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AMONG all the spheres of its activity estoppel probably performs no more useful service than in the alleviation of hardship caused by statutes of limitation. Here as in other places the elements of estoppel and its relations to more basic legal concepts are exceedingly hard to define. At some points its effects on limitation acts could be described in terms of express contract; at other points it merges into "fraud"; in general it provides the medium for official expressions of disapproval where civil litigation exceeds the permissible limits of private warfare.

To persons concerned about the clarity, symmetry, and design of the legal order, estoppel, here as elsewhere, is a source of exasperation.[1] Its principal function may be described as the protection of expectations aroused by misleading conduct. But in its application it takes a variety of forms. It is in fact one of the most useful and flexible working tools in Anglo-American law. In foreign systems, where estoppel has not in terms been recognized, a variety of legal concepts have been adapted for the performance of similar functions.[2]

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[1] To a Harvard professor the remark has been attributed that "estoppel is the first refuge of a weak mind."

[2] For references to the law of Quebec and Louisiana, based essentially on the provisions of the French Civil Code, see Hyde, "Estoppel in the Law of Quebec," 5 TULANE L. REV. 615 (1931).

It is interesting that in modern German law estoppel to plead prescription has been developed under the generalized mandate of the Civil Code (art. 242), requiring that obligations be performed in "good faith." This provision of the Code was the formal source of the vast body of case law constructed by German courts in the late stages of the German inflation, discussed by the writer in "The Effects of Inflation on Private Contracts: Germany, 1914-1924," 33 MICH. L. REV. 171 (1934). In pre-

This dissection of estoppel into its diverse elements has not altogether removed the confusion that surrounds estoppel in Anglo-American law. The factors of morality and social policy that estoppel reflects are sufficiently vague and complex, so that exact definition remains impossible.

The recognition of estoppel as a ground for suspension of limitation acts has encountered remarkably little resistance in American law. In no state is estoppel expressly admitted by statute as an exception to general rules for the limitation of actions. In only five states are there statutory provisions which can be construed to include the main elements of estoppel.[3] And yet from an early period American courts have freely invoked estoppel for this purpose.[4] Unlike "fraud" and "fraudulent concealment," estoppel did not require the intercession

scription cases German courts have held that lapse of time cannot be pleaded by a defendant whose conduct induced the plaintiff to delay beyond the statutory period. One Senate of the Reichsgericht attempted at one time to restrict this doctrine to cases where delay was intentionally sought for the purpose of securing the benefit of prescription. 64 DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS 220 (Oct. 26, 1906). Later decisions, however, have abandoned this restriction and invoked the "good faith" clause wherever the plaintiff was reasonably justified in believing that delay in starting suit would not be prejudicial. 109 DECISIONS OF THE REICHSGERICHT IN CIVIL MATTERS 281 (Nov. 9, 1915); v. 109, p. 306 (Dec. 13, 1924); v. 115, p. 135 (Dec. 17, 1926); JURISTISCHE WOCHENSCHRIFT, 1919, pp. 102 and 304.

[3] In these five states suspension of the statute is authorized where the prosecution of an action has been prevented by the person liable thereto, "by absconding or concealing himself" or "by any other indirect ways or means." Ark. Stat. (Crawford & Moses 1921), § 6974; Ky. Stat. (Carroll 1930), § 2532; Mo. Rev. Stat. (1929), § 879; Va. Code (1930), § 5825; W. Va. Code (1931), c. 55, art. 2, § 17. For cases taking advantage of this provision see Baker-Matthews Mfg. Co. v. Grayling Lumber Co., 134 Ark. 351, 203 S. W. 1021 (1918); Chesapeake and Nashville Ry. v. Speakman, 114 Ky. 628, 71 S. W. 633 (1903); Schrabauer v. Schneider Engraving Product, Inc., 224 Mo. App. 304, 25 S. W. (2d) 529 (1930). More commonly the courts in these states simply refer to estoppel as an independent ground for suspension, without express reliance on the statutory exception.

[4] Among the earlier cases admitting estoppel as an answer to a plea of the statute are Chapin v. Merrill, 4 Wend. (N. Y.) 657 (1830), and Gaylord v. Van Loan, 15 Wend. (N. Y.) 308 (1836), both involving express promises not to plead the statute; Davis v. Dyer, 56 N. H. 143 (1875); Black v. Winneshiek Ins. Co., 31 Wis. 74 (1872). In Bank of Hartford County v. Waterman, 26 Conn. 323 (1857), and Liskey v. Paul, 100 Va. 764, 42 S. E. 875 (1902), there is language manifesting hostility toward the use of estoppel in limitation cases. But in Lippitt v. Ashley, 89 Conn. 451, 94 A. 995 (1915), the Connecticut court indicated that it was willing to permit the use of estoppel. Likewise in Re Mohr's Estate, 212 Wis. 198, 248 N. W. 143 (1933), the court invoked estoppel in spite of the strong language of earlier cases to the effect that courts are powerless to create new exceptions to limitation acts.

Compare the struggle in the cases of the nineteenth century over the admission of "fraud" and "fraudulent concealment" as grounds for suspending the statute. Dawson, "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 at 599-602 (1933).

of the Chancellor to establish its claim to social position. In no case has it been suggested that equitable actions can be saved from extinction more readily than legal actions. In New Jersey, it is true, the circuitous device is employed of an injunction in equity against a plea of the statute at law.[5] In other states estoppel operates directly to strike down a plea of the statute without any distinction whatever between legal and equitable actions.[6]

One difficulty about the use of estoppel is peculiar to most of the limitation cases. It is commonly said that estoppel requires misleading conduct which relates to existing facts. But in most of the limitation cases the estoppel is promissory in character, since the defendant usually creates the impression that he will not in future claim the protection of the statute if suit is later brought. This difficulty is seldom mentioned by the courts and is evidently not thought to be an obstacle to the use of estoppel.[7] The limitation cases, indeed, are an important source of support for the theory of promissory estoppel, which has been proposed in recent years as a supplement to common law theories of consideration.[8]

Before considering the grounds recognized in modern law as a basis for estoppel to plead the statute of limitations, it is important to notice the relations between estoppel and express contract not to plead the

[5] Clark v. Augustine, 62 N. J. Eq. 689, 51 A. 68 (1902); Ketcham v. Ketcham, 84 N. J. Eq. 577, 94 A. 813 (1915), 88 N. J. Eq. 601, 103 A. 1053 (1917); Howard v. West Jersey and S. S. R. Co., 102 N. J. Eq. 517, 141 A. 755 (1928), 104 N. J. Eq. 201, 144 A. 919 (1929); Noel v. Teffeau, 116 N. J Eq. 446, 174 A. 145 (1934). The practice conforms in this respect to the methods used in New Jersey in cases of fraud and fraudulent concealment. See 31 MICH. L. REV. 591 at 636, and 31 MICH. L. REV. 875 at 876 (1933).

In Quick v. Corlies, 39 N. J. L. 11 (1876), estoppel was held to be available in a legal action to meet a plea of the statute, but a divided court in Freeman v. Conover, 95 N. J. L. 89, 112 A. 324 (1920), held that at law no exceptions could be read into the statute and resort to an equity injunction was necessary.

A few earlier cases in other jurisdictions seem to have assumed, without so deciding, that the intervention of equity by way of injunction was necessary. Bank of Tennessee v. Hill, 29 Tenn. 175 (1849); Chilton v. Scruggs, 73 Tenn. 308 (1880); Andreae v. Redfield, 98 U. S. 225 (1878).

[6] Bain v. Wallace, 167 Wash. 583, 10 P. (2d) 226 (1932); Haymore v. Commissioners of Yadkin, 85 N. C. 268 (1881); Baker-Matthews Mfg. Co. v. Grayling Lumber Co., 134 Ark. 351, 203 S. W. 1021 (1918); Neal v. Pickett, (Tex. Civ. App. 1925) 269 S. W. 160. Numerous other cases will be cited in subsequent notes, in which estoppel was held to be available at law as an answer to a plea of the statute. Ordinarily the point is not even discussed.

[7] Shapley v. Abbott, 42 N. Y. 443 (1870), and Lewis v. Ford, 67 Ala. 143 (1880), are among the rare cases where the "promissory" character of the estoppel is referred to. The courts gave this as one of several reasons why the defendant in the particular cases should not be deprived of the protection of the statute.

[8] 1 WILLISTON, CONTRACTS, § 139 (1931).

statute. Thereafter attention will be directed to various types of misleading conduct, lying outside the categories of express contract but nevertheless sufficient for the invocation of estoppel. And finally an attempt will be made to describe the outer boundaries of the estoppel exception, where it commences to merge with other grounds for suspension such as "fraud" and "fraudulent concealment."

I

PROMISES NOT TO PLEAD THE STATUTE

1. *Validity in General*

Underlying the whole group of estoppel cases is the fundamental question of policy, how far a litigant should be free by language or conduct to relinquish the protection of the statute of limitations. This question is most fully discussed in cases of express contracts not to plead the statute, where it clearly appears that the parties are attempting by private agreement to suspend or neutralize its effect. The validity of such agreements can be determined only in the light of the factors of social policy which have influenced legislatures in creating the defense of limitation.[9]

There can be no doubt that limitation acts are not concerned solely with the protection of individual litigants against trumped-up claims. Courts have repeatedly announced their conviction that the limitation of actions is necessary for the sake of stability and permanence in social relationships. Limitation legislation is directed not alone at the danger of perjured or distorted testimony, less readily refuted as a result of the lapse of time. Only in their broadest outlines do modern systems of limitation distinguish between claims on the basis of the reliability or unreliability of the evidence on which such claims are based. Even where clear and convincing evidence is available, the assertion of a claim should not be postponed too long. Conduct proceeds on the assumption that a claim withheld from suit has been abandoned; new relationships are gradually built up; to disturb or disentangle them after a considerable lapse of time is socially undesirable.

Nevertheless, the immediate effect of limitation legislation is the protection of private suitors, and its enforcement depends on private self-interest. In many states the statute of limitations must be affirma-

[9] For a general discussion of agreements not to take advantage of various defenses (such as the defense of fraud, usury, the statute of limitations and statutory exemptions from execution), see 39 YALE L. J. 727 (1930).

tively pleaded by the defendant,[10] and in no state is a defendant *required* to claim its protection. The effect of the statute on contract obligations is limited; it is usually said that it does not "extinguish the debt" but merely affects the remedy; and for many purposes this statement is sufficiently accurate.[11] Furthermore, through generally recognized doctrines as to acknowledgment and part payment of contract obligations, private parties are given a considerable degree of control over the operation of limitation acts.[12] A final reason may also be suggested for permitting freedom to "contract out" of the statute of limitations: the extreme difficulty in defining by legislation the intervals of time within which actions should be brought. If the periods of limitation defined by statute were carefully adjusted to the requirements of particular cases, or if scientific methods could be used to measure the effect of lapse of time on legal relationships, then time limitations in statutory form would doubtless possess a greater moral authority.

In American law a considerable degree of freedom has been conceded to private parties in controlling the limitation of actions through private contract. Only in two states does legislation expressly prohibit any modification of the time limitations prescribed by statute.[13] In other states a distinction must be drawn between contracts which purport to shorten and those which purport to extend the period of limitation. Contracts attempting to *shorten* the period of limitation have been invalidated by express legislation in some states;[14] but in the absence

[10] Atkinson, "Pleading the Statute of Limitations," 36 YALE L. J. 914 (1927).

[11] See the discussion in 38 YALE L. J. 662 (1929).

[12] 1 WOOD, LIMITATION OF ACTIONS, 4th ed., chs. 9-11 (1916).

[13] Kansas Rev. St. (1923), § 60-306 (7), applied in Commercial Nat. Bank v. Tucker, 123 Kan. 214, 254 P. 1034 (1927); Miss. Code (1930), § 2294. In Kentucky the same result has been reached in a long line of judicial decisions, without the aid of statute. Moxley v. Ragan, 73 Ky. 156 (1873); Wright v. Gardner, 98 Ky. 454, 33 S. W. 622 (1895); Union Central Life Ins. Co. v. Spinks, 119 Ky. 261, 84 S. W. 1160 (1904); Continental Casualty Co. v. Harrod, 30 Ky. L. Rep. 1117 (1907); Aetna Casualty & Surety Co. v. United States Gypsum Co., 239 Ky. 247, 39 S. W. (2d) 234 (1931).

[14] Ala. Code (1928), § 8951; Idaho Code (1932), § 28-110; Mo. Rev. Stat. (1929), § 2964; N. D. Comp. L. (1913), § 5927, applied in Storing v. Nat. Surety Co., 56 N. D. 14, 215 N. W. 875 (1927); 2 Okla. Stat. (Harlow 1931), § 9491; S. C. Code (1932), § 395, applied in Barringer v. Fidelity & Deposit Co., 161 S. C. 4, 159 S. E. 373 (1931); S. D. Comp. L. (1929), § 897.

In Texas it is provided that no contract shall be effective to restrict the period of limitation to less than two years. Tex. Stat. (1928), art. 5545, applied in Maryland Casualty Co. v. Farmers' State Bank & Trust Co., (Tex. Civ. App. 1924) 258 S. W. 584, and Southern Surety Co. v. Austin, (C. C. A. 5th, 1928) 22 F. (2d) 881.

of such legislation their validity is generally recognized.[15] The conflict in the cases has arisen chiefly in connection with contracts attempting to *extend* the period of limitation. Here a further distinction must be drawn, between extensions of the statutory period which are contracted for at the inception of the agreement on which the action is brought, and those contracted for at a later stage (usually after a breach has occurred).

Hostility toward contractual extensions of the statutory period has chiefly appeared where the protection of the statute is contracted away at the inception of the obligation, in advance of any breach. Some courts have held such contracts inconsistent with the policy of limitation acts and therefore wholly void.[16] On the other hand, there is some authority declaring that the protection of the statute can be surrendered in perpetuity.[17] In other states it has not as yet been necessary to take

[15] Such provisions have been held valid in insurance contracts: Riddlesbarger v. Hartford Ins. Co., 7 Wall. (74 U. S.) 386 (1868); McFarland & Steele v. Peabody Ins. Co., 6 W. Va. 425 (1873); Peoria Marine and Fire Ins. Co. v. Whitehill, 25 Ill. 382 (1861); Ripley v. Aetna Ins. Co., 3 Tiff. (30 N. Y.) 136 (1864); Andes Ins. Co. v. Fish, 71 Ill. 620 (1874); Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501 (1909); Kulberg v. Fraternal Aid Union, 135 Minn. 150, 160 N. W. 685 (1916); 7 COOLEY, BRIEFS ON INSURANCE, 2d ed., pp. 6800-6810 (1928).

Indemnity bonds: Ilse v. Aetna Indemnity Co., 69 Wash. 484, 125 P. 780 (1912); Dugand v. Indemnity Ins. Co., 122 Misc. 639, 203 N. Y. S. 541 (1924).

Contracts of shipment: Missouri, Kansas & Texas Ry. v. Harriman, 227 U. S. 657, 33 S. Ct. 397 (1913); Greenhill v. Delano, 193 App. Div. 842, 184 N. Y. S. 617 (1920).

In two states, in the absence of legislation, courts have held ineffective any attempt to shorten the statutory period: Miller v. State Ins. Co., 54 Neb. 121, 74 N. W. 416 (1898), and the Kentucky cases cited above, note 13. In all the states, presumably, the reasonableness of such contracts will be scrutinized by the courts and the time limitations held invalid if they operate to cut off all access to the courts. Page County v. Fidelity & Deposit Co., 205 Iowa 798, 216 N. W. 957 (1928); Cook v. Heinbaugh, 202 Iowa 1002, 210 N. W. 129 (1927); Stewart v. Nat. Council, 125 Minn. 512, 147 N. W. 651 (1914); Beeson v. Schloss, 183 Cal. 618, 192 P. 292 (1920); Eliot Nat. Bank v. Beal, 141 Mass. 566, 6 N. E. 742 (1886).

[16] Forbach v. Steinfeld, 34 Ariz. 519, 273 P. 6 (1928); First National Bank v. Mock, 70 Colo. 517, 203 P. 272 (1922). By the Louisiana Civ. Code, art. 3460 (Dart 1932), it is expressly provided that agreements renouncing the benefit of rules of prescription in advance are wholly void.

In Forbach v. Steinfeld the court suggested, as an additional reason against the enforcement of such agreements, the danger that waivers of the statute of limitations might become a standard form of contract, like the "waiver of protest" in commercial paper, and might be imposed by the superior economic power of one of the parties, thus being removed from the sphere of "free contract."

[17] The case that goes furthest in this direction is Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714 (1925), where defendant's intestate had agreed with his wife at the time of their separation to pay plaintiff, their daughter, $10 a month for her support,

so extreme a position. Courts have merely enforced contracts not to plead the statute where actions were brought relatively soon after the statutory period would normally have expired.[18] From the language of the cases, however, one may safely conclude that, by some device or another, most states will fix some limit on the period for which such agreements will be effective.[19]

Less opposition has developed toward contractual extensions of the statutory period where they are first agreed to after breach of the

and had expressly "waived" the statute of limitations on this obligation for a period of 99 years. Plaintiff's action was not brought until more than 20 years later. The court, in holding the statute suspended, expressly repudiated a suggestion in an earlier California case that some time limit would be set on the operation of such agreements. The result must be explained in part, however, by the moral obligation of the father to support his dependent daughter, a factor which the court quite properly emphasized in the course of its opinion.

[18] Parchen v. Chessman, 49 Mont. 326, 142 P. 631 (1914), action brought three and one-half months after the statute would otherwise have run; Quick v. Corlies, 39 N. J. L. 11 (1876), action brought five years after expiration of 16 year statutory period; State Trust Co. v. Sheldon, 68 Vt. 259, 35 A. 177 (1895), time interval not stated.

In Crocker v. Ireland, 141 Misc. 418, 252 N. Y. S. 631 (1931), an endorser of promissory notes expressly waived "all defenses arising out of lack of diligence in enforcing collection thereof." The court held that this language included a waiver of the statute of limitations, and that an action brought 15 years after the execution of the agreement was not barred, since the statute could not operate until breach and a breach would not occur until an action had been brought and the statute was pleaded as a defense. The case is noted in 45 HARV. L. REV. 592 (1932).

[19] Green v. Coos Bay Wagon Road Co., (C. C. Ore. 1885) 23 F. 67; Watertown Nat. Bank v. Bagley, 134 App. Div. 831, 119 N. Y. S. 592 (1909); Mutual Life Ins. Co. v. United States Hotel Co., 82 Misc. 632, 144 N. Y. S. 476 (1913); Crane v. French, 38 Miss. 503 (1860); Cowart v. Perrine, 21 N. J. Eq. 101 (1870); Kellogg v. Dickinson, 147 Mass. 432, 18 N. E. 223 (1888); Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555 (1896); Parchen v. Chessman, 49 Mont. 326, 142 P. 631 (1914). In First Nat. Bank v. Mock, 70 Colo. 517, 203 P. 272 (1922), the court held void the waiver of the statute there involved, on the ground that no time limit on its operation was fixed by the parties. The court intimated, however, that the waiver would have been enforced if a reasonable time had been fixed in the agreement itself.

From ordinary doctrines of contract law it would be difficult to derive any test for determining how long a time would be considered "reasonable." As is pointed out in 30 COL. L. REV. 383 (1930), and in Crocker v. Ireland, 141 Misc. 418, 252 N. Y. S. 631 (1931), no breach of a promise not to plead the statute would occur until an action was brought and the statute pleaded. If the statute were made to operate from the date of the original contract or from the date of defendant's breach of the principal obligation, then no additional time would be added and the promise not to plead the statute would be rendered wholly ineffective. A more or less arbitrary solution would be possible, such as a doubling of the statutory period prescribed for the particular class of obligation. As is indicated below, section I (1), the solution usually adopted depends on the use of estoppel and allows suspension of the statute only so long as the creditor's *reliance* is considered reasonable.

original obligation. At first sight no strong reason appears for a distinction between this type of contract and promises not to plead the statute made at the *inception* of the original obligation. Courts must have been influenced, in the indulgence they have shown toward this type of contract, by the doctrines of acknowledgment and part payment, which enable debtors in contract obligations to extend the statutory period although a breach has already occurred and the statute has begun to operate.[20] If acknowledgment or part payment could have this result, an express contract for the same purpose should have at least as much effect. Whether or not this is the correct explanation, contracts extending the statutory period, made after the accrual of liability but before the statute has run, have received most favorable treatment. In the earlier decisions some hostility was shown to this class of contract; in modern times its validity is almost universally accepted.[21]

In a discussion of estoppel to plead the statute of limitations this whole group of cases must receive an important place. It is on the theory of estoppel that agreements not to plead the statute are commonly enforced, as the next section will attempt to show. Furthermore,

[20] WOOD, LIMITATION OF ACTIONS, 4th ed., chs. 9-11 (1916).

[21] Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 P. 439 (1900); Oliver v. United States Fidelity & Guaranty Co., 176 N. C. 598, 97 S. E. 490 (1918); Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481 (1897); Holman v. Omaha & Council Bluffs Ry. & Bridge Co., 117 Iowa 268, 90 N. W. 833 (1902); City of Springfield v. Deming, 215 Mo. App. 309, 252 S. W. 91 (1923); Mann v. Cooper, 2 App. D. C. 226 (1894); Noyes v. Estate of Hall, 28 Vt. 645 (1856); Randon v. Toby, 11 How. (52 U. S.) 493 (1850); Utica Ins. Co. v. Bloodgood, 4 Wend. (N. Y.) 652 (1830); Gaylord v. Van Loan, 15 Wend. (N. Y.) 308 (1836); Hobart v. Verrault, 74 App. Div. 444, 77 N. Y. S. 483 (1902); Watertown Nat. Bank v. Bagley, 134 App. Div. 831, 119 N. Y. S. 592 (1909); Andrews v. Cosmopolitan Bank, 183 App. Div. 787, 171 N. Y. S. 875 (1918).

The case of Nunn v. Edmiston, (Tex. Civ. App. 1895) 29 S. W. 1115, holding a written "waiver" of the statute to be against policy and void, was ignored in Smith v. Dupree, (Tex. Civ. App. 1911) 140 S. W. 367, and then followed in Young v. Sorenson & Hooper, (Tex. Civ. App. 1913) 154 S. W. 676. Subsequent Texas cases have freely invoked estoppel, however, in cases where agreements for extensions of time had led creditors to delay suit beyond the statutory period. Kraus v. Morris, (Tex. Civ. App. 1922) 245 S. W. 450; McNeill v. Simpson, (Tex. Civ. App. 1929) 24 S. W. (2d) 485; McNeese v. Page, (Tex. Civ. App. 1930) 29 S. W. (2d) 489.

In Shapley v. Abbott, 42 N. Y. 443 (1870), there is strong language to the effect that a promise not to plead the statute is against policy and wholly void. Lower courts in New York, in decisions cited in the previous paragraph, have refused to be impressed with this pronouncement.

For further discussion of the validity and effect of contracts not to plead the statute of limitations, see 30 COL. L. REV. 383 (1930); 14 Cal. L. Rev. 126 (1926); 1 WILLISTON, CONTRACTS, § 183 (1931).

the cases involving contracts not to plead the statute have presented most directly the question whether the broader purposes of limitation acts preclude any modification of their provisions through the deliberate action of private individuals. In most of the decisions this question has been answered in the negative and the public interest in the extinguishment of stale claims has been relegated to a minor rôle. From this it follows even more clearly that the protection of the statute may be forfeited without express agreement, through conduct indicating that such protection would not be claimed. It is true that estoppel to plead the statute may be admitted even in states that refuse to enforce express contracts not to plead it.[22] But wherever the limitation of actions has been subjected to control by the free play of private contract, it can be expected that courts will show an even greater liberality if the elements of estoppel appear.

2. *Theories of Enforcement*

If the validity of agreements not to plead the statute is once accepted, then convenience would dictate their specific enforcement. But technical difficulties appear at this stage. In many cases the remedy in damages for breach of the contract would be considered "adequate" under the usual tests of equity. The damages would presumably be measured by the money value of the cause of action lost through the plea of the statute, which the defendant had contracted not to make.

[22] It is only in Kentucky that the question has been directly raised whether estoppel can be recognized although express contracts not to plead the statute would be invalid. In Kansas and Mississippi there are statutes invalidating all contracts which purport to modify the limitation periods prescribed by statute (see above, n. 13), but the cases in those states which admit estoppel to plead the statute were decided before this prohibitory legislation went into effect. See, for example, Missouri, K. & T. Ry. v. Pratt, 73 Kan. 210, 85 P. 141 (1906), and Barnett v. Nichols, 56 Miss. 622 (1879). In Kentucky, on the other hand, a long line of judicial decisions has refused to enforce contractual modifications of the statutory system of limitation (see above, n. 13); nevertheless, estoppel has been allowed to operate for the purpose of extending the statutory period. Chesapeake & Nashville Ry. v. Speakman, 114 Ky. 628, 71 S. W. 633 (1903); Louisville & Nashville R. R. v. Carter, 226 Ky. 561, 10 S. W. (2d) 1064 (1927); Loy v. Nelson, 201 Ky. 710, 258 S. W. 303 (1924). No Kentucky case seems to have observed the inconsistency in these two lines of decision. The inconsistency is all the more striking, because the Speakman and Carter cases both involved requests for delay and agreements to settle, from which a promise not to plead the statute could easily have been implied. See below, section II. By emphasizing the misleading character of the defendant's assurances and the plaintiff's reliance thereon, the court in both cases was able to find the elements of estoppel and thus save the claims from the statutory bar. It is at least doubtful whether it would have done so if the promises not to plead the statute had been express.

The circuity of such procedure, however, would render it far less satisfactory than specific enforcement of the agreement not to plead the statute. An appeal to equity for an injunction against a plea of the statute would likewise involve circuity and unnecessary litigation. For this reason every state except New Jersey is committed to the policy of specific enforcement *at law*, through the rejection of a plea of the statute where either an enforceable contract or the accepted elements of estoppel appear.[23]

The label that will be applied to this specific relief has been the subject of some uncertainty. One possible analogy is the *acknowledgment* made after the statute has run, which is sufficient to revive contract claims already barred. An agreement not to take advantage of the statute, made *before* the statutory period has expired might be construed as an acknowledgment of liability sufficient to set the statute in operation from the date of the new agreement. The acknowledgment theory has in fact been resorted to in some cases.[24] But it is objectionable on several grounds. First of all, it is by no means clear that an agreement not to take advantage of a single defense amounts to an unconditional acknowledgment of liability on the original claim.[25] Secondly, this theory makes no provision for tort claims, to which doctrines of acknowledgment and part payment have never been applied.[26] Finally, the requirement of a writing for a valid acknowledgment, imposed by legislation in most of the states,[27] would prevent

[23] See the cases cited above, notes 5 and 6. Very few courts seem to be aware of the fact that the exclusion of a plea of the statute, as a result of a contract not to plead it, amounts to specific performance in a legal action. Randon v. Toby, 11 How. (52 U. S.) 493 (1850), is an exception.

[24] Stearns v. Admr. of Stearns, 32 Vt. 678 (1860); Rowe v. Thompson, 15 Abb. Pr. (N. Y.) 377 (1863), estoppel being suggested as an additional ground by one of the two majority judges; Carraby v. Navarre, 3 La. 262 (1832); Bowmar v. Peine, 64 Miss. 99 (1886).

The "acknowledgment" analysis has been adopted in some cases where the promise not to plead the statute occurred *after* the statutory bar had fallen. Burton v. Stevens, 24 Vt. 131 (1852); Jordan v. Jordan, 85 Tenn. 561 (1886).

[25] This objection is made by the writer in 30 COL. L. REV. 383 (1930), and by 1 WOOD, LIMITATION OF ACTIONS, 4th ed., § 76 (1916). Apparently Professor Williston is of the opposite opinion. 1 WILLISTON, CONTRACTS, § 184 (1931).

[26] 1 WILLISTON, CONTRACTS, § 186 (1931); 1 WOOD, LIMITATION OF ACTIONS, 4th ed., § 66 (1916).

[27] For example, by 2 Fla. Gen. L. (1927), § 4650; Ga. Code (1933), § 3-901; Idaho Code (1932), § 5-238; Ill. Stat. (Cahill 1933), c. 83, § 17; Ind. Ann. Stat. (Burns 1933), § 2-610; Iowa Code (1931), § 11018; Kan. Rev. Stat. (1923), § 60-312; Me. Rev. Stat. (1930), c. 95, § 104; Mass. Gen. L. (1932), c. 260, § 13; Mich. Comp. L. (1929), § 13984; Miss. Code (1930), § 2318; Mont. Rev. Code

relief in cases where the surrender of statutory protection was oral or was inferred from conduct.

Results have also been explained occasionally in terms of "waiver." Where the limitation arises from express agreement, purporting to shorten the period defined by statute, this theory is appropriate.[28] The objection to its use as a method of excluding statutory defenses rests chiefly on substantive grounds. A litigant it seems should not be free to waive the protection of the statute by unilateral declaration, without the element of reliance by the opposite party which is characteristic of estoppel. Some decisions have employed the term "waiver," but in all of the cases there appeared a reliance in fact on defendant's promise not to take advantage of delay.[29] Accordingly, a large majority of courts, as a result of conscious choice or unconscious preference, have analyzed results in terms of "estoppel." [30]

Estoppel as a theory for enforcing contracts not to plead the statute

(1921), § 9062; Neb. Comp. Stat. (1929), § 20-216; Ohio Code (Throckmorton 1930), § 11223; N. C. Code (1931), § 416; Vt. Pub. L. (1933), § 1666.

[28] Waiver and estoppel become almost indistinguishable in the cases cited below, notes 49-52, involving the abandonment of contractual time limitations, through express declaration or misleading conduct. For a discussion of the "waiver" of contractual time limitations in insurance policies, without the elements of estoppel, see 38 YALE L. J. 662 (1929).

[29] Webber v. Williams College, 23 Pick. (40 Mass.) 302 (1839); Warren v. Walker, 23 Me. 453 (1844); Parchen v. Chessman, 49 Mont. 326, 142 P. 631 (1914); Andrews v. Cosmopolitan Bank, 183 App. Div. 787, 171 N. Y. S. 875 (1918); Hill v. Hesse, 126 Cal. App. 338, 14 P. (2d) 338 (1932); Hasman v. Canman, 136 Cal. App. 91, 28 P. (2d) 372 (1933).

[30] For example, a promise not to plead the statute made after the statutory period has elapsed will be ineffective, since the delay by the creditor is not attributable to reliance on defendant's promise. Lotten v. O'Brien, 146 Wis. 258, 131 N. W. 361 (1911); Kroeger v. Farmers' Mut. Ins. Co., 52 S. D. 433, 218 N. W. 17 (1928); Trask v. Weeks, 81 Me. 325, 17 A. 162 (1889); Kemper v. Industrial Accident Comm., 177 Cal. 618, 171 P. 426 (1918). Similarly, where the creditor does not in fact rely on the promise, but starts an action before the statute has run. Sonnenfeld v. Rosenthal-Sloan Millinery Co., 241 Mo. 309, 145 S. W. 430 (1911); McFarland v. Peabody Ins. Co., 6 W. Va. 425 (1873).

For cases attributing the enforcement of contracts not to plead the statute to the operation of estoppel, see State Trust Co. v. Sheldon, 68 Vt. 259, 35 A. 177 (1895); Quick v. Corlies, 39 N. J. L. 11 (1876); Newell v. Clark, 73 N. H. 289, 61 A. 555 (1905); Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 P. 439 (1900); State Loan and Trust Co. v. Cochran, 130 Cal. 245, 62 P. 466 (1900); Barcroft & Co. v. Roberts & Co., 91 N. C. 363 (1884); Holman v. Omaha & Council Bluffs Ry. & Bridge Co., 117 Iowa 268, 90 N. W. 833 (1902); Smith v. Dupree, (Tex. Civ. App. 1911) 140 S. W. 367; Randon v. Toby, 11 How. (52 U. S.) 493 (1850); Schroeder v. Young, 161 U. S. 334 (1895); Mann v. Cooper, 2 App. D. C. 226 (1894); Utica Ins. Co. v. Bloodgood, 4 Wend. (N. Y.) 652 (1830); Gaylord v. Van Loan, 15 Wend. (N. Y.) 308 (1836).

has numerous advantages. Most important of these is the fact that the formal elements of an enforceable contract are not necessarily required.[31] It also becomes unnecessary to distinguish sharply between express contracts not to plead the statute and various types of misleading conduct which could not readily be fitted within the categories of contract law. It becomes possible also to save tort claims from the statutory bar, where litigants have been induced to delay suit through justified reliance on express promises or misleading conduct.[32] Most courts have also considered it an advantage that they are enabled, through the use of estoppel, to evade the common statutory requirement of a writing for acknowledgments of liability.[33] Finally, an analysis in terms of estoppel suggests an answer to one of the most difficult questions raised by agreements of this character, as to how

[31] See, for example, Nashville, C. & St. L. Ry. v. Tennessee Mill Co., 143 Tenn. 237, 227 S. W. 443 (1920), where the court held void as an unlawful discrimination a contract between plaintiff, a common carrier, and defendant, a shipper, for an indefinite extension of credit. At the same time, plaintiff's reliance on the contract in delaying suit was held sufficient ground for invoking estoppel to plead the statute.

In Webber v. Williams College, 23 Pick. (40 Mass.) 302 (1839), defendant notified plaintiff that if it would forbear to sue on the debt in question it would have the same rights for a year or more as it then had. Plaintiff's treasurer replied that plaintiff could not consent to any further delay, but plaintiff nevertheless *did* delay until after the expiration of the statutory period. It was held that this was a sufficient compliance with defendant's request so that defendant's "waiver" of the statute was enforceable. Some cases have reached the opposite result on similar facts. Green v. Coos Bay Wagon Road Co., (C. C. Ore. 1885) 23 F. 67, and Shapley v. Abbott, 42 N. Y. 443 (1870). But with the latter case compare Hobart v. Verrault, 74 App. Div. 444, 77 N. Y. S. 483 (1902). See also Hill v. Hesse, 126 Cal. App. 338, 14 P. (2d) 338 (1932).

[32] Armstrong v. Levan, 109 Pa. St. 177 (1885); Louisville & Nashville R. R. v. Carter, 226 Ky. 561, 10 S. W. (2d) 1064 (1927); Holman v. Omaha & Council Bluffs Ry. & Bridge Co., 117 Iowa 268, 90 N. W. 833 (1902); Renackowsky v. Detroit Board of Water Comrs., 122 Mich. 613, 81 N. W. 581 (1900); Empire Gas & Fuel Co. v. Lindersmith, 131 Okla. 183, 268 P. 218 (1928); McLearn v. Hill, 276 Mass. 519, 177 N. E. 617 (1931); Howard v. West Jersey & S. S. R. Co., 102 N. J. Eq. 517, 141 A. 755 (1928), 104 N. J. Eq. 201, 144 A. 919 (1929); Noel v. Teffeau, 116 N. J. Eq. 446, 174 A. 145 (1934).

[33] Barcroft & Co. v. Roberts & Co., 91 N. C. 363 (1884); Cecil v. Henderson, 121 N. C. 244, 28 S. E. 481 (1897); Oliver v. United States Fidelity & Guaranty Co., 176 N. C. 598, 97 S. E. 490 (1918); Gaylord v. Van Loan, 15 Wend. (N. Y.) 308 (1836); Brookman v. Metcalf, 27 N. Y. Super. Ct. 568 (1867); Smith v. Dupree, (Tex. Civ. App. 1911) 140 S. W. 367. See also the views expressed by three of the four majority judges in Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555 (1896).

But see Hodgdon v. Chase, 29 Me. 47 (1848), and Shapley v. Abbott, 42 N. Y. 443 (1870), where it was held that a "waiver" of the statute of limitations came within the purpose of the statute requiring acknowledgments to be in writing, so that an oral waiver was ineffective.

long the contract will be effective to suspend the statute. In general terms the answer will be that the statute is suspended only so long as the creditor's reliance on the agreement is justified. In practice this test enables courts to fix a "reasonable" limit, one which conforms to their own views of social policy.[34]

II

REQUESTS FOR DELAY

In the cases so far considered the ground for suspension of the statute has been an express promise not to claim its protection if suit is begun after the statutory period has elapsed. In most of these cases the formal elements of an express contract were present. Where that was not true it was still possible to find the elements of an estoppel, consisting chiefly in the delay directly induced by reliance on a promise.[35]

Where the debtor requests delay without an explicit reference to the statute of limitations the same reasons may exist for invoking estoppel. If it were thought necessary to do so, an agreement not to take advantage of the delay could often be inferred and the situation could thus be described in terms of express contract or contract implied in fact. The vaguer concept of estoppel makes it possible to dispense with such inquiries. Through the use of estoppel the central question becomes whether or not the creditor was justified in believing that the requested delay would not be used to his disadvantage.

Perhaps the clearest cases of this type are those in which both

[34] Several cases have held that a promise not to plead the statute may be effective for more than the statutory period from the date the promise was made. McGee v. Jones, 79 Cal. App. 403, 249 P. 544 (1926); Brownrigg v. De Frees, 196 Cal. 534, 238 P. 714 (1925); Mann v. Cooper, 2 App. D. C. 226 (1894); Hobart v. Verrault, 74 App. Div. 444, 77 N. Y. S. 483 (1902). But two cases have held that the statute commences to operate at once on the promise not to plead the statute, so that only the normal statutory period thereafter is allowed. Cameron v. Cameron, 95 Ala. 344 (1891); Trask v. Weeks, 81 Me. 325, 17 A. 162 (1889). This is essentially the solution suggested in 30 COL. L. REV. 383 (1930). The technical difficulty, suggested above, note 19, is that no breach of the promise not to plead the statute can occur until an action is brought and the statute is pleaded. By using estoppel courts can avoid this technical difficulty and concentrate on the "reasonableness" of the creditor's reliance, in the light of the general statutory policy in the limitation of actions. See, for example, Holman v. Omaha & Council Bluffs Ry. & Bridge Co., 117 Iowa 268, 90 N. W. 833 (1902); Crane v. French, 38 Miss. 503 (1860); Kellogg v. Dickinson, 147 Mass. 432, 18 N. E. 223 (1888).

[35] See Webber v. Williams College and similar cases referred to above, note 31.

parties agree to an extension of time on an obligation already due. Even though the statute of limitations is never expressly mentioned, it is usually understood by the parties that the indulgence granted to the debtor will not in any way prejudice the creditor. Where the extension agreement is based on good consideration and the creditor is therefore precluded from suing during the period fixed, a strong claim arises for protection against the statutory defense.[36] Even without this, it seems unjust for the debtor to escape liability merely because the creditor has complied (though not required to comply) with their agreement for an extension of time. The agreement itself can be construed as a request for delay, which, when acted on by the opposite party, will preclude reliance on the statute by the debtor.[37]

Closely allied is the group of cases in which the debtor, without purporting to enter into an express contract, requests delay and at the same time promises to perform if his request is granted. Here again it would be possible to infer an agreement not to take advantage of the delay requested, in consideration of the creditor's actual forbearance to sue. Analyzed in terms of estoppel, this situation reveals similar elements of justified reliance by the creditor and estoppel is freely invoked.[38]

[36] Beadles v. Smyser, 209 U. S. 393 (1908); In re Board of Education, 35 Okla. 733, 130 P. 951 (1913); Quanchi v. Ben Lomond Wine Co., 17 Cal. App. 565, 120 P. 427 (1911); McNeese v. Page, (Tex. Civ. App. 1930), 29 S. W. (2d) 489; McNeill v. Simpson, (Tex. Civ. App. 1929) 24 S. W. (2d) 485.

The commonest cases of this type are those in which the parties agree to await the outcome of pending litigation and the debtor agrees to perform any obligation established as a result thereof. Missouri, K. & T. Ry. v. Pratt, 73 Kan. 210, 85 P. 141 (1906); Charles Weitz' Sons v. United States Fidelity & Guaranty Co., 206 Iowa 1025, 219 N. W. 411 (1928); Depuy v. Selby, 76 Okla. 307, 185 P. 107 (1919); Davis v. Dyer, 56 N. H. 143 (1875); Smith v. Lawrence, 38 Cal. 24 (1869); Haymore v. Commissioners of Yadkin, 85 N. C. 268 (1881); Daniel v. Board of Commrs., 74 N. C. 494 (1876); Brookman v. Metcalf, 27 N. Y. Super. Ct. 568 (1867).

[37] Hill v. Hesse, 126 Cal. App. 171, 14 P. (2d) 338 (1932); Hasman v. Canman, 136 Cal. App. 91, 28 P. (2d) 372 (1933); Basile v. California Packing Corp., (C. C. A. 9th, 1928) 25 F. (2d) 576; Phillips v. Phillips, 163 Cal. 530, 127 P. 346 (1912); Kraus v. Morris, (Tex. Civ. App. 1922) 245 S. W. 450; Lyndon Sav. Bank v. International Co., 78 Vt. 169, 62 A. 50 (1905). See also Rowe v. Thompson, 15 Abb. Pr. (N. Y.) 377 (1863); Lange v. Binz, (Tex. Civ. App. 1926) 281 S. W. 626; and Nashville, C. & St. L. Ry. v. Tennessee Mill Co., 143 Tenn. 237, 227 S. W. 443 (1920). Contra, Green v. Coos Bay Wagon Road Co., (C. C. Ore. 1885) 23 F. 67.

[38] Armstrong v. Levan, 109 Pa. 177 (1885); Empire Gas & Fuel Co. v. Lindersmith, 131 Okla. 183, 268 P. 218 (1928); Kreielsheimer v. Gill, 85 Wash. 175, 147 P. 871 (1915); Ketcham v. Ketcham, 84 N. J. Eq. 577, 94 A. 813 (1915), 88 N. J. Eq. 601, 103 A. 1053 (1918); Newton v. Carson, 80 Ky. 309 (1882); Chesapeake

Where the request for an extension of time is not accompanied either by a promise not to plead the statute or by assurances of eventual performance, a different question is presented. In the absence of conduct of the debtor indicating that further delay will not be prejudicial, the creditor may be said to act at his peril in permitting any extension of time beyond the statuory period. From a simple request for delay it is not ordinarily possible to infer an assurance that the claim will survive the statutory bar. At any rate, decided cases have refused on these facts to exclude a plea of the statute on the ground of estoppel.[39]

III

CONDUCT INDICATING SUIT UNNECESSARY

Even without a specific request that the creditor refrain from suing, the debtor's conduct may induce delay by suggesting that litigation is unnecessary and an amicable settlement can be secured. Such suggestions may clearly imply that delay in suing will not be prejudicial. The effect on the creditor may be exactly the same as if an extension of time were requested as an indulgence to the debtor, with similar assur-

& Nashville Ry. v. Speakman, 114 Ky. 628, 71 S. W. 633 (1903); Louisville & Nashville R. R. v. Carter, 226 Ky. 561, 10 S. W. (2d) 1064 (1927); Winn v. Dinsdale Grain & Lumber Co., 196 Iowa 1140, 196 N. W. 80 (1923); *contra,* Liskey v. Paul, 100 Va. 764, 42 S. E. 875 (1902), and the earlier Kentucky case of Kennedy v. Foster's Exr., 77 Ky. 479 (1879).

In such cases there may still be room for the question whether the debtor's assurances of future performance will excuse a failure by the creditor to realize on a cause of action already accrued. For example, in Neal v. Pickett, (Tex. Civ. App. 1925) 269 S. W. 160, the grantees in a deed had fraudulently secured delivery by representing that mining machinery had already been placed on the land in question and boring operations had already commenced. The court held that delay in suing to rescind the deed was justified by the assurances of the defendant that if plaintiffs would forbear to sue mining operations would be commenced at once. On the other hand, the court in Trail v. Firth, 186 Cal. 68, 198 P. 1033 (1921), held that a cause of action for fraud by a grantor of land was complete as soon as the grantor's fraud was discovered, and that delay in suing would not be excused by subsequent promises of the grantor to make up the deficiency of the water supply which had been the subject of his misrepresentations. See also McKay v. McCarthy, 146 Iowa 546, 123 N. W. 755 (1910).

[39] St. Joseph & Grand Island Ry. v. Elwood Grain Co., 199 Mo. App. 432, 203 S. W. 680 (1918); Hill v. Hilliard & Co., 103 N. C. 34, 9 S. E. 639 (1889); Coleman v. Walker, 60 Ky. 65 (1860). In Bank of Tennessee v. Hill, 29 Tenn. 176 (1849), the court refused to invoke estoppel against an endorser who merely requested the holder of a note to proceed first against a prior endorser.

It has been held, however, that a short-term limitation created by express contract can be "waived" by a mere request not to sue. Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240, 38 N. E. 627 (1894).

ances that no injury would result. On theoretical grounds there is no reason for excluding estoppel from this class of cases as well. The chief difficulty appears at another point, in establishing that the creditor was justified in his conclusion that an action was unnecessary or could be safely postponed.

Justification for delay is found most readily in cases where negotiations for a settlement are actively continued until the end of the statutory period. Without an express contract the debtor would not be in a position to insist on postponement in such cases. But if the negotiations offer some reasonable prospect of eventual agreement, most claimants will prefer to continue them, rather than to face the hazards of contested litigation. The clearest case for estoppel is one in which the debtor conducts negotiations with the deliberate purpose of exploiting this natural impulse in the creditor.[40] Even where no intent to mislead can be proven, however, the creditor's inaction may be equally justified. A break in negotiations for a considerable period should probably be enough to force the creditor into renewed activity, looking either toward a resumption of negotiations or the start of suit.[41] So long as negotiations are proceeding smoothly with every indication of success, the creditor can rely on the assurance they give that suit will not be necessary.[42]

[40] Crawford v. Winterbottom, 88 N. J. L. 588, 96 A. 497 (1916).

[41] In Kenyon v. United Electric Rys., 51 R. I. 90, 151 A. 5 (1930), defendant's claim adjuster assured the plaintiff shortly after her accident in November, 1926, that the company would "do the right thing by her," and told plaintiff to put in a claim when she had fully recovered. In May, 1928, plaintiff went to see the adjuster and named a sum for which she would settle. The adjuster told plaintiff he would see about it and let her know. In July and again in September, 1928, plaintiff telephoned to inquire why she had not heard from him, and on both occasions the adjuster replied that she would hear from him. On November 5, 1928, after the statute had run on the claim, the adjuster told plaintiff that they had dropped the case and would pay nothing. It was held on these facts that defendant's agents had done nothing to induce plaintiff not to sue, that plaintiff was bound to know the action would be barred in two years, and that no ground for an estoppel was shown.

See also Ford v. Rogovin, (Mass. 1935) 194 N. E. 719, and Brown v. Atlantic Coast Line R. R., 147 N. C. 217, 60 S. E. 985 (1908).

[42] Howard v. West Jersey & S. S. R. Co., 102 N. J. Eq. 517, 141 A. 755 (1928), 104 N. J. Eq. 201, 144 A. 919 (1929); Baker-Matthews Mfg. Co. v. Grayling Lumber Co., 134 Ark. 351, 203 S. W. 1021 (1918); Swofford Bros. Dry Goods Co. v. Goss, 65 Mo. App. 55 (1896); Missouri Pac. Ry. v. Coombs & Bro. Comm. Co., 71 Mo. App. 299 (1897). See also Barnett v. Nichols, 56 Miss. 622 (1879), and Calistoga Nat. Bank v. Calistoga Vineyard Co., (D. C. Cal. 1935) 46 P. (2d) 246.

In Klass v. City of Detroit, 129 Mich. 35, 88 N. W. 204 (1901), the court refused to find grounds for an estoppel in negotiations conducted, without authority for that purpose, by the committee on claims and accounts of the city council.

In most of the cases last referred to the amount of the liability was in dispute. Where that is not the case it is by no means clear that a debtor's assurances of future performance will justify continued indulgence. Such assurances might, of course, amount to an acknowledgment, renewing the obligation and setting the statute in operation as of their date. If insufficient as an acknowledgment (either because conditional in form or because not in writing), promises of future performance cannot ordinarily be relied on by the creditor.[43] Some cases to the contrary may be found, but most of them must be explained by special circumstances which lent some added credibility to promises repeated after past default.[44]

Still less reliance can be placed on assurances by the debtor that the start of an action is not necessary in order to save the plaintiff's claim. Insofar as such statements involve a misrepresentation of law, reliance by the creditor would be no more justified here than in the ordinary case of misrepresentation of law.[45] A common source of hardship to

[43] Monroe v. Herrington, 110 Mo. App. 509 (1904); Town of Franklin v. Franks, 205 N. C. 96, 170 S. E. 113 (1933); Raby v. Stuman, 127 N. C. 463, 37 S. E. 476 (1900).

[44] Bain v. Wallace, 167 Wash. 583, 10 P. (2d) 226 (1932); Freeman v. Conover, 95 N. J. L. 89, 112 A. 324 (1920); Rapp v. Rapp, 218 Cal. 505, 24 P. (2d) 161 (1933).

In Renackowsky v. Board of Water Commrs., 122 Mich. 613, 81 N. W. 581 (1900), it was held that the declaration sufficiently met a defense of the statute through allegations that defendant board "recognized" the plaintiff's claim, made payments thereon, and formally resolved to pay plaintiff his regular wages as long as he was disabled.

In Weir v. Bauer, 75 Utah 498, 286 P. 936 (1930), plaintiff was induced to delay efforts to collect the sums due on corporate bonds held by him, as a result of repeated promises by defendant Bauer to secure a formal vote of the board of directors of the issuing corporation, extending the date of maturity on plaintiff's bonds. These assurances were made more plausible by the fact that Bauer was in complete control of the corporation's affairs, owned a large majority of the outstanding stock and bonds, and was attempting himself to collect on bonds of the same issue.

[45] Hilliard v. Pennsylvania R. R., (C. C. A. 6th, 1934) 73 F. (2d) 473; Hopperton v. Louisville & Nashville R. R., 17 Ky. L. Rep. 1322 (1896). But cf. Guile v. La Crosse Gas & Electric Co., 145 Wis. 157, 130 N. W. 234 (1911). On the general subject of misrepresentation of law as a basis for rescission of contract or the recovery of damages, see 32 COL. L. REV. 1018 (1932).

The frequently cited case of Andreae v. Redfield, 98 U. S. 225 (1878), involved the question whether public officials could bind the Federal Government through their assurances that no action need be brought and that by the established practice of the United States Treasury the presentation of claims to the refund clerk would be enough to ensure their payment. The court held these assurances insufficient to estop the Government. From this case it cannot be inferred, however, that public officials through misleading conduct can never estop governmental agencies from pleading the

creditors has been the short period of limitation usually provided for the filing of claims against decedents' estates. Even explicit statements by personal representatives to the effect that such statutes will not be enforced and that the filing of claims will not be necessary have been held insufficient for estoppel.[46] Somewhat more leniency has been shown in the administration of workmen's compensation acts, where short periods of limitation have likewise produced exceptional hardship, aggravated by the personal inequality of the parties.[47] But in the case of ordinary claims, subject to the provisions of general limitation acts, the time, place, and manner of starting court actions must be ascertained at the litigant's peril. If he is ignorant of any detail in this complicated process, he is required to hire an attorney. Otherwise, how can an ancient and honorable profession be assured a decent maintenance? [48]

statute of limitations. See, for example, Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 P. 52 (1902).

[46] Wells v. Child, 12 Allen (94 Mass.) 333 (1886); Toler v. Wells, 158 Miss. 628, 130 So. 298 (1930); Given v. Whitmore, 73 Me. 374 (1882); Estate of Claghorn, 181 Pa. 608, 37 A. 921 (1897). Cf. Wilson v. McElroy, 83 Iowa 593, 50 N. W. 55 (1891).

But where all the interested parties have participated in inducing the creditor to delay, a different result has been reached. McWilliams' Appeal, 117 Pa. 111, 11 A. 383 (1887); In re Williams' Estate, 121 Misc. 54, 200 N. Y. S. 222 (1923). See also Ketcham v. Ketcham, 84 N. J. Eq. 577, 94 A. 813 (1915); Hamilton's Exr. v. Wright, 27 Ky. L. Rep. 1144 (1905); and Clark v. Augustine, 62 N. J. Eq. 689, 51 A. 68 (1902).

[47] In Kettering Mercantile Co. v. Fox, 77 Colo. 90, 234 P. 464 (1925), the filing by the employee of a notice of claim within the period defined by statute was held to be dispensed with by the employer's conduct in securing a hearing before the industrial accident commission and failing to object when the commission's referee set the case over to a date which fell after the expiration of the statutory period.

In Guile v. La Crosse Gas & Electric Co., 145 Wis. 157, 130 N. W. 234 (1911), defendant was held to be estopped to rely on a statutory requirement of written notice within one year of all personal injury claims (described by the court as a "statute of limitations"). Defendant's officers had represented to the plaintiff that there was no need to comply with this statutory requirement and that an insurance company was liable to plaintiff for his damages.

For other cases showing indulgence in applying limitation provisions of industrial accident legislation, see Greeley Gas & Fuel Co. v. Thomas, 87 Colo. 486, 288 P. 1051 (1930); Schrabauer v. Schneider Engraving Product, Inc., 224 Mo. App. 304, 25 S. W. (2d) 529 (1930); Twonko v. Rome Brass & Copper Co., 183 App. Div. 292, 170 N. Y. S. 682 (1918). To be distinguished on its facts is Stein v. Packard Motor Co., 210 Mich. 374, 178 N. W. 61 (1920).

[48] Broad generalizations, such as the one suggested in the text, are as hazardous here as elsewhere. The opposite point of view was taken, for example, in Clark v. Augustine, 62 N. J. Eq. 689, 51 A. 68 (1902), where a three-month limitation on suits against a decedent's estate was aggravated by misrepresentations of the executors

These doctrines have all been greatly relaxed in the group of cases involving short-term limitations provided for by express contract. It was pointed out earlier that such contractual limitations have almost everywhere been held valid, in the absence of legislation prohibiting or regulating them. But since they are based on private agreement rather than on general legislation, courts have been more willing to infer a surrender of their protection. The question has arisen most frequently in connection with the limitation clauses of insurance policies. Here the benefit of such clauses has been held to be forfeited not only by starting negotiations for a settlement [49] but even by mere acknowledgments of liability.[50] Likewise a promise to assist the insured in preparing proofs of loss, leading to delay in the filing of a claim, has been held sufficient.[51] Even the failure of the insurance company to have an agent subject to service of process in the county where plaintiff elected to sue, was held in an early Michigan case to prevent the enforcement of a contractual limitation in the policy.[52]

IV

MISLEADING CONDUCT

In all the cases so far considered, the element chiefly emphasized as a basis for estoppel has been the reliance by the creditor on assurances that delay would not be prejudicial. These assurances may be expressed in the form of an express promise not to plead the statute,

as to the place where they would be available for service of process. As a result the three months period expired before the plaintiff was able to secure service of process.

[49] Little v. Phoenix Ins. Co., 123 Mass. 380 (1877); Voorheis v. People's Mut. Ben. Soc., 91 Mich. 469, 51 N. W. 1109 (1892); Phenix Ins. Co. v. Rad Bila Hora Lodge, 41 Neb. 21, 59 N. W. 752 (1894); Andes Ins. Co. v. Fish, 71 Ill. 620 (1874). It is enough if the agents of the insurer "hold out hopes of an amicable adjustment." Martin v. State Ins. Co., 44 N. J. L. 485 (1882); Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538 (1890). In St. Paul Fire & Marine Ins. Co. v. McGregor, 63 Tex. 399 (1885), the conduct chiefly relied on to raise an estoppel was a disclaimer by the company when sued as garnishee by a third party, with a request that plaintiff be impleaded as the real party in interest.

[50] Bish v. Hawkeye Ins. Co., 69 Iowa 184 (1886); Home Ins. Co. v. Myer, 93 Ill. 271 (1879); Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538 (1890); Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240, 38 N. E. 627 (1894); Thompson v. Phenix Ins. Co., 136 U. S. 287 (1890); Black v. Winneshiek Ins. Co., 31 Wis. 74 (1872); Hamblin v. Newark Fire Ins. Co., 48 R. I. 473, 139 A. 212 (1927).

[51] Killips v. Putnam Fire Ins. Co., 28 Wis. 472 (1871). See also Ames v. N. Y. Union Ins. Co., 14 N. Y. 253 (1856).

[52] Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202 (1864).

a request for further delay, or a promise of future performance if no action is brought. Through most of these situations, however, there runs a common thread — the expectation on the creditor's part that a defense of the statute would not be interposed. Where this element did not appear there was at least a justified expectation that the claim could be collected without litigation and that the start of suit was therefore unnecessary. Outside these main groups of estoppel cases there lies a more heterogeneous group of situations, in which the debtor's conduct interferes more directly with the prosecution of an action. Here also the courts have resorted to estoppel, in the absence of some broader and more compelling remedial principle.

In some cases of this type the elements of express contract not to plead the statute can be easily inferred. In *McLearn v. Hill*,[53] for example, the plaintiff had brought an action for personal injuries alleged to have been caused by defendant's negligence. Defendant's counsel suggested that plaintiff's claim be consolidated for trial with claims then pending in another court, arising out of the same accident. Plaintiff's counsel agreed to do so, discontinued the action already begun, and started a new action in the other court. By the time the second action was started the statute of limitations had run on the claim. Holding that defendant was estopped to plead the statute in the second action, the court said:[54]

> "The plaintiff was induced to discontinue his seasonable action, impregnable against the defence of the statute of limitations, in reliance upon the conduct of the defendant. Acceptance by the defendant of the favor so solicited from the plaintiff involved as matter of fair dealing an undertaking on his part not to rely on a defence based upon facts coming into existence solely from the granting of that favor by the plaintiff. Nothing appears to have been said about the statute of limitations during the talks or correspondence between counsel. It cannot be ruled that the plaintiff was lacking in essential perspicacity in failing to think of that as possible defence open in these conditions to the defendant in the second action. . . .
>
> "The offer of proof does not charge deceit, bad faith or actual fraud. Facts falling short of these elements may constitute conduct contrary to general principles of fair dealing and to the good conscience which ought to actuate individuals and which it is the

[53] 276 Mass. 519, 177 N. E. 617 (1931).

[54] 276 Mass. 519 at 523, 526, 177 N. E. 617 (1931).

design of courts to enforce. It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place as a part of the law. . . .

"In the case at bar there was no express promise by the defendant not to plead the statute of limitations to this action. It may be that neither party at the time of the transactions set out in the offer of proof had the statute in mind. But the arrangement suggested by the defendant could be carried out only by not pleading the statute. Trial of the plaintiff's case with the others of necessity implied a trial upon the merits and not a foreclosure of every element of merit by the rigid defence of the statute. An estoppel of this nature may rest upon a necessary implication as well as upon an express stipulation."

A similar instance of sharp practice in litigation in which estoppel was employed is provided by the Utah case of *Anderson v. Cercone*.[55] There the parties were originally husband and wife. The wife had started an action for divorce and at about the same time the husband started an action to recover possession of land, claiming that title had been taken in the wife's name but that the purchase money had been paid with his own funds. At the wife's solicitation the parties were reconciled under an agreement by which both actions were to be dismissed. Plaintiff, the husband, accordingly dismissed his action for recovery of the land but the wife, in violation of her agreement, carried on her divorce action to final decree and then remarried. Holding that the action was not barred by a seven-year statute on claims for the recovery of real property, the court declared that defendant's conduct was "a palpable egregious fraud," of which she should not be allowed to take advantage.

Estoppel has also been used to deprive litigants of advantages secured by more direct methods of obstruction. In a Michigan case the plaintiff had already started an action and prosecuted it to judgment, when defendant secured from the trial court, on ex parte application, an order staying further proceedings in the cause. The order was entered the day before the expiration of the period within which execution could be allowed to issue. Defendant's counsel promised to notify plaintiff's counsel immediately that the order had been granted but failed to do so until after the statutory period had elapsed. Under these circumstances it was held that defendant was estopped to rely on

[55] 54 Utah 345, 180 P. 586 (1919).

the statute, as a result of his own improper and misleading efforts to interfere with the issuance of execution.[56]

Similarly, estoppel has been resorted to in cases where the defendant misled the plaintiff by suggesting service of process at a place where defendant could not be found,[57] and where the identity of the suable party was deliberately withheld from the plaintiff until after the statutory period had elapsed.[58] A recent New Jersey case has even gone so far as to hold that the failure of a hit-and-run driver to disclose his identity to a witness at the scene of the accident would prevent him from relying on the statute as a defense.[59]

How far courts will go in this direction will depend rather on basic assumptions of Anglo-American procedure than on notions as to the scope of estoppel. In that procedure, litigation is conceived essentially as a contest between adverse parties, to whom the main responsibility and initiative are transferred. All available resources of delay and obstruction can be freely used, subject to a moderate degree of regulation by the courts. It is a question how far estoppel will be used to undermine this elaborate and highly organized system of private combat. It has been held that the running of the statute of limitations will not be suspended as a result of various kinds of procedural slips, caused by the claimant's own stupidity or neglect.[60] A delay caused by

[56] Albert v. Patterson, 172 Mich. 635, 138 N. W. 220 (1912). The case was aggravated by the fact that defendant's counsel had assured the trial judge that a stay of proceedings could properly be ordered on ex parte application, though this was not the case.

[57] Clark v. Augustine, 62 N. J. Eq. 689, 51 A. 68 (1902).

[58] Fitzgerald's Estate, 252 Pa. 568, 97 A. 935 (1916), where an action against an unincorporated association was defended actively by the real party in interest, who failed to object that the association had been improperly named as a corporation. The action was ultimately dismissed because incorporation was not proved. It was held that the statute of limitations could not be pleaded in a new action brought thereafter, in which the defendant was properly named.

[59] Noel v. Teffeau, 116 N. J. Eq. 446, 174 A. 145 (1934). The court declared that a standard of conduct, enforceable in civil as well as criminal actions, was created by a criminal statute which required every driver involved in an automobile accident to stop at once and disclose his name, address, operator's license and registration number to the injured party or to a witness of the accident. The non-compliance of the defendant with this standard (though created for another purpose) was held to make a plea of the statute "unconscionable." It should be pointed out, however, that in the particular case there were additional facts, indicating a deliberate effort by the defendant to conceal his identity until after the statutory period had passed. Defendant not only instructed his wife and daughter not to tell anyone of the accident, but his later report to the police was misleading.

[60] In Limpert Bros. v. Stitt, 94 N. J. L. 472, 110 A. 832 (1920), plaintiff's complaint was stricken out on motion with leave to file a new complaint. Instead of

unsuccessful suit against third parties is taken at the plaintiff's own risk.[61] In such cases the concept of estoppel provides no more protection to unwary litigants than the concept of "fraudulent concealment," to which at this point it is very nearly allied.[62]

V

RELATIONS OF ESTOPPEL TO FRAUD AND FRAUDULENT CONCEALMENT AS GROUNDS FOR SUSPENSION

A sharp line of demarcation between estoppel and other recognized grounds for suspension of limitation acts would serve no useful purpose. This appears most clearly in connection with "fraud" and "fraudulent concealment," two exceptions that have been widely recognized in modern law. One common characteristic may appear to mark off most of the estoppel cases from those in which the fraud and fraudulent concealment exceptions are commonly used. In most of the estoppel cases the effect of the defendant's conduct is not to conceal the existence of the entire cause of action, but rather to obstruct the prosecution of

doing so, plaintiff issued a summons in a new action, after the statutory period had elapsed. In Tomlinson v. Bennett, 145 N. C. 279, 59 S. E. 279 (1907), the plaintiff delayed suit in the hope of being able to set up his claim as a counterclaim in an action brought by the opposite party and later discontinued.

In Lamb v. Martin, 43 N. J. Eq. 34, 9 A. 747 (1887), the plaintiff in effect sought relief through estoppel against the doctrine of election of remedies. Having obtained a decree for specific performance of a contract to sell land, plaintiff was enjoined by a court of equity from suing for restitution of purchase money paid. Plaintiff later caused the specific performance suit and the decree rendered therein to be stricken from the court files, but it was held that his claim for restitution of purchase money was nevertheless barred and that the injunction entered against him in the meantime had been due to his own election of remedies. But compare the relief given to an embarrassed creditor in Exchange Bank v. Thomas, 115 Ky. 832, 74 S. W. 1086 (1903), where the dilemma in which the creditor was placed was apparently due to the *debtor's* contrivance.

[61] Smith v. Jones, 33 Ky. 89 (1835). Compare Hunter v. Niagara Fire Ins. Co., 73 Ohio St. 110, 76 N. E. 563 (1905).

In United States Fidelity & Guaranty Co. v. Dickason, 277 Ill. 77, 115 N. E. 173 (1917), the plaintiff allowed defendant at defendant's own request to conduct the defense in an action brought by a third party, defendant having agreed earlier to indemnify plaintiff for any loss on the third party's cause of action. It was held that, in the absence of a promise by defendant not to plead the statute, there was no excuse for delay in commencing an action against defendant, since plaintiff should have considered the possibility that defendant might fail to establish a defense in the third party's suit.

[62] The relations between "fraudulent concealment" and estoppel are further considered in Dawson, "Fraudulent Concealment and Statutes of Limitation," 31 MICH. L. REV. 875 at 912-917 (1933).

a known claim. On the other hand, fraud and fraudulent concealment will normally produce complete ignorance on the part of the claimant that any injury has occurred or any ground for relief exists.

A distinction based on this circumstance would be artificial. As has already been suggested, some type of obstruction can be analyzed either in terms of estoppel or in terms of "fraudulent concealment" of some fact essential to the prosecution of a claim.[63] The choice between these two categories is not apt to affect results, which depend on the fundamental policies of common law courts toward extreme forms of belligerence between litigants.

It is even more difficult to preserve a distinction between estoppel and "fraud." These two grounds for suspension of limitation acts have been fused most completely in cases of confidential or fiduciary relationship, where exceptionally high standards of conduct have been imposed. Mere non-disclosure by persons subject to this type of moral obligation would more commonly be described as "fraud."[64] Several cases have employed estoppel in situations where non-disclosure was aggravated by failure to take affirmative steps in protecting the opposite party's interests.[65] Where technical difficulties arise in affording complete protection to confidential relationship, these difficulties may be surmounted by invoking estoppel as a supplementary device.[66]

From this review of the cases it appears that estoppel has been admitted in a variety of situations to qualify the general provisions of

[63] Above, section IV.

[64] Dawson, "Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 at 610-614 (1933). Compare the elaborate review of the authorities in Steele v. Glenn, (Tex. Civ. App. 1933) 57 S. W. (2d) 908, where the court explained the "fraud" exception itself as a product of estoppel, through reluctance to admit that the "cause of action" in fraud cases should be defined differently where discovery of the fraud was postponed.

[65] Livermore Falls Trust & Banking Co. v. Riley, 108 Me. 17, 78 A. 980 (1911), failure of bank director to enforce collection of note on which he was surety; Goodrich v. First Nat. Bank, (Tex. Civ. App. 1934) 70 S. W. (2d) 609, same; In re Mohr's Estate, 212 Wis. 198, 248 N. W. 143 (1933), failure of executor to collect debt owed by him to estate; Nahikian v. Mattingly, 265 Mich. 128, 251 N. W. 421 (1933). Compare the earlier case of Harrisburg Bank v. Forster, 8 Watts (48 Pa.) 12 (1839), where similar inaction by the cashier of a bank was described as "fraud."

Other cases suggesting the intimate connections between fraud and estoppel are Lippitt v. Ashley, 89 Conn. 451, 94 A. 995 (1915); Patrick v. Groves, 115 N. J. Eq. 208, 169 A. 701 (1933); and Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 P. 52 (1902).

[66] In Loy v. Nelson, 201 Ky. 710, 258 S. W. 303 (1924), the plaintiff sought to impose a resulting trust on land purchased with plaintiff's funds by her son, under

limitation acts. Most commonly it has been used as the theory for enforcing express (or implied in fact) contracts not to plead the statute as a defense. Concerning the validity of such contracts there is some dispute. Where their validity is recognized, estoppel provides a convenient theory which enables courts to evade some technical difficulties in their enforcement. In other cases, nearly related to those of the first group, the elements of express contract are less distinctly outlined and greater emphasis is laid on the factor of reliance on misleading conduct of the opposite party. At the outer fringes of the field lie a variety of situations in which estoppel appears as the device for restraining the excesses of over-zealous litigants and expressing a general disapproval, on moral grounds, of unfair and misleading conduct. At this point estoppel merges into "fraud" and "fraudulent concealment," the two recognized exceptions to limitation acts with which it is most nearly connected.

American systems of limitation have provided almost no support in express legislation for an "estoppel" exception. The widespread recognition that estoppel has achieved in judicial decision supplies further evidence of the need for flexibility in the administration of limitaton acts.

whom the defendants claimed. The court described the action as one based on "fraud," but was unable to rely on the statutory exception for fraud cases because the Kentucky statute imposed an unconditional limitation of 10 years after the fraud was committed and the deed in the instant case was taken more than 10 years before the action was commenced. The court nevertheless found grounds for estoppel to plead the statute, resulting from the close personal relations between the parties, the plaintiff's long-continued and undisturbed possession, and the son's assurances that title had been taken in plaintiff's name.