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The Uniform Statute of Limitations on Foreign Claims Act

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THE UNIFORM STATUTE OF LIMITATIONS ON FOREIGN CLAIMS ACT: TOLLING PROBLEMS*

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In July, 1957, the National Conference of Commissioners on Uniform State Laws approved a *Uniform Statute of Limitations on Foreign Claims Act.*[1] Section 2, its only substantive provision, reads as follows:

> Section 2. [Periods of Limitation on Foreign Claims.] The period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever first bars the claim.[2]

As promulgated, the Conference proposal amounts to a limited borrowing statute calling for the application of the law of the place of accrual in the single instance of the statutory period there having run. The forum's statute of limitations controls in all other situations. A compromise solution to a difficult and complicated problem is presented by the Commissioners.[3]

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1. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 264 (1957). The act was approved by the American Bar Association on July 16, 1957.

2. The other provisions of the act read as follows:

[*Be It Enacted . . .*]

Section 1. [*Definition.*] As used in this act, "claim" means any right of action which may be asserted in a civil action or proceeding and includes, but is not limited to, a right of action created by statute.

. . . .

Section 3. [*Existing and Future Claims.*] The periods of limitation prescribed in this act apply only to a claim upon which action is commenced more than one year after the effective date of this act.

Section 4. [*Uniformity of Interpretation.*] This act shall be construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 5. [*Short Title.*] This act may be cited as the Uniform Statute of Limitations on Foreign Claims Act.

Section 6. [*Repeal.*] The following acts and parts of acts are hereby repealed one year after the effective date of this act: . . . .

Section 7. [*Time for Taking Effect.*] This act shall take effect . . . .

3. A suggestion that the act include a more complete borrowing provision was rejected by the Commissioners. See Vernon, *Report on the First Tentative Draft of the Uniform Statute of Limitations on Foreign Claims Act,* 3 WAYNE L. REV. 187, 204 (1957).

In the absence of statutory change, the period of limitations normally applicable to a claim accruing beyond the forum's borders is that prescribed by that forum's internal or municipal law.[4] Several states retain this common law rule,[5] although most have altered it by legislation.[6] As the prefatory note to the Uniform Act points out, however,

4. See, *e.g.*, Filson v. Fountain, 197 F.2d 383, 384 (D.C. Cir. 1952): "Though appellees' obligation, if any, was created in New Jersey, the District of Columbia statute governs because suit was brought in the District"; Goodwin v. Townsend, 197 F.2d 970, 972 (3d Cir. 1952): "Viewing it [the foreign statute of limitations] as procedural and as, therefore, not operating to extinguish the plaintiff's right, he denied the defendant's motion for a directed verdict and her subsequent motion for judgment n.o.v. In so doing he committed no error. For it is perfectly clear that the Ontario statute in question has no substantive effect but merely operates to bar suits in the courts of that province"; Universal Airline, Inc. v. Eastern Air Lines, Inc., 188 F.2d 993, 996 (D.C. Cir. 1951): "A statute of limitations affects procedure, and it is therefore the statute of the forum that controls"; Janes v. Sackman Bros. Co., 177 F.2d 928, 930 (2d Cir. 1949): "In view of the truism of the conflict of laws that the statute of limitation normally to be applied is that of the forum, it is appropriate that we first examine the law of New York on this subject"; Panhandle Eastern Pipe Line Co. v. Parish, 168 F.2d 238 (10th Cir. 1948) (Applying the bar of the Kansas statute although the claim was not barred where it arose); Dam v. General Electric Co., 144 F.Supp. 175, 179, 180 (E.D. Wash. 1956): "It is a well-established general rule that all matters of procedure, such as the limitation of time in which an action may be brought, where the limitation pertains to the remedy rather than the right, are governed by the law of the forum"; Mullins v. Ala. Great So. R. R., 239 Ala. 608, 195 So. 866 (1940) (Barring the action on the basis of the local time period, although not barred where it arose); Pierce v. Stirling, 225 Ark. 108 279 S.W.2d 840, 842 (1955) (New Mexico contract: "[T]he Arkansas statute of limitations, the law of the forum, must and does control"); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944, 948 (1953) (Dealing with an Arizona survival statute: "They are analogous to statutes of limitation, which are procedural for conflict of laws purposes and are governed by the domestic law of the forum"); Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149, 150 (1953): "The statute of limitations of any state is without extraterritorial effect, and limitations are governed by the law of the forum"; Knipfer v. Buhler, 227 Minn. 334, 35 N.W.2d 425, 426 (1948): "Statutes which limit the period within which actions may be commenced are generally considered procedural, and therefore the law of the forum is applied"; Smith v. Turner, 91 N.H. 198, 17 A.2d 87 (1940) (Applying the longer local period to a claim which was barred where it arose); Heisel v. York, 46 N.M. 210, 125 P.2d 717 (1942) (Applying the longer local period to a claim which was barred where it arose); Freeman v. Lawton, 353 Pa. 613, 46 A.2d 205, 206, 207 (1946): "[W]hether the suit was in time is not to be determined by the law of Florida; the law of the remedy must be found in this Commonwealth"; Davison v. Sasse, 72 S.D. 199, 31 N.W.2d 758 (1948) (Hearing a claim which was barred where it accrued); Cate v. Perry, 11 S.W.2d 352 (Tex. Civ. App. 1928) (Applying local bar, although not barred where it arose).

5. The following states have no "borrowing" legislation: Connecticut, Georgia, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota and Vermont.

6. See ALA. CODE ANN. tit. 7, § 37 (1940); ARIZ. REV. STAT. § 12-506 (A) (1956); ARK. STAT. ANN. § 37-231 (1947); ALASKA COMP. LAWS ANN. § 55-2-23 (1949); CAL. CODE CIV. PROC. § 361 (Deering 1953); COLO. REV. STAT. ANN. § 87-1-22 (1953); DEL. CODE ANN. tit. 10, § 8120 (1953); FLA. STAT. ANN. § 95.10 (1943); IDAHO CODE ANN. § 5-239 (1947); ILL. REV. STAT. c. 83, § 21 (1955); IND. ANN. STAT. § 2-606 (1946); IOWA CODE § 614.7 (1958); KAN. GEN. STAT. ANN. § 60-310 (1949); KY. REV. STAT. § 413.320 (1955); ME. REV. STAT. ANN. c. 112, § 111 (1954); MASS. ANN. LAWS c. 260, § 9 (1956); MINN. STAT. § 541.14 (1953); MISS. CODE ANN. § 741 (1942); MO. ANN. STAT. § 516.180 (1952); MONT.

the statutory modifications take varying forms and achieve varying results.[7] The draftsmen of the Uniform Act are attempting to do away with the existing statutory variations. Further, they are trying to bring all jurisdictions into agreement—as a minimum—that when a claim is barred where it accrued, it will be everywhere barred.

Section 2 of the proposed act accomplishes the minimum objective. If an action is barred by the law of the place of accrual, under the act proposed no jurisdiction will grant relief. Preventing diverse treatment of claims not so barred, perhaps the primary objective of the act, is not achieved. To analyze the effectiveness of the Conference solution, it is necessary to examine the act in context as a part of the general legislative scheme in each of the prospective enacting states. Since the act is a borrowing statute, existing borrowing provisions will be repealed upon its adoption. The major remaining legislation in conjunction with which the act must operate is that dealing with the suspension of local statutes of limitations on claims accruing outside of the forum. The deterrent effect such tolling provisions would have on the achievement of the desired uniformity is here examined.[8]

Historical Background

The 1957 effort by the Conference represents its second attempt to deal with the problem area of statutes of limitation. In 1939 a more direct attack was made in the form of a *Uniform Statute of Limitations Act*.[9] No state adopted it.[10] Had it been accepted by all of the states, the internal periods of limitation in each would have been the same. If every state had a one year statutory period for the bringing of a libel action, it would, on the surface, appear that significant uniformity

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REV. CODES ANN. § 93-2717 (1947); NEB. REV. STAT. § 25-215 (1943, reissue 1956); NEV. REV. STATS. § 11.020 (1957); N. Y. CIV. PRAC. ACT § 13; N. C. GEN. STAT. ANN. § 1-21 (Supp. 1955); OHIO REV. CODE ANN. § 2305.20 (1953); OKLA. STAT. tit. 12 § 99 (1951); ORE. REV. STAT. § 12-260 (1953); PA. STAT. ANN. tit. 12, § 39 (1953); R.I. GEN. LAWS ANN. § 9-1-18 (1956); TENN. CODE ANN. § 28-114 (1955); TEX. CIV. STAT. ANN. art. 5537 (1941); UTAH CODE ANN. § 78-12-45 (1953); VA. CODE ANN. § 8-23 (1950); WASH. REV. CODE § 4.16.290 (1951); W. VA. CODE ANN. § 5409 (1955); WIS. STAT. § 330.205 (1957); WYO. COMP. STAT. ANN. § 3-520 (1945).

7. UNIFORM STATUTE OF LIMITATIONS ON FOREIGN CLAIMS ACT, Prefatory Note 3. Proyect has classified the various borrowing provisions into sixteen different categories. See Proyect, *A Study of the Uniform Statute and the Present State of the Law Limiting Claims Arising in Foreign States*, 4 WAYNE L. REV. 123 (1958).

8. The problems raised by the suspension legislation currently in force were discussed by the author in an earlier article. See Vernon, *The Uniform Statute of Limitations on Foreign Claims Act: A Discussion of Section Two*, 4 ST. LOUIS U.L.J. 442 (1957). No effort was made in the earlier article, however, to analyze the problem on the basis of specific provisions of the statutes in question.

9. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 289 (1939).

10. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS Table III, 340 (1958).

would result. And in a limited sense, it would. As tested against the concept of uniformity in the conflict of laws, however, the uniformity achieved by the adoption of identical internal time periods is spurious at best. In conflicts, uniformity contemplates a system in which the choice of forum will not affect the result reached in any single case. A claim based on events occurring in State *A* should, under a proper conflict of laws system, be dealt with in an identical manner irrespective of the forum. In this context, the 1939 act left much to be desired. Assume that States *A* and *B* have adopted the 1939 act, giving both states a one year statutory bar on the bringing of a libel action. A libel occurs in State *A* and involves residents thereof; the claim is asserted in the courts of State *B* eighteen months after accrual. Under the act such a claim would be barred if brought in State *A*. Conflicts uniformity would require that State *B* refuse to act as forum. The facts that State *B* has a one year statutory period on libel actions and that the claim is asserted eighteen months after accrual do not necessarily mean that the courts of *B* will refuse to grant relief. If the defendant entered State *B* fifteen months after the claim accrued, and if the commencement of the running of *B*'s one year statute is delayed until such entry, as would be the case in most American jurisdictions, the claim would be heard in *B* although barred in *A*.[11]

Not only did the 1939 Act fail to take the "commencement problem" into account, it specifically disavowed any intention to modify local practices in the area.[12] In a caveat, the Commissioners state that "it is deemed impractical to attempt to unify the various provisions of the several States relative to the events operating to suspend, toll, interrupt or extend the running of the limitation periods."[13] The prefatory note to the 1957 proposal takes the same approach and disclaims any intention "to define the events or conditions which may operate to suspend, toll, interrupt, or extend the applicable periods of limitation."[14] It is the thesis of this article that the failure to establish a uniform tolling provision as to claims accruing outside of the enacting states constitutes a serious omission by the Conference. Not only does it seem practical to unify the tolling or suspension provisions of the various states as they deal with foreign claims, but further, it seems essential that such unification occur if a reasonable modicum of conflicts uniformity is to be achieved by the legislation.

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11. *E.g., In re* Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941).

12. UNIFORM STATUTE OF LIMITATIONS ACT § 5: "The events or conditions which may operate to suspend, toll, interrupt or extend the running of the periods prescribed are not affected by this act."

13. Note 9 *supra.*

14. UNIFORM STATUTE OF LIMITATIONS ON FOREIGN CLAIMS ACT, Prefatory Note 3.

Tolling Local Periods of Limitation on Foreign Claims

The suspension statutes of the various states are not designed to deal with claims accruing beyond their borders. These statutes seem to focus on whether the party to be charged is present or absent rather than on whether the accrual of the claim is foreign or domestic. Although not particularly designed to do the job, the provisions have been "made to do." Mississippi and Pennsylvania are the only states dealing with the question of the suspension of the local time period solely on the basis of the place of the accrual of the claim.[15] They limit the operation of their tolling provisions to claims which accrue locally. All of the other legislation in the field speaks in terms of the presence or absence of the parties, their residence or nonresidence, or their coming into or returning to the jurisdiction. The following general patterns are found in the *statutory* language used:

Group I.—If a party is absent from the state at the time a claim accrues against him, the local time period is suspended until such time as the party *returns* to the state. The following are included in group I:[16]

Alaska	Minnesota	Rhode Island
Arizona	Montana	South Carolina
California	Nevada	South Dakota
Florida	North Carolina	Texas
Georgia	North Dakota	Utah
Idaho	Oregon	

Group II.—If a party is absent from the state at the time a claim accrues against him, the local time period is suspended until such

15. MISS. CODE ANN. § 740 (1942): "If, after any cause of action have *accrued in this state,* the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action, after his return"; PA. STAT. ANN. tit. 12, § 40 (1953): "In all civil suits and actions in which the cause of action shall have *arisen within this state* the defendant or defendants in such suit or action who shall have become non-resident of the state after said cause of action shall have arisen, shall not have the benefit of any statute of this state for the limitations of actions during the period of such residency without the state." (Emphasis supplied.)

16. ALASKA COMP. LAWS ANN. § 55-2-14 (1949); ARIZ. REV. STAT. § 12-501 (1956); CAL. CODE CIV. PROC. § 351 (1953); FLA. STAT. ANN. § 95.07 (1943); GA. CODE ANN. § 3-805 (1936); IDAHO CODE ANN. § 5-229 (1947); MINN. STAT. § 541.13 (1953); MONT. REV. CODES ANN. § 93-2702 (1947); NEV. REV. STATS. § 11.300; N.C. GEN. STAT. § 1-21 (Supp. 1955); N.D. REV. CODE § 28-0132 (1943); ORE. REV. STAT. § 12.150 (1953); R.I. GEN. LAWS ANN. § 9-1-18 (1956); S.C. CODE § 10-103 (1952); S.D. CODE § 33.0203 (1939); TEX. CIV. STAT. ANN. art. 5537 (1941); UTAH CODE ANN. § 78-12-35 (1953). The California language is, perhaps, typical of the entire group. "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

time as the party *comes into* or returns to the state. The following comprise group II:[17]

Alabama	Maryland	Ohio
Colorado	Michigan	Oklahoma
Connecticut	Nebraska	Tennessee
Delaware	New Mexico	Washington
Kansas	New York	Wyoming
Maine		

Group III.—The time during which a person is a *nonresident* of the state is not included in computing the running of any period of limitation. The following states are included:[18]

Indiana	New Hampshire
Iowa	New Jersey
Massachusetts	

Group IV.—The local time period is suspended only when a claim accrues against a *resident* of the state who is out of state at the time the claim accrues. Included in group IV are Kentucky and Missouri.[19]

Group V.—The local time period is suspended only as to claims which accrue locally. Mississippi and Pennsylvania are included.[20]

Group VI.—The local time period is tolled as provided in group II, above, but the provision is inapplicable if neither party resides in

17. ALA. CODE ANN. tit. 7, § 34 (1940); COLO. REV. STAT. ANN. § 87-1-30 (1953); CONN. GEN. STAT. § 8330 (1949); DEL. CODE ANN. tit. 10, § 8116 (1953); KAN. GEN. STAT. ANN. § 60-309 (1949); ME. REV. STAT. ANN. c. 112, § 111 (1954); MD. ANN. CODE art. 57, § 5 (1957); MICH. STAT. ANN. § 27.609 (1938); NEB. REV. STAT. § 25-214 (1943, reissue 1956); N.M. STAT. ANN. § 23-1-9 (1953); N.Y. CIV. PRAC. ACT § 19; OHIO REV. CODE ANN. § 2305.15 (1953); OKLA. STAT. § 12-98 (1951); TENN. CODE ANN. § 28-112 (1955); WASH. REV. CODE § 4.16.180 (1951); WYO. COMP. STAT. ANN. § 3-519 (1945). The language of the group II statutes is not as consistent as that used in group I. Some of the provisions refer to a simple "coming into" and others of a "returning or coming into." The Alabama provision speaks in terms of not counting the time of absence from the state and Maryland permits suit after presence in the state.

18. IND. ANN. STAT. § 2-606 (1946); IOWA CODE § 614.6 (1958); MASS. ANN. LAWS c. 260, § 9 (1956); N.H. REV. STAT. ANN. § 508.9 (1955); N.J. REV. STAT. § 2A:14-5 (1951). The following language from the Iowa provision is representative of the group: "The time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitations above described."

19. KY. REV. STAT. § 413.190 (1) (1953); MO. ANN. STAT. § 516.200 (1952). The Kentucky provision reads as follows: "If, at the time any cause of action . . . accrues against a resident of this state, he is absent from it, the period limited for the commencement of the action against him shall be computed from the time of his return to this state. . . ." The Missouri provision closely parallels this.

20. Note 15 *supra*.

the forum at the time the claim accrues. Included are Illinois and Wisconsin.[21]

Group VII.—The local time period is tolled as provided in group II, above, but the provision is inapplicable when both parties reside in the place of the accrual at the time it arises. Vermont is the only state with such a provision.[22]

Group VIII.—The local time period is suspended as to persons who "had before resided" in the state, and who, by departing, prevent service of process. Virginia and West Virginia comprise the group.[23]

Group I: "Returning" Construed to Mean "Entering for the First Time."

Seventeen states have existing statutory provisions to the effect that absence from the jurisdiction tolls the running of the statute until such time as he returns to the state. No reference is made to the place of accrual. The group I statutes merely provide that if a party is out of state at the time a claim accrues against him, the period of limitations does not commence to run until he returns to the jurisdiction. In discussing the language of the provision, the North Carolina Court said that a "casual examination of [the language] . . . might lead to the conclusion that the debtor must have been a resident of this State or temporarily residing therein at the time the obligation was created . . . since we usually do not speak of returning to a place

21. ILL. REV. STAT. c. 83, § 19 (1955); WIS. STAT. § 330.30 (1957). The pertinent language of the provisions are quite similar. The Illinois statute reads as follows: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited, after his coming into or return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action. *But the foregoing provisions of this section shall not apply to any case, when, at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue, were or are residents of this state.*" (Emphasis supplied.)

22. VT. STATS. tit. 9, c. 81, § 1702 (1947). The following proviso appears at the end of the Vermont suspension provision: "The provisions of this section shall not extend to a cause of action accruing in another state or government, when the parties thereto at the time of the accruing of such cause of action are residents of such other state or government."

23. VA. CODE ANN. § 8-33 (1950); W. VA. CODE ANN. § 5409 (1955). The provisions closely parallel each other. Virginia provides: "When any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same . . . obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which such right might or ought to have been prosecuted. . . ."

Louisiana and Arkansas have statutory provisions which so depart from the norm that they have not been classified and are not here discussed. See ARK. STAT. ANN. § 37-231 (1947); LA. REV. STAT § 9:5802 (1950). The Arkansas provision deals with debtors who "fraudulently abscond" from another state. Louisiana suspends its time period against former residents who are fugitives from justice.

we have never been."[24] Despite the obvious "coming back" connotation of the word "return," only three of the jurisdictions in group I, Georgia,[25] Minnesota[26] and Texas[27] so limit it. Other states in construing the provision have held that the words "return to" were words of art and that, in the context of their use, embraced an initial entry as well as a coming back.[28] Thus, the South Dakota Court says: "[W]hile, strictly speaking, this debtor has never returned, his case is clearly within the spirit of the . . . statute, which did not commence to run in his favor until he came within the jurisdiction of our courts."[29] And the Rhode Island Court explains: "In order to . . . give effect to the evident intent of the statute, the word return is construed to mean a coming within the State and within reach of the process of the Court. . . ."[30] Under the majority reading, and in the absence of a borrowing act,[31] a claim may accrue in State *A* between two residents thereof and be barred there; but, upon the debtor's entry into State *B*

24. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 787 (1953).

25. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438 (1945). This case involved a claim which accrued locally. "The basis for the saving provision is, of course, inability to bring suit in this State because of the temporary absence of the debtor. To come within the words of the statute, the defendant must have been a citizen of this State at the time of the accrual of the debt and subsequently have removed from the State." 34 S.E.2d at 442.

26. Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N.W. 1056 (1904) (Limiting the suspension provision to claims accruing locally).

27. U.S. Royalty Ass'n v. Stiles, 131 S.W.2d 1060, 1064 (Tex. Civ. App. 1939): "The courts in an unbroken line of decisions hold that this statute [suspension] has no application to persons who were non-residents of the State of Texas at the time the cause of action accrued. Simonds v. Stanolind Oil & Gas Co. et al., Tex. Sup., 114 S.W.2d 226, and authorities cited."

28. *E.g.*, Alaska Credit Bureau v. Fenner, 12 Alaska 158, 80 F.Supp. 7 (D. Alaska 1948) (claim accruing in State of Washington against a Washington defendant); Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 160 P.2d 331 (1945) (claims accruing outside of Arizona); Cvecich v. Giardino, 37 Cal. App. 2d 394, 99 P.2d 573 (1940) (foreign claim involving nonresident parties); Seaver v. Stratton, 133 Fla. 183, 183 So. 335 (1938) (claim accruing in Florida against a nonresident defendant who entered the State three years after the claim accrued); West v. Theis, 15 Idaho 167, 96 Pac. 932 (1908) (claim accrued in Kansas and involved parties who at the time of accrual resided in Kansas); Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953) (claim arose outside of North Carolina and involved nonresidents thereof); Jamieson v. Potts, 55 Ore. 292, 105 Pac. 93 (1909) (claim accrued in Oregon against an absent defendant); Croker v. Arey, 3 R.I. 178 (1855) (Massachusetts note and parties); Francis v. Mauldin, 215 S.C. 374, 55 S.E.2d 337 (1949); Burrows v. French, 34 S.C. 165, 13 S.E. 355 (1891) (New Hampshire note and parties); McConnell v. Spicker, 15 S.D. 98, 87 N.W. 574 (1901) (Minnesota note and party to be charged absent from South Dakota at the time of making and of accrual); Burnes v. Crane, 1 Utah 179 (1875) (Kansas replevin bond and defendants nonresidents of Utah until after accrual).

29. McConnell v. Spicker, 15 S.D. 98, 101, 87 N.W. 574 (1901).

30. Croker v. Arey, 3 R.I. 178, 180-81 (1855).

31. Georgia, North Dakota, South Carolina and South Dakota are the only jurisdictions among the group I states without some form of borrowing legislation. Of these, North Dakota appears to be the only uncommitted state.

several years later, the suit may be successfully prosecuted, State *B*'s time period being suspended or tolled until such entry.[32]

In rationalizing the artificial reading of the statutory language, several justifications have been articulated. (1) It is often stated that the group I legislation was patterned after 4 & 5 Stat. of Anne c. 16, § 19 (1705)[33] which was consistently construed by the English courts as suspending the period of limitations on claims accruing "beyond the seas" between nonresidents until the defendant arrived in England.[34] (2) American case law is said to support the artificial reading "overwhelmingly."[35] (3) Limiting the language to a "coming back" has been deemed to be "strained,"[36] "narrow,"[37] "confusing,"[38] "unfair,"[39] and "discriminatory."[40] A judge, in dissenting from the majority view, has commented that "there has been more unsound, superficial, and illogical writing by the courts in construing [these provisions] . . . than on any other subject it has been my privilege to investigate."[41] The author is in full agreement with this statement.

32. See, *e.g.*, Hatch v. Spofford, 24 Conn. 432 (1856); Mason v. Baltimore & O. R. Co., 81 Md. 446, 32 Atl. 311 (Md. App. 1895); Belden v. Blackman, 118 Mich. 448, 76 N.W. 979 (1898); *In re* Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941); Burrows v. French, 34 S.C. 165, 13 S.E. 355 (1891); McConnell v. Spicker, 15 S.D. 98, 87 N.W. 574 (1901).

33. 4 STAT. AT LARGE 207.

34. *E.g.*, Alaska Credit Bureau v. Fenner, 12 Alaska 158, 162, 80 F. Supp. 7, 8-9 (D. Alaska 1948); Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 787-88 (1953). For a discussion of the English cases, see Ruggles v. Keeler, 3 Johns. R. 263, 266, 3 Am. Dec. 482, 483 (N.Y. 1808).

35. *E.g.*, Alaska Credit Bureau v. Fenner, 12 Alaska 158, 162, 80 F.Supp. 7,8 (D. Alaska 1948): "While the statutes of the various states differ somewhat in phraseology, particularly in that for the words 'beyond the seas' words equivalent in meaning to 'out of the state' have been substituted, they have, by the *overwhelming weight of authority* and better reasoning, been construed to apply not only to residents but also to those who had never resided in the jurisdiction of the forum." (Emphasis supplied). See also Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 179, 160 P.2d 331, 335 (1945).

36. Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 181, 160 P.2d 331, 336 (1945): "To construe the act as limited to claims arising in this state would be a *strained* and *narrow* construction." (Emphasis supplied).

37. *Ibid.*

38. Cvecich v. Giardino, 37 Cal. App. 2d 394, 99 P.2d 573, 574 (1940): "If appellants construction . . . were adopted, so that the section were held to apply only where the defendant has at some time before the filing of the action been within the state, has thereafter left the state, and then returned, it would lead to *confusion* and *unfairness*." (Emphasis supplied.)

39. *Ibid.*

40. *E.g.*, Alaska Credit Bureau v. Fenner, 12 Alaska 158, 169, 80 F. Supp. 7, 11-12 (D. Alaska 1948) (fearing an unwarranted preference in favor of nonresidents); Croker v. Arey, 3 R.I. 178, 180, 181 (1855): "We cannot suppose that it was intended to give any greater protection to a foreigner than our own citizens." See also, *In re* Goldsworthy's Estate, 45 N.M. 406, 412, 115 P.2d 627, 631 (1941): "In Cvecich v. Giardino, 37 Cal. App. 2d 394, 99 P.2d 573, 576, it was said: 'Moreover, these cases point out, the courts should not *discriminate* against nonresident plaintiffs.'" (Emphasis supplied).

41. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 790 (1953).

Each of the articulated "explanations" justifying the inclusion of an initial entry in the words "returning to" calls for comment.

(a) *Early English Legislation and Decisions.*—The Statute of Anne, after which the group I legislation is said to be patterned, reads as follows:

> And be it further enacted . . . That if any Person or Persons against whom there is or shall be any such Cause . . . shall be, at the Time of such Cause . . . beyond the Seas; that then such Person or Persons, who is or shall be intitled to any such . . . . Action, shall be at Liberty to bring such Actions against such Person and Persons, *after their Return from beyond the Seas, so as they take the same after their Return from beyond the Seas, within such Times as are respectively limited for the bringing of said Actions before by this Act* . . . . (Emphasis supplied.)[42]

That the group I provisions, as well as those in groups II and III, were patterned after the English law cannot be doubted. It seems clear that "returning from out of state" was intended to be the equivalent of "returning from beyond the seas."[43] Further, the English courts consistently applied the statute to suspend the commencement of the running of the time period until entry into England even where the claim accrued elsewhere and involved foreigners.[44] England, on the basis of the recommendation of the Law Revision Committee, recognized the provision's lack of utility and repealed it in 1939.[45] The American courts, however, still persist in following the discarded English pattern.

Conforming to the English decisional pattern clearly requires the inclusion of an initial entry in reading the statutory language. But in a nation of fifty states, with the vast commercial intercourse among them bringing about an ever-growing mobility of population, different considerations are presented. For a state of the United States to grant relief on a claim barred in a sister state where it arose, and involving residents of the sister state, seems somewhat incongruous. In addition to running counter to the pressures toward mobility in our society, such action is inconsistent with our federal system. It is difficult to comprehend why a legislature should undertake to toll the local statute of limitations to protect a nonresident who has re-

42. 4 & 5 Anne 19, c. 16, § 19 (1705).
43. Notes 34 and 35 *supra*.
44. "4 & 5 Ann. c. 3, applies as against a debtor who has never been within the jurisdiction at all.—Kasson v. Holley (1871), 1 Man. L. R. I.—CAN," 32 ENGLISH EMPIRE DIGEST 347 (1927). See Sturt v. Mellish, 2 Atk. 610, 26 Eng. Rep. 765 (Ch. 1743); Aubry v. Fortescue, 10 Mod. 205, 88 Eng. Rep. 695 (K.B. 1714) (defendant beyond seas); Beven v. Clapham, 1 Lev. 143, 26 Eng. Rep. 339 (K.B. 1676) (foreign claim and plaintiff beyond seas). See also Strithorst v. Graeme, 3 Wils. 145, 95 Eng. Rep. 980 (K.B. 1770): "If the plaintiff is a foreigner, (as it seems he is) and doth not come to *England* in fifty years, he still hath six years after his coming to *England*, to bring his action . . . ."
45. Limitation Act, 2 & 3 Geo. 6, c. 21, § 34 (1939).

ceived all reasonable protection in his home state. Such a legislative intention would appear to be overly "solicitous of the rights of non-residents."[46] Legislative intentions, particularly of state legislatures, are difficult, if not impossible, to ascertain. To ascribe to the enacting body knowledge of a 1705 English statute and, further, of the judicial interpretation of that statute, seems far fetched. No statute may properly be construed in the abstract. The social purposes to be forwarded must be considered. These purposes must be ascertained, however, by a consideration of the various social factors involved and not by blind adherence to old English precedent. The majority view, following such precedent, imparts an unwarranted permanent vitality to certain claims. Unless a defendant remains in a single jurisdiction, he may never escape from the burden of the claim against him.[47] It is sufficiently difficult to try a law suit within a few years of the occurrence of the facts giving rise to it. To try it many years later in a jurisdiction which may be far removed geographically approaches the ridiculous.

As stated, the social purposes requiring the establishment of a time limitation on the right to assert a claim for relief must be analyzed. "Judicial and other weighty opinions have varied widely upon the general policy of the Statute and the conscientiousness of pleading it."[48] On the one hand, the Ohio court, in discussing the matter, expressed the view that

> there is much to be said for the philosophy of the late President Coolidge who, in support of his insistence that foreign governments make some effort to repay their debts to the United States after World War I, remarked, "They hired the money, didn't they?"[49]

Further, it is often said that "the law favors right of action rather than the right of limitation."[50] On the other side, it has been pointed out that "long dormant claims have often more of cruelty than of justice in them."[51] And prescription statutes have been described as

46. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 794 (1953) (concurring opinion). *Contra, In re* Goldsworthy's Estate, 45 N.M. 406, 412, 115 P.2d 627, 631 (1941): "[T]here is no apparent reason why the legislature should have intended to discriminate in the application of the statute tolling the statute of limitations."

47. See *In re* Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941).

48. PRESTON & NEWSOM, LIMITATION OF ACTIONS 1 (2d ed. Newsom 1943).

49. Meekison v. Groschner, 153 Ohio St. 301, 91 N.E.2d 680, 684-85 (1950).

50. *In re* Goldsworthy's Estate, 45 N.M. 406, 412, 115 P.2d 627, 631 (1941). See *e.g.*, National Sur. Co. v. Ruffin, 242 N.Y. 413, 152 N.E. 246, 247 (1926): "The interpretation of this particular word [return] was considered by Judge Denio, and, with the support of various cases both in this state and in England, he reached the conclusion that because a statute of limitations is to be liberally construed in favor of the claimant, such a word as 'return' is not to be strictly interpreted but should be held to be applicable to the case of a nonresident who entered the state for the first time when he was served."

51. PRESTON & NEWSOM, LIMITATION OF ACTIONS 1 (2d ed. Newsom 1943), quoting Best, C. J., in A'Court v. Cross 3 Bing. 329, 332-33, 130 Eng. Rep. 540, 541 (C.P. 1825).

"among the most beneficial to be found in our books."[52] The desirability of a time bar to encourage freedom of movement and commercial activity without the fear of the imposition of a half forgotten claim seems obvious. A reasonably certain cut off point seems necessary to prevent the imposition of an impossible burden on the courts in the trial of stale claims concerning which evidence is either unavailable or uncertain.

Tolling legislation, operating in conjunction with statutory time bars, amounts to a recognition that claimants should be given every reasonable opportunity to assert their claims. Evasion of process is not to be countenanced and the suspension provisions operate, in part, to render such evasion fruitless. The mere failure to be present due to the fact of residency elsewhere cannot be deemed evasion of process. While not amenable to process in the jurisdiction of nonresidency, the party may be served where he does reside. Suspending the time period on the basis of mental disability of a resident defendant raises quite a different question. No "evasion" is present, but the party to be charged may not be served with process elsewhere.

The establishment of a base time period is a legislative recognition that the plaintiff is at "fault" in delaying action.[53] Extension of the base time period via suspension provisions constitutes a recognition of the fact that not every delay is caused by the plaintiff's inaction—that it may be brought about by conditions beyond his control, either by defendant's evasion or his disability. Absence due to nonresidency is neither an evasion nor a disability. The social purposes of tolling legislation are perverted in most of the group I states by the expansion of the "return to" language. Taking into account the wording of the statute, the purposes to be served, and buttressing this with the precedent available in the three state minority,[54] the way is open, at least for the uncommitted jurisdictions, to make an informed and intelligent application of the tolling provision rather than to follow old English precedent. In the other states, new legislation seems called for.

(b) *Overwhelming American Authority.*—That American case law supports the view that the local statute of limitations is suspended until such time as the defendant enters the jurisdiction, without regard to the place of accrual or the residency of the parties cannot be

52. 1 WOOD, LIMITATIONS 9 (4th ed. 1916), quoting from Fisher v. Harnden, 9 Fed. Cas. 129 (No. 4819) (C.C.N.Y. 1812).

53. "The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation be presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof." 1 WOOD, LIMITATIONS 8 (4th ed. 1916).

54. Georgia, Minnesota and Texas, notes 25, 26 and 27 *supra*.

disputed. The development seems to stem from Chief Justice Kent's decision in the early New York case of *Ruggles v. Keeler*,[55] where he said:

> Whether the defendant be a resident of this state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso. If the cause of action arose out of the state, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction.

In North Carolina, with a majority of the court following the *Ruggles v. Keeler* approach, Mr. Justice Barnhill, in objecting to such a construction, stated:

> I readily concede that the majority view follows the apparent weight of authority which is the usual practice when the exact question presented has not been decided in this State . . . . [T]he courts of the several States . . . have picked up and followed the opinion in the Ruggles case. *This has been done in most cases with perfunctory or superficial discussion.*[56] (Emphasis supplied.)

In analyzing the authority in the area, only those jurisdictions with simple "return to" language should be considered. Cases in group II, where the statute refers to a "coming into," and those in group III, with the statute couched in terms of nonresidency, cannot be considered. While there is a respectable minority of 3 among the committed group I states, the bulk of the jurisdictions insist on adoption of *Ruggles v. Keeler*. Only 3 states appear to be uncommitted,[57] and it is to be hoped that they will, when the time comes, follow the more rational views of the minority.

In his critique of the majority view, Mr. Justice Barnhill raises a possible constitutional objection to it. He suggests that to read the tolling provision as being operative on claims accruing outside of the enacting state between nonresidents thereof is to permit the legislature to exceed its authority. Thus, he says:

> Of necessity the absence of any right to be protected or any evil to be remedied by our Legislature in respect to property located in another State and its want of authority to legislate in respect thereto have a direct bearing on the meaning of the language used.
>
> Strangely enough, however, no court, so far as I have been able to ascertain, has considered the limitations upon the authority of the law-

55. 3 Johns. R. 263, 267, 3 Am. Dec. 482, 483 (N.Y. 1808). See Sinai v. Levi, 208 Misc. 650, 144 N.Y.S.2d 316, 319 (N.Y. City Ct. 1955): "The defendant was outside of the state from the time the cause of action arose until sometime in 1954; therefore the statute did not begin to run against him until he entered the state for the first time."

56. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 790 (1953).

57. Montana, Nevada and North Dakota.

> making agency of government in determining the meaning of similar language used in prescription statutes.
>
> Our statute was designed and intended to prescribe, regulate, and protect the rights of residents. That was the extent of the legislative authority of the General Assembly.[58]

The suggestion is an interesting one. No authority is cited by the justice in asserting the limitation on legislative power. *Home Ins. Co. v. Dick*[59] and its companion cases enunciating the doctrine of extraterritorial due process[60] may conceivably have some application. In the *Dick* case, an insurance contract entered into in Mexico contained a clause limiting to one year the time within which a claim could be asserted. Under the law of Mexico, the contractual limitation was valid. Prior to the bringing of the action in Texas, the only contact with the forum was the plaintiff's citizenship there. Throughout the period in question, however, he continually resided in Mexico. The claim in question was asserted in Texas more than one year after its accrual. Relief was granted by the Texas court on the basis of a statute there declaring the agreement to limit the time for asserting claims to be invalid.[61] A unanimous Court held that Texas had exceeded its constitutional powers in agreeing to act as forum. As developed, the concept of extraterritorial due process of the *Dick* case is of limited scope. It may be invoked to prevent an assertion of "legislative"[62] power by the courts of a forum in contravention of private agreements where the contacts with the forum are but "slight" and "casual."[63] In the *Dick* case itself, Mr. Justice Brandeis, while limiting the power of the state courts as to private agreement, recognized a distinction where statutes were involved. He said:

> It is true that a State may extend the time within which suit may be brought in its own courts, if, in doing so, it violates no agreement of the parties. And, *in the absence of a contractual provision,* the local statute of limitations may be applied to a right created in another jurisdiction even where the remedy in the latter is barred. In such

58. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 793 (1953) (concurring opinion).

59. 281 U.S. 397 (1930).

60. Hartford Acc. & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934). See also Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954).

61. TEX. CIV. STAT. ANN. art. 5545 (1941). "No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State."

62. The limitation on the freedom of a court to pick and choose a choice-of-law rule is ably demonstrated by Briggs, *The Jurisdictional-Choice-of-Law Relation in Conflicts Rules,* 61 HARV. L. REV. 1165 (1948).

63. Watson v. Employers Liab. Assur. Corp., 348 U.S. 66, 71 (1954).

> cases, the rights and obligations of the parties are not varied.[64] (Emphasis supplied.)

While, as the author has pointed out elsewhere, such a distinction between private agreements limiting the time within which action may be brought and statutes doing the same thing is not defensible, it exists.[65] The *Dick* case suggests, however, a possible approach when planning transactions. If the parties are in a jurisdiction which permits contractual limitation of the time for bringing suit, the insertion of such a clause would prevent another jurisdiction having little or no contact with the transaction from applying its tolling statute to suspend its local time period until entry into the state. Mr. Justice Barnhill's suggestion, although raising an interesting possibility, does not appear to be a fruitful means of proceeding in the area.

(c) *"Unsound, superficial, and illogical writing by the courts"*[66].— Illustrative of Mr. Justice Barnhill's observation that the case law development in the area has brought forth some "unsound, superficial, and illogical writing by the courts" are the cases suggesting that any result other than that reached by the majority of group I states would be "strained," "narrow," "confusing," "unfair," and "discriminatory."[67] One early case suggested the imposibility of statutes of limitation "running on the same cause of action in two different states at the same time."[68]

The Arizona Court felt that:

> [T]o construe the act as limited to claims arising in this state would be a *strained* and *narrow* construction. It would require us to add to the broad scope of the act applying to any "person against whom there shall be a cause of action" the limiting words "arising in this state."[69] (Emphasis added.)

The same court felt no compulsion to refrain from inserting the words "or coming into for the first time" following the "return to" language in the statute. Its proposition seems two-sided. The majority reading, while certainly not "narrow," is obviously "strained." Limiting a returning to a coming back may be deemed narrow if limiting statutory usage to ordinary meaning is necessarily narrow. "Strict adherance to literalness is the cardinal sin of statutory construction . . . . Context and purpose are controlling and the right to be

64. 281 U.S. at 409 (1930).

65. Vernon, *Some Constitutional Problems in the Conflict of Laws and Statutes of Limitation*, 7 J. PUB. L. 120, 131 (1958).

66. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 790 (1953) (concurring opinion).

67. Cases cited notes 36 through 40 *supra*.

68. Edgerton v. Wachter, 9 Neb. 500, 4 N.W. 85, 86 (1880).

69. Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 181, 160 P.2d 331, 336 (1945).

protected or the evil to be remedied is to be accorded prime consideration."[70]

In discussing tolling provisions and their application to foreign claims involving nonresidents of the forum, the reasons for suspending the local time period must be considered. In such a case, the plaintiff is clearly not inconvenienced by the defendant's absence from the state. There is no evasion of process involved. Tolling statutes are aimed at preventing a defendant from taking advantage of the base time period by evading process for the required period of time—at least as the suspension provisions deal with absence from a jurisdiction. Adopting any concept of statutory construction oriented to the accomplishment of the general scheme established by the legislature, and within that framework, achieving a reasonable and just result, it is the majority position which seems untenable. Little justification exists for the artificial reading given the group I enactments. A flexible system of statutory construction, whether it be narrow or broad, strained or artificial, would seem to be an essential part of any common law system. But such construction is improper when the results achieved thereby pervert the purpose of the statute itself.

The California Court suggests that the minority view would lead to "confusion" and "unfairness" and it asks:

> At what time must the defendant have been within the state prior to the commencement of the action? Must he have been within the state at some time after the creation of the obligation, and then left and returned, or is it sufficient that he may have been within the state at some remote past time? It would seem unlikely that the legislature could have intended that the operation of the statute should turn upon such uncertain and immaterial factors.[71]

The fact that justice is complicated should not deter a court. In fact, however, in the situation presented, few complications appear. When analyzed in light of the "context and purpose" of the legislation and with a view to the "right to be protected and the evil to be remedied," the answers to the questions posed by the California court appear. Presence within the state at some remote time has no significance. Since the suspension provision is aimed at preventing evasion of process, if, at the time the claim accrued, the party to be charged was present in California and subsequently left, the provision would be applicable. It may be, further, that within the context of the purpose of the legislation the section should be limited to those claims which accrue in California. The result thus reached would more closely carry out the aim of the provision than the present sweeping

70. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783, 792 (1953).

71. Cvecich v. Giardino, 37 Cal. App. 2d 394, 99 P.2d 573, 574 (1940).

California rule. Perhaps the most desirable rule would suspend the operation of the statute only in that jurisdiction which, on the basis of the relationship of the parties and the context of the transaction, is the one most likely or naturally to be chosen as forum. Suspending the time period only in the "natural" forum is not, however, within the legislative framework of the group I statutes. The "natural" forum would normally be the place where the claim accrues or where the debtor is amenable to process at the time of accrual. The result in the minority jurisdictions approaches this. The Alaska court feared that the adoption of the minority view would limit the applicability of the tolling provision

> to those who were present in the territory when the contract sued on was made and later absented themselves or became non-residents but returned into the territory and remained long enough to be served with process. Not only does it seem that this would be an unreasonable restriction of the scope of the statute, but it would [said the court] result in giving unwarranted preference to those who were non-residents at the time the contract was made or the cause of action accrued . . . .[72]

Further, New Mexico, in holding its tolling provision to be applicable to foreign claims between nonresidents, indicated that any other result would amount to discrimination in favor of resident plaintiffs and against nonresident plaintiffs.[73] Thus, both resident defendants and nonresident plaintiffs are said to be subject to discrimination by the limitation of the forum's tolling statute to claims accruing locally and to residents who absent themselves from the jurisdiction.

The wherein of the discrimination is difficult to discern. It is apparently thought to arise in the following situations:

> (a) A claim arises in state *A* between residents of state *A*. While the parties remain in *A*, the period of limitations in state *B* runs and the claim is barred there.
> (b) A claim arises in state *B* between residents of state *B*. If the defendant leaves the state prior to the running of *B*'s statute of limitations, the statute is tolled. Upon the defendant's return to State *B*, he is subject to suit.

The discrimination against the nonresident plaintiff presumably is his inability to succeed in an action under illustration (a) whereas the local plaintiff may succeed in a suit under illustration (b). As against resident defendants, the discrimination would appear to be found in the fact that they remain amenable to suit in state *B* under illustration (b) while the nonresident defendant, under illustration (a) is

72. Alaska Credit Bureau v. Fenner, 12 Alaska 158, 169, 80 F. Supp. 7, 11, 12 (D. Alaska 1948).
73. *In re* Goldsworthy's Estate, 45 N.M. 406, 412, 413, 115 P.2d 627, 631 (1941). See Cvecich v. Giardino, 37 Cal. App. 2d 394, 99 P.2d 573 (1940).

free from suit in state *B*. What is called a preference or discrimination in the situations posed merely amounts to an unequal treatment of unequals. Discrimination is desirable when based on real differences. It is to be encouraged. Only where the preferential treatment is based on irrelevant distinctions is it abhorrent to the Constitution and to the mores of our society. Controversy concerning racial discrimination, perhaps the most pressing social problem of the day, is not based on disagreement as to the propriety of discrimination where real differences appear. It is based on disagreement as to the significance of the difference in race or color. In the situations posed, it is unrealistic to talk of discrimination or preferential treatment in a derogatory sense. To toll the local statute of limitations on the basis of the absence of a local resident or as a result of the local accrual of the claim is to do no more than to apply the forum's legislative power to a situation of some local interest. If the same thing were done to a foreign claim between nonresidents, no discrimination would be present but the forum would be undiscriminating. The group I minority view seems to result in an equality of treatment. The debtor in both situations must face the test of the period of limitations where he resides or where the claim accrues. He is not required to face it elsewhere. The nonresident defendant has not, by his absence from the forum state, evaded process in the same manner as the resident defendant. The nonresident plaintiff may assert his claim wherever he can serve the other party. He has no cause to complain as to the running of a foreign statute of limitations with which neither party had contact.

Groups II and III: Suspending the Time Period Until Entry or During Nonresidency

Group II, comprising sixteen jurisdictions, involves statutory language calling for the suspension of the local time period until the party to be charged "returns to" or "comes into" the forum state. The five states in group III toll the local statute during the nonresidency of the defendant. Thirteen of the group II states have construed the provision and all, except Ohio[74] and possibly Kansas,[75]

74. Wentz v. Richardson, 165 Ohio St. 558, 138 N.E.2d 675 (1956).

75. See Christian v. Kint, 87 F. Supp. 977, 979 (W.D. Mo. 1950), discussing the confused state of the Kansas authority as follows:

> Though the . . . authorities of the Supreme Court of Kansas leave one in a quandry as to what is the real position assumed by that Court, so far as the statutes of limitation of Kansas are [tolled] . . . yet there is a decision of that Court, in Williams v. Metropolitan Street Ry. Co., 68 Kan. 17, 74 P. 600 . . . which, in our opinion, clarifies that situation and is a direct ruling, consonant with the weight of accepted authority, that the general rule . . . that statutes providing that the period of limitation shall not run in favor of a debtor who is absent from or out of the state, extends to persons who have never resided in the state, as well as to

appear to disregard the place of accrual and the residency of the parties.[76] They suspend the local statute pending the defendant's initial entry into the jurisdiction.[77] With the "coming into" language, artificial construction has been unnecessary. The courts have felt a lesser compulsion to justify the results reached than have the group I courts. They do speak of the need to add the words "accruing in this state" in order to limit the provision's operation.[78] A liberal construction in favor of the claimant is another explanation given.[79]

In group III, New Jersey has recoguized the purpose of the suspension statutes and has limited its operation to claims accruing locally against local residents.[80] The court said:

> In this case the defendant was not a resident when the cause of action accrued but plaintiff is not advantaged thereby because the cause did not accrue in this state.[81]

This eminently sensible restriction on the suspension provision is,

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citizens who may be temporarily absent, is the law of Kansas . . . . See Panhandle E. Pipe Line Co. v. Parish, 168 F.2d 238, 240 (10th Cir. 1948), where the court through Judge Bratton discussed the problem as follows:

> In certain cases, the Supreme Court of Kansas held that section 60-309 applies only where the defendant resided in Kansas when the cause of action accrued but was out of the state or had absconded or concealed himself; and that it has no application where the defendant did not reside in the state at the time of the accrual of the cause of action. Bruner v. Martin, 76 Kan. 862, 93 P. 165, 14 L.R.A., N.S., 775, 123 Am. St. Rep. 172, 14 Hm. Ann. Cas. 39; Stock Exchange Bank of Wykes, 88 Kan. 750, 129 P. 1131. In other cases, the court applied the statute with controlling effect where the defendant was a nonresident of the state at the time the cause of action accrued. Gibson v. Simmons, 77 Kan. 461, 94 P. 1013; Kirk v. Andrew, 78 Kan. 612, 97 P. 797; Hendricks v. Brooks, 80 Kan. 1, 101 P. 622, 133 Am. St. Rep. 186.

76. *E.g.*, Steen v. Swadley, 126 Ala. 616, 28 So. 620, 622 (1900) (application of absentee debtor statute to out of state contracts); Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Hatch v. Spofford, 24 Conn. 432 (1856) (claim accruing elsewhere and parties residing outside of state at time of accrual); Jones v. Wells & Sappington, 2 Houst. 209, 7 Del. 209 (1860) (foreign claim and parties); Frye v. Parker, 84 Me. 251, 24 Atl. 844 (1892) (foreign accrual and foreign residents as parties); Mason v. Baltimore & O. R.R., 81 Md. 446, 32 Atl. 311 (Md. App. 1895) (foreign accrual and out of state resident as defendant); Belden v. Blackman, 118 Mich. 448, 76 N.W. 979 (1898) (New York judgment against an Arkansas debtor); Edgerton v. Wachter, 9 Neb. 500, 4 N.W. 85 (1880) (Iowa claim against Iowan); *In re* Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941) (Missouri claim involving Missouri parties); Sinai v. Levi, 208 Misc. 650, 144 N.Y.S.2d 316, 319 (1955) (running of statute on foreign claim begins with debtors entrance into state); Fairfax Nat'l Bank v. Burt, 197 Okla. 517, 176 P.2d 216 (1946) (nonresident defendant); Continental Ill. Nat'l Bank v. Ehrhart, 1 F.R.D. 199 (E.D. Tenn. 1940) (Illinois note and parties). Washington and Wyoming seem to be the only truly uncommitted states.

77. *Supra* note 76.

78. *E.g., In re* Goldsworthy's Estate, 45 N.M. 406, 412, 115 P.2d 627, 632 (1941).

79. National Sur. Co. v. Ruffin, 242 N.Y. 413, 152 N.E. 246, 247 (1926).

80. Shapiro v. Friedman, 132 N.J.L. 456, 41 A.2d 10 (1945) (nonresident defendant and accrual outside of the state).

81. 41 A.2d at 12.

thus, available both to group II and group III jurisdictions which have not, as yet, firmly decided the question, or which wish to reexamine the basis of the result reached. Case law in the other group III states tends to the conclusion that the time period suspends during nonresidency without regard to place or accrual.[82]

Groups IV and V: Suspending the Time Period Only as to Residents Absent From the State at the Time of Accrual or Where the Claim Accrues Locally

In both groups, the courts follow the statutory language quite literally. The Kentucky[83] and the Missouri[84] courts, in group IV, hold that the absence of a nonresident defendant at the time the claim accrues does not suspend the running of the period of limitations. And in the group V states, Mississippi[85] and Pennsylvania,[86] the courts apply the tolling provision as directed, limiting its operation to claims accruing locally. In Mississippi, the result has been explained in the following language:

> The reason for not giving a defendant the benefit of the time he is absent from the State is that his absence prevents the plaintiff from exercising his right of suit. If the action does not lie in Mississippi, no suit can be maintained here and no right of plaintiff is denied him, and the rule would disappear with the reason . . . .[87]

Groups VI and VII: Tolling Provision Inapplicable If Neither Party a Resident of the Forum at the Time of Accrual, or Where Both Parties Are, at that Time, Residents of the Place of Accrual

The group VI statutory provision calls for the suspension of the local time period, without regard to the place of accrual, until the debtor comes into the state. The provision is inapplicable, however, when *neither* party resides in the forum at the time the claim accrues. Neither Illinois nor Wisconsin appears to have faced the situation of foreign accrual and nonresidency of both parties. Both states have applied the provision to suspend the local time period without regard

82. See John v. John, 307 Mass. 514, 30 N.E.2d 542 (1940) (Connecticut defendant and Massachusetts statute suspended until the defendant entered the state); Moore v. Moore, 96 N.H. 130, 71 A.2d 409 (1950); City of Davenport v. Allen, 120 Fed. 172 (S.D. Iowa 1903) (both parties nonresidents of Iowa although the claim accrued there); Damler v. Baine, 114 Ind. App. 534, 51 N.E.2d 885 (1943) (local claim with defendant being a nonresident).

83. See Bancokentucky v. Nat'l Bank of Ky., 281 Ky. 784, 137 S.W.2d 357, 374 (1939); Bybee's Exr. v. Poynter, 117 Ky. 109, 77 S.W. 698 (Ky. App. 1903).

84. Carter v. Burns, 332 Mo. 1128, 61 S.W.2d 933, 944 (1933) (statute runs from the time the cause of action accrues against nonresident defendant).

85. United States Fid. & Guar. Co. v. Ransom, 192 Miss. 286, 5 So. 2d 238 (1941); Le Mieux Bros. v. Armstrong, 91 F.2d 445 (5th Cir. 1937).

86. Otis v. Bennett, 91 F.2d 531 (3d Cir. 1937).

87. United States Fid. & Guar. Co. v. Ransom, 192 Miss. 286, 5 So. 2d 238, 240 (1941).

to the place of accrual where the plaintiff was a resident of the forum at the time of accrual and the defendant was not.[88]

Vermont, standing alone in group VII, joins Mississippi and Pennsylvania, although indirectly, in recognizing a distinction based upon the foreign accrual of the claim. The local time period is suspended in Vermont until the party to be charged enters the state, but the provision is inoperative if the claim accrues elsewhere and both parties reside at the place of accrual.[89]

Suspending the Time Period in Jurisdictions Without Borrowing Statutes

The following states seem to be without statutory authority calling for the courts to vary the common law and to recognize the bar of a foreign statute of limitations:

Connecticut	(II)	New Mexico	(II)
Georgia	(I)	North Dakota	(I)
Maryland	(II)	South Carolina	(I)
Michigan	(II)	South Dakota	(I)
New Hampshire	(III)	Vermont	(VII)
New Jersey	(III)	Wisconsin	(VI)[90]

Of these 12 jurisdictions, 10 may be found in groups I, II and III. Georgia[91] and New Jersey[92] of the first three groups have adopted the minority view. Seven of the remaining 8 seem committed to the majority position.[93] Only North Dakota remains uncommitted. Since the 7 majority states are without borrowing statutes, they will apply the local time period in all cases.[94] With the local statute being tolled until the defendant's entry into a jurisdiction, stale claims are currently being invited. *In re Goldsworthy's Estate,*[95] a 1941 New Mexico case, is perhaps a prime illustration of the "invitation to sue." A claim was filed against Goldsworthy's estate in September, 1939, to recover for services rendered in Missouri from 1917 to 1923.[96] The defense asserted that the claims were barred by the statutes of limitation of both New Mexico and Missouri, the decedent having

88. See Janeway v. Burton, 201 Ill. 78, 66 N.E. 337 (1903); Book v. Ewbank, 311 Ill. App. 312, 35 N.E.2d 961 (1941); National Bank v. Davis, 100 Wis. 240, 75 N.W. 1005 (1898). See also *In re* Gilbert's Estate, 167 Wis. 291, 167 N.W. 447 (1918).

89. See Wetmore v. Karrick, 95 Vt. 318, 115 Atl. 234 (1921).

90. The Wisconsin borrowing statute is so limited, being restricted to personal injuries and nonresident plaintiffs, that the state is here classified as being without any borrowing legislation. WIS. STAT. § 330.205 (1957).

91. See note 25 *supra.*

92. See note 79 *supra.*

93. See notes 28, 75, 81 *supra.*

94. *Ibid.* See also note 3 *supra.*

95. 45 N.M. 406, 115 P.2d 627 (1941).

96. The total claim was for $905.60. Of this, $59.60 involved claims accruing after 1923 and $16 was for board for two weeks in 1923 and for two days in 1930. *Id.* at 409, 410, 115 P.2d at 629.

remained a resident of Missouri until three months prior to her death when she moved to New Mexico. The trial court "reached the conclusion that as the indebtedness was not contracted in New Mexico and did not accrue [t]herein, that it is barred by our Statute of Limitations . . . ."[97] In the absence of a borrowing statute, the bar of the Missouri statute was, of course, ignored. In reversing the trial court and in holding that the New Mexico time period was suspended until decendent's entry into the state three months before her death, the court said:

> We see no cogent reason to strive to discover a contrary legislative intent. In the first place, the law favors right of action rather than the right of limitation . . . . Therefore, a statute which tolls the statute of limitations should be liberally construed in order to accomplish that purpose.
>
> Secondly, since our courts are open to the assertion of causes of action accuring in other states, there is no apparent reason why the legislature should have intended to discriminate in the application of the statute tolling the statute of limitations. *In view of the principles of comity and the desirability for the uniformity of laws, we should not discover in a statute an intention to discriminate as to the place where the cause of action accrued, unless such intention is plain and unescapable.*[98] (Emphasis supplied.)

It would be difficult to find a case presenting more cogent reasons for discovering a contrary legislative intent. Comity and uniformity can hardly be deemed forwarded by the New Mexico decision. Comity would call for New Mexico's recognizing the bar of the Missouri statute. Uniformity in the sense of achieving a "uniform" result would also require a recognition of Missouri's bar. The result in the *Goldsworthy* case may still be repeated in the seven group I, II and III states following the majority view and having no borrowing legislation. Combining the majority view with the absence of borrowing legislation creates a situation in which claims may persist indefinitely. Only three of the states following the common law, Georgia, New Jersey and Vermont (to a limited extent) have ameliorated some of the mischief caused by the absence of borrowing acts by their limitation on the operation of their suspension provisions.

Tolling Provisions and the Uniform Statute of Limitations on Foreign Claims Act

As a limited borrowing statute, the *Uniform Statute of Limitations on Foreign Claims Act* ameliorates one of the major problem areas existing in the common law states. If a claim is barred where it accrued, it is barred everywhere. *In re Goldsworthy's Estate* could not

97. *Id.* at 408, 115 P.2d at 628.
98. *Id.* at 412, 115 P.2d at 631.

arise under the proposed act. Whether or not the forum's tolling provision operates on claims accruing elsewhere or on nonresident defendants is not relevant where the claim cannot be asserted where it accrued. Variations of result occasioned by the differing suspension provisions become significant only where the claim is not barred by the period of limitations at the place of accrual. If for any reason the statute there is tolled, the varying tolling provisions operate to introduce uncertainties and anomalies and to prevent even-handed treatment of claims.

The act contemplates a "uniform" system or procedure whereby the shorter of the two applicable time periods are applied, that of the place of accrual or that of the forum. Even without the tolling problem, certain inconsistencies of treatment are apparent due to the application of varying local time periods.[99] The different tolling provisions complicate the operation of the act by introducing the question of the time at which the local time period commences to run. Perhaps the following illustrative cases will serve to demonstrate how the different suspension provisions compound the problem: Assume that all states have adopted the *Uniform Statute of Limitations on Foreign Claims Act,* that all have a one year statute of limitations applicable to the claim in question, and that the claim is asserted thirty months after its accrual.

State *A*: The place where the claim accrues.
State *B*: Having tolling statutes in groups I, II and III and following the majority construction thereof.
State *C*: Having tolling statutes in groups I, II and III and following the minority construction thereof.
State *D*: Having a group IV tolling provision.
State *E*: Having a group V tolling provision.
State *F*: Having a group VI tolling provision.
State *G*: Having a group VII tolling provision.
State *H*: Having a group VIII tolling provision.
State *X*: The place to which the defendant removes six months after the accrual of the claim and where he remains for two years before being served with process in another jurisdiction.

(1) Assume that the parties resided in State *A* at the time of accrual. Since the defendant left *A* prior to the running of its statute, the time period would have another six months to run after his return to *A* thirty months after accrual. By remaining in State *X* for two years and being amenable to process there for the entire period, the

99. See Vernon, *The Uniform Statute of Limitations on Foreign Claims Act: A Discussion of Section Two,* 4 ST. LOUIS U.L.J. 442 (1957).

one year period of limitations in *X* would operate to bar the claim. With proper service in State *B*, the claim would be heard, *B*'s local period being suspended until the defendant's entry thirty months after accrual. Assuming that the defendant was amenable to process in the other jurisdictions, no action could be maintained in States *C*, *D*, *E*, *F*, *G* or *H*, the local statutory periods having commenced running immediately upon the accrual of the claim and continuing to run until the bars became effective.

(2) Assume that the defendant resides in State *D* at the time of accrual. The claim would be heard in States *A*, *B*, *D* and *G* and not in the other jurisdictions.

(3) Assume that the defendant resided in State *F* at the time of accrual. Suit may successfully be maintained only in States *A*, *B*, *F* and *G*.

(4) Assume that the claim accrued in State *E* and involved two residents of State *A*, the parties remaining in State *A* for several years and that State *A*'s statute had run. Again assuming proper service, successful suit could be maintained only in States *B*, *E*, *F* and *G*.

Innumerable variations can be made on the same theme. To have a Uniform Act so completely devoid of uniform results raises a serious question as to the desirability of its adoption. Certainly in those jurisdictions presently without borrowing legislation, the act would be an improvement. Uniform legislation in the conflicts area, however, can and should accomplish something more than the establishment of a uniform procedure. It can and should establish a system designed to bring about reasonably consistent results without regard to the choice of forum.

A Uniform Tolling Section to be Added to the Uniform Statute of Limitations on Foreign Claims Act

Complete uniformity of result could be accomplished by expanding the borrowing provision of the Uniform Act. Thus, section 2 could be changed to provide for the application of the period of limitations of the place of accrual in every case. With this modification, the local time period and suspension provisions would not affect the result. Perfect uniformity, although the abstract goal of a conflict of laws system, is of dubious validity in the area under discussion. Uniformity for its own sake is not desirable. By adopting the foreign limitations period in every case, it would seem that its tolling provision would also be applicable. Thus, if the running of the time period at the place of accrual is suspended, it would be everywhere suspended. Such suspension might well be permanent unless and until the debtor returns to the place of accrual. In the absence of an actual or a deliberate evasion of process, such a result would appear to defeat the

general purposes of limitation of time periods. As has been suggested elsewhere,[100] prior to the commissioners' promulgation of the act, a proper approach may be to borrow only the base time period of the place of accrual. Thus, if the claim accrued in State *A*, having a one year statutory period, and if the defendant left *A* six months after accrual, the claim would be barred twelve months from the date of accrual in all jurisdictions except State *A*. No permanent national suspension would be possible and uniformity would be had in all jurisdictions except the place of accrual.

The commissioners rejected this suggestion. Assuming that the present limited borrowing provision in section 2 of the act is the best that can be achieved politically, the addition of a uniform tolling section to the act would correct one of its major deficiencies. One possibility would be to insert the Mississippi-Pennsylvania (group V) type of provision. It could read as follows, being added to section 2 of the act:

> Section 2. [Periods of Limitation on Foreign Claims.] The period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever first bars the claim, *provided that the period of limitations of this state shall commence running as soon as the claim accrues and that its operation shall not be suspended by reason of the defendant's absence from this state.*

Or, in the negative, the following could be added to section 2: "The period of limitations of this state shall not be suspended or tolled as to claims accruing outside of this state."

In essence, such an addition would limit the application of tolling provisions to claims accruing locally. It has the advantage of simplicity and of establishing certain cut off dates in every jurisdiction except for the place of accrual. Variations of local statutory period would still result in different results being reached, but the variations introduced by local suspension provisions would be obliterated. Since the Uniform Act is based on a choice between the law of the place of accrual and the law of the forum, the group V solution suggested would appear to be more consistent with the overall pattern of the act than would be any solution based on residency of the parties.

As mentioned above, perhaps the ideal tolling provision would be one based on a natural forum concept. Two elements seem to militate against any attempt to incorporate such a provision in the Uniform Act. First, such a provision would necessarily be couched in general terms and the uncertainties thus introduced may well outweigh the advantages. Second, the Mississippi-Pennsylvania concept, being con-

100. Vernon, *Report on the First Tentative Draft of the Uniform Statute of Limitations on Foreign Claims Act*, 3 WAYNE L. REV. 187, 202-04 (1957).

sistent with the forum-place-of-accrual division of the basic act, is more compatible with the overall statutory scheme.

Some adjustment should be made in the Uniform Act to solve the suspension problems raised. As currently written, the act fails to achieve the basic minimum uniformity necessary to justify it as uniform legislation. If the differing results brought about by varying suspension provisions can be precluded by the addition of a clause or sentence to section 2, it should be done. Recognizing that the Uniform Act currently has other built-in imperfections, once the local statute is permitted to run from the time of accrual, the act will have much to commend it and such defects as are present will be minor ones.