is the doctor's duty or promise, raised by law, to use due care. Thus, negligent performance of the contractual undertaking is always a kind of breach of contract.⁴ However, it is the negligent act that is usually the gravamen of the complaint. The majority rule is that when the tortious or negligent nature of the physician's act is the wrong complained of, rather than the breach of an express warranty, the statute which applies is not the one pertaining to breach of contract.⁵

Illinois follows the majority rule. In action for malpractice, the Illinois courts will apply the shorter two year personal injury statute even though the complaint sets forth lack of due care as a breach of contract. This view is illustrated by the early case of *Keirsey v. McNeemer*.⁶ In deciding which statute to apply, the court said that the plaintiff's complaint was merely that the defendant's negligent treatment caused him bodily harm. The court refused to apply the contract limitation to a case involving the breach of a duty raised by law. A doctor is under the obligation to use due care even in the absence of a contract. Thus, the court felt that calling the doctor's duty contractual should not, of itself, result in applying the five year contract limitation.

Since the statute of limitations varies in length due to the probabilities of falsifying evidence, the result reached in *Keirsey* does make sense. Proving negligence is a rather abstract task at best. Evidence is elusive, memories fade and injuries heal. The damages recoverable in a tort action are far more extensive than in an action for breach of contract.⁷ It is due to these facts that the statute of limitations for personal injury cases is only two

ages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued.

² Ill. Rev. Stat. ch. 83, § 16 (1965). [Oral contracts-Arbitration awards-Damage to property-Possessory actions-Civil actions.] Actions on unwritten contracts, expressed or implied, or on awards of arbitration . . . and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

³ Ill. Rev. Stat. ch. 83, § 17 (1965). [Writing-New contracts] Actions on bonds . . . written contracts, or other evidence of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued.

⁴ *Burrell v. Preston*, 54 Hun. 70, 70 N.Y. Supp. 177 (1889); *Keirsey v. McNeemer*, 197 Ill. App. 173 (4th Dist. 1915).

⁵ An annotation, in 80 A.L.R.2d 320 (1961), discusses both the majority and minority rules as well as the special malpractice statute of limitation in use in some states.

⁶ 197 Ill. App. 173 (4th Dist. 1915).

⁷ *Zostautas v. St. Anthony DePadua Hosp.*, 23 Ill. 2d 326, 178 N.E.2d 303 (1962).

years. In a malpractice case, the elements proved relate to the negligence of the physician and the extent of the personal injuries suffered. It is the presence of these elements in personal injury cases that induced the legislature to place a short two year limitations period on them. To allow a party to bring a claim of this nature after the two year period has elapsed would flaunt the statutes logic.

It is still possible, in a proper case, for the statute of limitations governing contracts to apply. However, to make a malpractice action rest solely on a breach of contract would require the allegation of a breach of duty other than the duty to use due care. In general, a physician is not a guarantor of the results of his work,⁸ but if he did so guarantee, then the failure to achieve the guaranteed result would be a breach of a contractual obligation existent between the parties. It would be a breach of a duty created by the parties, not by the law, and to an action based on that breach, the five or ten year limitation governing contract actions would apply.

There is an Illinois case which follows this line of reasoning. In *Stanley v. Chastek*,⁹ the plaintiff alleged that the defendant contracted to straighten her teeth. Due to his negligent treatment, he failed, and all of her teeth had to be removed. The trial court dismissed the suit on the grounds that the two year statute of limitations had run. The appellate court, in reversing, said that the action was for breach of an express contract to straighten the plaintiff's teeth and thus the longer statute applied.¹⁰

Though the *Stanley* case was concerned with the existence of a written contract, the result should be the same in cases concerning oral contracts. When a breach of an obligation other than the duty to use due care is complained of, a plaintiff may sue in contract and benefit by the longer statute of limitations. In so electing, the presence or absence of negligence on the part of the doctor becomes immaterial and many problems of proof are overcome. However, the measure of damages in breach of contract cases is significantly different from that in cases of personal injury sounding in tort. If successful in a contract action, the plaintiff will have to be satisfied with a lesser award.¹¹

⁸ 41 Am. Jur. *Physicians and Surgeons* § 104 (1942).

⁹ 34 Ill. App. 2d 220, 180 N.E.2d 512 (2d Dist. 1962).

¹⁰ In the case of *Gault v. Sideman*, 42 Ill. App. 2d 96, 107; 191 N.E.2d 436, 442 (1st Dist. 1963), the court said by way of dictum, "We have been unable to find any case in Illinois which holds that a doctor may be held liable for an agreement made by him with the patient that an operation would cure the condition from which the plaintiff was suffering." In the light of the *Stanley* case, that statement in a later case must mean that either the court failed to find the *Stanley* case or that the court looked upon a dentist's contract to cure as being different from that of a doctor's.

¹¹ Though only dicta therein, this point is clearly illustrated in *Zostautas v. St. Anthony De Padua Hosp.*, 23 Ill. 2d 326, 178 N.E.2d 303 (1962). For further illustration see p. 133 of this symposium.

WHEN DOES THE STATUTE BEGIN TO RUN?

Courts have been in wide disagreement concerning what event will start the running of the statute of limitations. Four possibilities¹² have been espoused by the various jurisdictions that have considered the problem:

1. The statute of limitations begins to run when the physician's wrongful act occurs.
2. The statute begins to run when the tortious act results in an injury.
3. The statute begins to run when the injury is, or by the exercise of reasonable diligence should have been, discovered.
4. In the case of continuing treatment by the physician, the statute begins to run when the treatment is terminated.

1. *Time Of The Wrongful Act*

Some courts purport to follow the view that the statute of limitations begins to run at the time of the wrongful act.¹³ That is, the statute is said to attach at the instant the wrongful act is done rather than at the later time when the wrongful act results in an injury. However, this rule is usually relied upon in those cases where the act and injury occur simultaneously and thus could just as easily be cited for support of the time of injury view.¹⁴

If the statute really does begin to run from the time of the wrongful act, rather than from the time of the injury, an interesting dilemma may result. The effect could be to bar a plaintiff before he ever really had a cause of action. It is hornbook law that one of the essential elements of negligence is damage. If no damage has yet occurred, there is no cause of action. Thus, in a fact situation where damages do not accrue until long after the tortious act has occurred, plaintiff might be barred before he ever had a cause of action on which to sue.

2. *Time Of The Injury*

The second view purports to start the statute of limitations running from the time the damage is actually done. *United States v. Reid*¹⁵ is a good example of this view. In the *Reid* case, a claim against the United States was brought by a civilian employee of an army hospital. The plaintiff was X-rayed but the plates were improperly interpreted. As a result, the plaintiff returned to work and aggravated his incipient tuberculosis. The court

¹² Annotated at 80 A.L.R.2d 373 (1961).

¹³ *Ibid.*

¹⁴ *Giambozi v. Peters*, 127 Conn. 380, 16 A.2d 833 (1940); *Cappucci v. Barone*, 266 Mass. 578, 165 N.E. 653 (1929); *Bernarth v. LeFever*, 325 Pa. 43, 189 Atl. 342 (1937).

¹⁵ 251 F.2d 691 (5th Cir. 1958).

held that the plaintiff's claim did not accrue until damages were sustained, and thus the two year statute of limitations did not begin to run until some time after the improper X-ray reading took place.

A case from Florida clearly illustrates one of the reasons behind the previous decisions. In *Miami v. Brooks*,¹⁶ the plaintiff was X-rayed by a physician employed by the defendant-city. The injury which flowed from the improper use of the X-ray machine was an ulcer that developed five years after treatment. The Florida court held that where there is nothing to put the defendant on notice of any possible injury, the statute of limitations does not attach until there has been notice of an invasion of the legal right or until the plaintiff has been put on notice of his right to a cause of action. Once damages occur, there is notice and, though more substantial damages may arise at a later date, the statute attaches at once.

A problem occurs in a case like *Brooks*. *Brooks* holds that since injury puts the plaintiff on notice, the statute of limitations does not begin to run until an injury accrues. The problem is to determine when the injury occurred. In the *Brooks* case, it could be argued that the injury occurred when the X-ray was administered, since the X-ray must have produced a change on the sub-cellular level which manifested itself as an ulcer several years later. It could also be argued that no real injury occurred until the damage became manifest, since a suit before that time could not be successful. Some courts attack the problem squarely on the issue of lack of notice being a bar, regardless of when the injury occurred.

3. Time Of Discovery Of The Injury

The case of *Ayers v. Morgan*,¹⁷ a Pennsylvania case, presented the classic fact situation in which justice demands that the statute of limitations runs from the time of the discovery of the injury. In the *Ayers* case, the patient submitted to abdominal surgery. The operation was performed by Dr. Morgan on April 20, 1949. The patient was discharged from the hospital a few days later, but continued to experience abdominal pains. On January 3, 1957, he returned to the hospital for a series of tests, which showed that Mr. Ayers' pains were being caused by a sponge that had been left in his abdomen by Dr. Morgan during the operation. The court held that the statute ran from the date of the injury, and not from the wrongful act; and when the nature of the injury is such that it cannot be discovered, the statute is tolled. In reaching this conclusion, Justice Musmanno used as his analogy those cases involving subterranean trespass with resultant loss of subjacent support. In those cases, until an injury is caused to the surface by a subsidence of the land, the statute is tolled, for plaintiff has no way of knowing the wrong has occurred until the damage becomes apparent.

¹⁶ 70 So.2d 306 (Fla., 1954).

¹⁷ 379 Pa. 282, 154 A.2d 788 (1959).

There was an interesting concurring opinion. It was there said that the Constitution of Pennsylvania provides that all courts shall be open so that all men may have a remedy for injuries done to them or their property. As applied to the facts of the *Ayers* case, if the statute were not tolled, it would be unconstitutional as preventing any remedy. Article II § 9 of the Illinois Constitution contains a similar provision.

The Nebraska courts have also created a special exception to the statute of limitations by case law. In *Spath v. Morrow*,¹⁸ a needle was left in the patient's body and not discovered until nine years later. The Nebraska court said the general rule is that a cause of action accrues and the statute of limitations runs from the time plaintiff has a right to maintain a cause of action. There are, however, exceptions. The statute of limitations presumes that one having a good complaint will not unreasonably delay enforcing it. When the plaintiff is unaware of his cause of action, he cannot be charged with the lack of diligence in pressing it which the statute was designed to prevent. The legislature could not have intended such a result.¹⁹

In Illinois, the plaintiff's knowledge of the injury, negligent act, or cause of action in general is irrelevant. The problem of plaintiff's lack of notice of the existence of her cause of action arose in *Mosly v. Michael Reese Hospital*.²⁰ In that case, Mrs. Mosly was operated on by agents of the defendant-hospital in 1956. A surgical needle was left in her body and not discovered until 1960 during a subsequent operation at another hospital. The needle had traveled through her body sowing a path of destruction. Mrs. Mosly contended that the statute of limitations should not begin to run until discovery of the act of malpractice, or until the plaintiff, by exercise of reasonable care, could have learned of the negligent act. The appellate court said that the statute of limitations prevents suit on stale demands. There are exceptions placed in the act by the legislature,²¹ but this was not one of them. It is unfortunate that such a meritorious claim had to be rejected.

The legislature agreed that it was indeed unfortunate. Shortly thereafter, though too late to benefit Mrs. Mosly, a new statute was passed. Directed precisely at the issue presented by the Mosly case, the statute reads,

Whenever in the course of any medical, dental, surgical or other professional treatment or operation, any foreign substance

¹⁸ 174 Neb. 38, 115 N.W.2d 581 (1962).

¹⁹ The case of *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961) reaches the same result. There, a wing nut was left in plaintiff's body after a hysterectomy. The court said that the statute of limitations bars stale claims due to the danger of fraud. Here there is no danger. Plaintiff did not sleep on her rights, for she did not and could not know she had a claim. Justice demands that she be allowed her day in court.

²⁰ *Mosly v. Michael Reese Hospital*, 49 Ill. App. 2d 336, 199 N.E.2d 633 (1st Dist. 1964). See 42 Chi-Kent L. Rev. 74 (1965) for a more detailed analysis of the *Mosly* case.

²¹ Some exceptions are: Ill. Rev. Stat. ch. 83 § 19 (1965)—absence from the state, Ill. Rev. Stat. ch. 83 § 20 (1965)—death of party, Ill. Rev. Stat. ch. 83 § 22 (1965)—fraudulent concealment.

other than flesh, blood, or bone, is introduced and is negligently permitted to remain within the body of a living human person, causing harm, the period of limitation for filing an action for damages does not begin to run until the person actually knows or should have known of the facts of hurt and damage to his body; provided that no such action may be commenced more than ten years after such treatment or operation.²²

Though part of the injustice is removed by this statute, it is directed at an extremely narrow situation. Other states, by case law, have reached a better solution which is more broadly applicable.²³ For example, in the previously discussed *Brooks* case, the Illinois courts would have to hold that the statute of limitations had run. X-rays are not foreign substances left in the body and thus the cause of action would not be saved by the narrow Illinois statute.

As yet, Illinois²⁴ has not joined those states which forestall the running of the statute of limitations until plaintiff knows or should have known of her injury. Though chapter 83, § 22.1 is a small step in the right direction, it is disheartening to note the implication that additional changes in this aspect of the law also have to emanate from the legislature.

4. *The End Of Treatment Rule*

Without speaking in terms of notice or knowledge of the injury done, some courts toll the statute until the treatment during which the injury was suffered has come to an end. This is called the "end of treatment" rule and generally applies when a patient undergoes continuous treatment.²⁵ The development of this rule is traceable to the early Ohio case of *Gillette v. Tucker*.²⁶

Defendant in the *Gillette* case left a sponge in the plaintiff's body during an operation in 1897. The incision refused to heal due to the presence of the sponge. The doctor treated the plaintiff, but had no success in curing the infection which had developed at the site of the incision. In November, 1899, the plaintiff and the defendant argued and the doctor-patient relationship was terminated. The plaintiff engaged another doctor who operated and, upon discovering the gauze sponge, removed it. The plaintiff then filed suit against the defendant who pleaded the statute of limitations. The issue brought before the court was whether the statute of limitations attached at the time the defendant left the sponge inside the

²² Ill. Rev. Stat. ch. 83 § 22.1 added July 12, 1965.

²³ *Supra* notes 17 and 18.

²⁴ Neither has Ohio. The case of *Truxel v. Goodman*, 49 N.E.2d 569 (1942) clearly illustrates this point. There, defendant sutured internal organs while closing up. The plaintiff discovered his injury and its cause several years later, but the court of appeals held that the statute runs from the moment the cause of action accrues even though plaintiff is unaware of the injury.

²⁵ Annotation at 80 A.L.R.2d 379 (1961).

²⁶ 67 Ohio St. 106, 65 N.E. 865 (1902).

patient, or one year later at the time the treatment terminated. The court held that as long as the doctor-patient relationship continued, the doctor had a duty to undo his wrong. Each day's failure to remove the sponge was a breach of a fresh duty owed and thus the statute did not attach until the doctor-patient relationship terminated.

The *Gillette* decision was rendered by a court equally divided, three to three. That ruling was subsequently reversed in *McArthur v. Bowers*,²⁷ but the *McArthur* case was directly overruled and the decision reached in the *Gillette* case reaffirmed in *Bowers v. Santee*.²⁸ In the *Bowers case*,²⁹ the court said that the patient has a right to rely upon the doctor taking such steps as reasonable care and skill would require to correct the damage done. The patient has a right to so rely until the contract of employment is at an end. The court went on to say that during treatment the doctor should not be harrassed by lawsuits prematurely begun to save a cause of action. Thus, the statute does not attach until the treatment has come to an end.

This rule has been adopted and modified by several states. These courts have stated that so long as the relation of physician continues as to the particular injury or malady which he is employed to cure, and the physician continues to attend and examine the patient in relation thereto, and there is something more to be done by the physician in order to effect a cure, the statute of limitations does not begin to run.³⁰

It is unclear whether Illinois has adopted the "end of treatment" rule as an exception to the rule that the statute runs from the time of the injury.³¹ The only case somewhat in point rejects the *Gillette* rule. In the case of *Gangloff v. Apfelbach*,³² the court expressly disapproved the "end of treatment" rule. That case involved a peculiar set of facts. The plaintiff broke his elbow and was treated by the defendant who set the arm. When the cast was removed, the elbow proved to be locked. In June of 1936, an operation was performed to free the elbow, but it failed. In addition, during the operation, the defendant-doctor severed some nerves, with the result that the plaintiff's hand and fingers were paralyzed. Two more operations

²⁷ 72 Ohio St. 656, 76 N.E. 1128 (1905).

²⁸ 99 Ohio St. 351, 124 N.E. 238 (1919).

²⁹ The plaintiff had fractured her leg on December 29, 1913, and defendant failed to set it properly. Treatment continued until May, 1914. Suit was filed in April of 1915. If the statute ran from the date the leg was set, the suit would be barred by the one year statute of limitations.

³⁰ *Schmit v. Esser*, 183 Minn. 354, 236 N.W. 622, 74 A.L.R. 1312 (1931); *De Haan v. Winter*, 258 Mich. 293, 241 N.W. 923 (1932); *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941); *Thatcher v. DeTar*, 351 Mo. 603, 173 S.W.2d 760 (1943).

³¹ An interesting problem is raised when the patient discovers that he has a cause of action, but continues to be treated by the defendant-doctor. Some courts hold that the end of treatment rule still applies while others hold that the statute attaches as soon as the plaintiff has been put on notice that he has a cause of action. Annotated at 80 A.L.R.2d 383 (1961).

³² 319 Ill. App. 592, 49 N.E.2d 795 (1st Dist. 1943).

were performed, but the paralysis was never remedied. Treatment continued until March, 1940. The plaintiff filed suit in April, 1941, and the defendant pleaded the statute of limitations. The plaintiff contended that the statute did not begin to run until the treatment ended. The court said that the "end of treatment" doctrine was a minority rule, of which the court expressly disapproved. In addition, since there was only one act of negligence, the cutting of the nerves, that rule would not apply. Because the doctor could not remedy the defect, failure to remedy it was not a continuing wrong.

The court, in the *Gangloff* case, did not really decide that the "end of treatment" rule would not apply in a proper case. The court disapproved of the doctrine, but that disapproval was not necessary to the decision. The case actually held that if Illinois did follow the rule, the doctrine could not be applied, since nothing remained to be done in the treatment of the patient after the nerves were severed. In so deciding, the court perhaps overlooked the more relevant fact that apparently neither the plaintiff nor the defendant realized that the paralysis was incurable and that the plaintiff had a right to rely on the doctor's skill in remedying the condition. Though this case is a strong indication that the end of treatment doctrine is not accepted in Illinois, since it is the only case on the subject and the language rejecting the rule is mere dicta, it cannot be said to be conclusive.

WHAT ACTS CONSTITUTE FRAUD THAT TOLLS THE STATUTE?

There is a conflict in authorities as to whether fraudulent concealment of a cause of action tolls the statute of limitations.³³ The Illinois legislature resolved the problem for the Illinois courts. Chapter 83, § 23 of the Illinois Revised Statutes provides:

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

The problem that remains is one of statutory construction. What is fraudulent concealment? There is general accord that conduct which amounts to fraudulent concealment is that which has the effect of preventing the injured party from learning of the true facts.³⁴ The conflict in authorities relates to whether actual knowledge of the wrong done to the patient and/or the presence of an affirmative act are necessary elements of fraudulent concealment. As applied to malpractice, there are no Illinois cases. Other jurisdictions are split.

³³ The majority of states do toll the statute, though there are a few that do not. Annotated at 80 A.L.R.2d 400 (1961).

³⁴ *Id.* at 406.

The majority of the courts that have dealt with the problem of the necessity of knowledge hold that scienter, or knowledge on the part of the physician, is required.³⁵ These courts are reluctant to say that the concept of fraud includes the good faith acts of a physician which happen to result in a patient's cause of action being concealed.

Whether an affirmative act, designed to conceal the wrong or the acquisition of information concerning the existence of the wrong done, is a necessary element, raises a more difficult problem. The courts that have ruled that mere silence is sufficient to bring about a fraudulent concealment base their decision on the existence of a confidential relationship.³⁶ They conclude that as between physician and patient there exists a relation of trust and confidence that gives rise to a duty to disclose, the breach of such duty being a fraudulent concealment that will toll the statute. Those courts that require an affirmative act which tends to conceal the cause of action have adopted the more traditional definition of fraud.³⁷

A determination of which rules are applicable in Illinois is difficult at best. There are no cases which squarely meet the issues. In case after case it is stated that mere silence is not enough, but none of these cases involve a situation wherein a breach of the duty to disclose was raised. The cases that are concerned with the existence of a confidential or fiduciary relationship address themselves to relieving the plaintiff of the obligation of using due diligence to discover the fraud rather than to the question of whether failing to disclose relevant facts is such fraud that will toll the statute.³⁸

The case that comes closest to the question of silence being fraud sufficient to toll the statute is *Barnes v. Huffman*.³⁹ In that case, the plaintiff sued to recover the value of land she had conveyed to her father. She alleged that her father induced the conveyance by falsely telling her that executing the deed was necessary to facilitate the settlement of another lawsuit which was then pending. The plaintiff had no knowledge of the significance of her acts and her father fraudulently concealed the existence of the true nature of the deed for ten years. The action was for assumpsit and the defendant pleaded the statute of limitations. The plaintiff contended that the facts showed a fraudulent concealment which tolled the statute. The court agreed. Assuming that the court distinguished between the fraud which induced the transaction and the fraud which concealed the existence of the cause of action, this case would support the conclusion that one who stands in a relationship of trust and confidence to another has a duty to disclose,

³⁵ *Id.* at 407.

³⁶ *Id.* at 408.

³⁷ *Id.* at 407.

³⁸ Two early examples of this are *Vigus v. O'Bannon*, 118 Ill. 334, 8 N.E. 778 (1886) and *Gillett v. Wiley*, 126 Ill. 310, 19 N.E. 287 (1888).

³⁹ 113 Ill. App. 222 (1903).

and silence would be sufficient to toll the statute as being fraudulent concealment. However, there was present in *Barnes*, affirmative acts of fraud which initially induced the transaction. If those acts also constituted fraudulent concealment, the case does not hold that mere silence is enough. The fact that acts of fraudulent concealment occurred prior to the accruing of a cause of action is usually irrelevant for the purpose of tolling the statute of limitations.⁴⁰

Though Illinois has not yet decided, the better rule would seem to be that silence when there is a duty to speak is a fraudulent concealment that will toll the statute. When a case does present itself to the Illinois courts, there is no reason to suppose that they would choose to adopt the contrary rule. This conclusion draws some support from Illinois decisions which have recognized that there is no duty to use due care in discovering the fraud of one who stands in a confidential relationship to another.⁴¹ Recognizing the extra protection given one who stands in a confidential relationship to another, the Illinois court's adoption of a rule that invariably requires an affirmative act would be somewhat inconsistent.

MERRILL C. HOYT

THE GOOD SAMARITAN STATUTE

The Illinois Legislature has recently passed (June 21, 1965) an act designed to promote the giving of medical aid to accident victims. The theory behind the passage of the act was to encourage physicians fearful of malpractice suits to stop and render aid to those injured in automobile accidents. The statute reads,

Any person licensed pursuant to this act, or any person licensed to practice the treatment of human ailments in any other State or Territory of the United States, except a person licensed to practice midwifery, who in good faith provides emergency care without fee at the scene of a motor vehicle accident or in case of nuclear attack shall not, as a result of his acts or omissions, except wilful or wanton misconduct on the part of such person, in providing such care, be liable for civil damages.¹

This statute, or one similar to it, has been adopted by some thirty-two states.² However, it is curious that its enactment was thought to be necessary in Illinois where there is not a single reported case of a doctor being

⁴⁰ 34 Am. Jur. *Limitations* § 234 (1941).

⁴¹ *Supra* note 37.

¹ Ill. Rev. Stat. ch. 91 § 2a (1965).

² A complete list of those states where this statute or one similar to it has been enacted can be found in 13 DePaul L. Rev. 297 (1964). Also included there is a more complete review of the reasons for enacting the Good Samaritan Statute and the good expected to be thereby achieved.