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STATUTES of limitation are framed in terms of the interval between the accrual of a "cause of action" and the filing of suit. How far is the operation of this mathematical formula varied by the circumstance that the existence of the cause of action was for some time unknown to the suitor? In most American States statutes have given a partial answer to the question, but in uncertain terms. There, as well as in States where statutes are silent, an effort to provide a full and final answer would face a tangled web of history and legal doctrine, interwoven with imponderable factors of social policy which are but vaguely mirrored in the ideas and language lawyers have used.

I

STATE OF MODERN LEGISLATION

Legislation in 32 States has admitted an exception to the normal operation of limitation acts in cases involving "fraud." [1] In eight of these, the scope of the "fraud" exception is limited by a distinction be-

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[1] For example, Ala. Code 1928, sec. 8966: "In actions seeking relief on the ground of fraud where the statute has created a bar, the cause of action must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud. . . . " Substantially the same provision is to be found in Ariz. Rev. Code (1928), sec. 2060; Cal. Code Civ. Proc. (1931), sec. 338(4); Fla. Comp. Laws (1927), sec. 4663(5); Idaho Code (1932), sec. 5-218(4); Kan. Rev. Stat. (1923), ch. 60, sec. 306(3); Ky. Stat. (Carroll 1930), sec. 2519; Mason's Minn. Stat. (1927), sec. 9191(6); Mo. Rev. Stat. (1929), sec. 862; Mont. Rev. Code (1921), sec. 9033(4); Neb. Comp. Stat. (1929), sec. 20-207; Nev. Comp. Laws (Hillyer 1929), sec. 8524; N. M. Ann. Stat. (1929), ch. 83, sec. 123; N. Y. Civ. Pr. Act, sec. 48(5); N. C. Code (1931), sec. 441(9); Ohio Gen. Code (Page 1926), sec. 11224; Okla. Stat. (1931), sec. 101(3); Or. Code Ann. (1930), sec. 6-103; Utah Comp. Laws (1917),

tween legal and equitable actions;[2] in the rest, the form of action is immaterial. There are minor variations in statutory language,[3] but these variations have not proved to be important. Wherever the exception applies it has the effect of suspending the operation of the relevant statutory provision until "discovery" of the "cause of action." A casual glance at statutory provisions might lead to the conclusion that, while the concepts "fraud," "cause of action," and "discovery" are left undefined, this exception does not on the whole complicate unduly the mathematics of limitation acts by the introduction of new variables.[4] But such a conclusion must be immediately dispelled by the briefest study of reported decisions. Not only has the "fraud" exception inspired an enormous mass of litigation, but it has in operation produced results that could scarcely have been reached, by mere deduction, from the bare statutory language.

Confusion as to the scope and operation of the "fraud" exception has not resulted alone from ambiguity and vagueness in statutory language, although that language is sufficiently ambiguous and vague. Confusion has come also from competition between the "fraud" excep-

sec. 6468(4); Wash. Comp. Stat. (Rem. 1922), sec. 159 (4); Wis. Stats. (1931), sec. 330.19(7); Wyo. Rev. Stat. (1931), sec. 89-411. In addition, see the statutes of Georgia, Maine, and Maryland quoted infra, note 7.

In four code States the distinction is drawn between actions at law and actions "solely cognizable" in equity, applying the exception only to the latter class: Iowa Code (1931), sec's 11007(5) and 11010; N. D. Comp. Laws (1913), sec. 7375(6); S. C. Code (1932), sec. 338(6); S. D. Comp. Laws (1929), sec. 2298(6).

In Colorado the statutory exception applies to "bills for relief on the ground of fraud" (Colo. Ann Stat. (Courtwright's Mills 1930), sec. 4638); construed to mean "bills in equity" in Harkison v. Harkison, (C. C. A. 8th, 1900) 101 Fed. 71. In Mississippi, in addition to the fraudulent concealment exception cited in note 5, infra, there is an exception for "concealed fraud" in "suits in equity for the recovery of land" (Miss. Code (1930), sec. 2312). In Pennsylvania there is an express statutory exception applying "to any one affected with a trust, by reason of his fraud." (Pa. Stat. (Purdon 1931) tit. 12, sec. 83.)

In Alabama only one year after discovery is allowed for the commencement of an action. In Kentucky and Missouri non-discovery will not extend the statutory period more than ten years beyond the perpetration of the fraud.

[2] See note 1, supra, par's 2 and 3.

[3] The most important type of variation is the survival in four States of the distinction between legal and equitable actions, already referred to in note 1. In two States (see note 1) there is special legislation as to the period allowed after the perpetration of the fraud, even where there has been no discovery, and in Alabama an unusually short period is allowed after discovery. The Georgia, Maine, and Maryland statutes are cast in somewhat different language; see infra, note 7.

[4] Cf. E. W. Patterson, "Can Law Be Scientific?" 25 ILL. L. REV. 121 at 125 (1930).

tion and the independent exception for cases of "fraudulent concealment." The latter exception has been recognized by statute in 13 States,[5] and by decision apart from statute in 14 jurisdictions.[6] Similarity of phrasing and identity of essential purpose have combined to produce a deep underlying confusion between the "fraud" and "fraudulent concealment" exceptions. Indeed, an attempt will be made later to show that the distinctions between them have been unnecessary and to some extent accidental, and in their effect on actual decision unfortunate. But, while these exceptions have produced confusion in legal doctrine and have interacted upon each other in the course of judicial decision,[7] it is possible to isolate the "fraud" exception and to examine

[5] Here there are two main types of statutory provision. An example of the first is Conn. Gen. Stat. (1930), sec. 6028: "If any person, liable to an action by another, shall fraudulently conceal from him the existence of the cause of such action, such cause of action shall be deemed to accrue against said person so liable therefor at the time when the person entitled to sue thereon shall first discover its existence." Similarly: Ill. Ann. Stat. (Smith-Hurd 1930), ch. 83, sec. 23; Ind. Ann. Stat. (Burns 1926), sec. 301(4); Mass. Gen. Laws (1932), ch. 260, sec. 12; Mich. Comp. Laws (1929), sec. 13983; Miss. Code (1930), sec. 2312; R. I. Gen. Laws (1923), sec. 4882; Vt. Gen. Laws (1917), sec. 1863.

The second type of statutory provision, achieving substantially the same result as the first, is the provision that where the prosecution of an action is prevented by the person liable thereto "by absconding or concealing himself," or "by any other indirect ways or means," the operation of the statute will be suspended. Ark. Stat. (1921), sec. 6974; Ky. Stat. (Carroll 1930), sec. 2532; Mo. Rev. Stat. (1929), sec. 879; Va. Code (1930), sec. 5825; W. Va. Code (1931), ch. 55, art. 2, sec. 17.

The exception is limited to "personal actions" in Massachusetts, Mississippi, and Vermont; and "actual misrepresentation" is required for fraudulent concealment in Rhode Island. Two years after discovery are allowed by the Michigan statute, five years in Illinois.

[6] American Bonding Co. v. Fourth Nat. Bank, 206 Ala. 639, 91 So. 480 (1922); Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771 (1912); Lieberman v. First Nat. Bank, 2 Penn. (Del.) 418, 45 Atl. 901 (1900); Lewis v. Denison, 2 App. D. C. 387 (1894); Faust v. Hosford, 119 Iowa 97, 93 N. W. 58 (1903); Schmucking v. Mayo, 183 Minn. 37, 235 N. W. 633 (1931); Bankers' Surety Co. v. Willow Springs Beverage Co., 104 Neb. 173, 176 N. W. 82 (1920); Quimby v. Blackey, 63 N. H. 77 (1884); Holloway v. Appelget, 55 N. J. Eq. 583, 40 Atl. 27 (1897); Dodds v. McColgan, 241 N. Y. S. 584, 229 App. Div. 273 (1930); Waugh v. Guthrie Gas, Light, Fuel & Improvement Co., 37 Okla. 239, 131 Pac. 174 (1913); Hall v. Pa. R. R., 257 Pa. 54, 100 Atl. 1035 (1917); Hudson v. Shoulders, 164 Tenn. 70, 45 S. W. (2d) 1072 (1932); Munson v. Hallowell, 26 Tex. 475 (1863).

In four States fraudulent concealment as a ground for suspension of the statute has been rejected. Atchison, Topeka, and Santa Fe R. R. v. Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051 (1904); Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781 (1905); Howk v. Minnick, 19 Ohio St. 462 (1869); Cornell v. Edsen, 78 Wash. 662, 139 Pac. 602 (1914). In North Dakota the question has been left undecided. Roether v. Nat. Union Fire Ins. Co., 51 N. D. 634, 200 N. W. 818 (1924).

[7] In a few States both "fraud" and "fraudulent concealment" are recognized by statute as grounds for suspension, and may thus be used concurrently. Of the statutory

the remarkable results that have been reached with its aid. This will be the subject of the present article. The "fraudulent concealment" exception will be separately discussed at a later date.

The statutory exception for "actions for relief on the ground of fraud" presents a problem of construction that is characteristic in the field of statutory limitation of actions. For limitation acts are not drafted in the shape of particularized enactments, narrow in scope and employing language with reference to specific objectives of legislative policy. On the contrary, they are framed on broad lines which cut across the whole range of judicial remedies and include in their language an almost infinite diversity of human situations. Modern legislation has greatly improved the bases of classification by substituting concepts of a substantive character for the procedural tests of early statutes.[8] But the concepts are as a rule so broad and embrace cases of such varied fact content[9] that they bear little relation to the policy factors which

provisions cited in notes 1 and 5, supra, only Kentucky and Missouri will be found to duplicate in this manner. But the Maine statute (Me. Rev. Stat. (1930), ch. 95, sec. 103) expressly includes both exceptions in a single clause; and the Georgia statute (Ga. Ann. Code (Park 1914), sec. 4380) will bear this construction, since it allows postponement "if the defendant, or those under whom he claims, has been guilty of a fraud by which the plaintiff has been debarred or deterred from his action." Similarly the Maryland statute (Md. Ann. Code (1924), art. 57, sec. 14) which applies "in all actions where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party."

As to the cases cited in note 6, in which the exception for "fraudulent concealment" was adopted independently of statute, it will be found that a considerable number come from States which likewise have recognized the "fraud" exception. The interaction of these two exceptions, whether established by statute or judicial decision, will be discussed in a subsequent article on fraudulent concealment.

[8] Modern statutes, outside New England at any rate, have gone a long way from the procedural classifications of the original statute of James I and of early American statutes based on that model (actions on the case, in assumpsit, etc.). Instead we frequently find such categories as "contract," "fraud," "mistake," "mortgage," etc.

[9] Modern statutes have gone some distance toward breaking up the broad categories, based on conceptual classifications, with which limitation acts were embellished for a considerable period. The statutes collected in 2 WOOD, LIMITATIONS, 4th ed., 1567-1689 (1916), use language far more suggestive of fact situations in which the causes of action arise, such as "actions for the use and occupation of land," "for underground trespass to land," "for criminal conversation and seduction," "against a municipal corporation for damages or injuries to property caused by a mob or riot" (Cal. Code Civ. Proc. (1931), sec. 340, no. 5), and so on. The question is whether scientific drafting will not require us to go further in this direction. The careful specifications of the German Civil Code might be used to point the way. (See especially sec's 196-7, where there is an exhaustive enumeration of the types of persons, such as merchants, seamen, public institutions, physicians, whose claims will be barred in two years. Special periods of limitation are then attached to various types of legal transactions, in connection with other code provisions concerning them. For example, articles 490, 558, 638, 786, 801, 1226, and 2287.)

should govern the limitation of actions. Perhaps an extreme example is the very common provision limiting actions on "contracts express and implied." This embraces the formal written contract, the merely oral contract, and, in most jurisdictions, a variety of tort cases which are so circumstanced that the tort may be "waived" and suit brought in quasi-contract.[10] Furthermore, such concepts are often borrowed from another context in which they were applied for a wholly different purpose, or perhaps for many different purposes.[11] This being the case, it is not surprising that courts, in applying the statutory formulas, should feel free to redefine them for the special purposes in hand, and should not hesitate to read in "implied exceptions," independent of specific statutory language and based on an assumed, though vaguely apprehended, policy behind limitation legislation.

[10] The New York cases provide an interesting study in the application of this generalized provision, and especially of its competition with other equally generalized clauses of the limitation statutes. In Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606 (1889), defendant had received certain insurance money which the plaintiff claimed to be payable to himself. The court held applicable the six-year limitation on "contracts express and implied." In Mills v. Mills, 115 N. Y. 80, 21 N. E. 714 (1889), the same result was reached after the defendant, a mortgagee with power of sale, had sold the mortgaged land and received the money proceeds more than six years before the action was brought. But in Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163 (1900), an action by a mortgagor of land to recover the money proceeds of the mortgagee's sale was held to be an action to redeem from the mortgage, governed by the 20-year statute for mortgage redemptions. And in Treadwell v. Clark, 190 N. Y. 51, 82 N. E. 505 (1907), an action by a pledgor of stock to "redeem" as against a purchaser with notice was held to be an "equitable action" barred under the New York Code in ten years, since an accounting was necessary and the plaintiff was also entitled to specific restitution (although specific restitution was not provided for by the final decree).

A similar problem arises through the competition of the "contract" clauses with provisions for actions for personal injuries, particularly in malpractice cases, where there is a contractual relationship between physician and patient although the wrong consists of personal injury. Most decisions refuse to consider the "contract" elements sufficiently prominent to apply the longer period usually provided for "contract" actions. See annotations in 1 A. L. R. 1313 (1919) and 62 A. L. R. 1417 (1929); also Weinstein v. Blanchard, (N. J. 1932) 162 Atl. 601.

[11] There is an obvious advantage in this appropriation of familiar concepts over which battles have been fought and won in other fields. There is at least an immediate economy of effort. If, for example, mathematical symbols were used to express the legislative meaning, no progress could be made until courts had defined the relationship of the new symbols to the ones in daily judicial use. But since the meaning of even the most familiar concepts must be redefined in the new setting to which they are thus applied, there is ultimately, perhaps, no real saving of effort. The danger, in the interval, is confusion of thought, through apparent resemblances of different things. But surely the most miraculous feature of a system of case law, a feature illustrated in the limitations field as well as anywhere, is that courts are so seldom misled by language into doing what they are unwilling to do.

The very difficulty of defining the policy of limitation acts may be said to justify indecent liberties with specific language. For it is clearly impossible to assess by statistical methods the social interests that necessitate the wholesale sacrifice of "stale" claims. If "stale" claims were necessarily spurious the result would be not at all distressing. But limitation acts destroy the meritorious with the spurious claim, provided it is not presented within the period fixed. It is often urged that when evidence grows "stale" or has completely disappeared, it will be more difficult to separate the meritorious from the spurious claim, and this is true. But if that were the sole consideration, then statutes of limitation should be framed with reference not to conceptual analyses or even to fact settings from which claims might arise; they should rather emphasize the type of evidence offered, and consider the chances of its loss or fabrication.[12] It is also legitimate to appeal to a social interest in the "security of transactions." [13] Lawyers and legislatures should of course be concerned for the stability of human relationships, and for the fulfillment of expectations which long delay may generate. But it scarcely has to be insisted that staleness of claim or need for stability will not dictate the solution of particular controversies; these factors and even the language of statute form but a shadowy background for the vivid outlines of a concrete human drama.

The lack of exact methods for measuring these vague and remote interests of society will undoubtedly justify the use, in legislation, of exact and even arbitrary tests. But the gap between means and end, between legislative technique and legislative purpose, will often deprive

[12] It is not seriously proposed that limitation acts should provide longer periods where litigants can find "matter of record" to bolster up their testimony; and shorter periods where the trial discloses that no properly authenticated documents were produced to impress the jury. If that were the proposal one would have to go further, and suggest the means by which documents were to be "authenticated," whether by other documents or by oral testimony, etc. As a matter of fact, the type of evidence that may be expected in certain classes of litigation undoubtedly has influenced legislative decisions as to the appropriate period of limitation. And compare the distinction sometimes drawn between "contracts in writing" and "contracts not in writing." For example, Ariz. Rev. Code (1928), sec's 2060, 2062; Cal. Code Civ. Proc. (1931), sec's 337, 339; Conn. Gen. Stat. (1930), sec's 6005, 6010; Fla. Comp. Laws (1927), sec. 4663(5); Ill. Ann. Stat. (1930), ch. 83, sec's 16, 17; Nev. Comp. Laws (1929), sec. 8524; Okla. Stat. (1931), sec. 101. But it does not appear that legislation can go much further in this direction without encountering even more formidable problems of definition.

[13] Although so elusive a phrase can not be given specific content, it may serve as "a red light which says to the legislator or the judge: Consider the consequences of your decision upon the habits and expectations of men as exemplified in legal transactions." E. W. Patterson, "Can Law Be Scientific?" 25 ILL. L. REV. 121 at 144 (1930). See also Llewellyn, "A Realistic Jurisprudence," 30 COL. L. REV. 431 at 445 (1930).

particular provisions of real moral authority. Especially where the language used is generalized or ambiguous, we must expect that "interpretation" will reshape the meaning of limitation acts, and that competing factors of policy will undermine their specific provisions.

II

EARLIER HISTORY OF UNDISCOVERED FRAUD AS A GROUND FOR SUSPENSION

The modern statutory exception for "actions for relief on the ground of fraud" gives legislative sanction to results already achieved through a long process of growth in judicial decisions. The statute of James I, from which American legislation is largely derived,[14] contained no exception for cases of fraud. Judicial recognition of a "fraud" exception was not easy in view of the fact that the statute expressly authorized postponement of its operation, in five cases of personal disability in the plaintiff existing at the time the "cause of action" accrued, namely, infancy, coverture, insanity, imprisonment, and absence beyond the seas.[15] But bills in equity were not included in the enumeration of actions barred by the statute of James. The Chancery was thus left free to formulate, under the cloak of its own doctrine of laches, independent tests for equitable remedies.[16] The first reported case on "fraud" as a ground for suspension of the statute was an action brought in the Chancery on facts that would have justified

[14] It was the first comprehensive statute to adopt the modern method of arithmetical computation, instead of the earlier method of referring to certain well-known historical events. It is true that the statute of 32 Henry VIII, c. 2, 5 Stats. at Large 7 (1540), adopted the former of these methods to a limited extent. But the timidity of the legislature is reflected in the fact that the statute applied only to real actions, already lapsing into obsolescence; and also in the excessively long periods of limitation that were provided—60 years for writs of right, 50 years for possessory assizes and avowries for rents and services, and 30 years for claims based on the claimant's own possession. See T. E. Atkinson, "Some Procedural Aspects of the Statute of Limitations," 27 COL. L. REV. 157 (1927).

[15] 21 James I, c. 16, sec. 7, 7 Stats. at Large 275 (1623).

[16] 1 WOOD, LIMITATIONS, 4th ed., sec. 58 ff. (1916). By the nineteenth century equity cases had developed the notion that equity followed the statute by "analogy," at least in cases where its jurisdiction was concurrent with that of courts of law. See infra, note 34. But it seems likely, from the hints that have found their way into the early Chancery reports, that this is a very late rationalization and that for some time the treatment of the statute by the Chancery was extremely free. See TOTHILL, TRANSACTIONS OF THE HIGH COURT OF CHANCERY 2, 53, 75, 178, 179 (1671).

relief at law.[17] The plaintiff sued for restitution of 1000 guineas paid to the defendant through the latter's false statement that he had undergone that much expense in procuring a marriage for the plaintiff. On discovering that the lady's consent had been procured without any expenditure whatever, the plaintiff sued in the Chancery, more than eight years after the payment to the defendant. The Chancellor, after ruling that the statute of limitations was no bar, decreed for the plaintiff, and on appeal to the House of Lords the decree was affirmed. The necessary inference was that in actions in form equitable for relief on the ground of fraud, the operation of the statute was postponed until discovery.[18]

Through the influence of Lord Mansfield this doctrine was accepted for a brief period in common law courts. In the case of *Bree v. Holbech*, an action of general assumpsit for restitution of money paid, a dictum of Lord Mansfield showed his willingness to apply the equity doctrine to legal actions.[19] Dicta in later common law cases pointed in

[17] Booth v. Lord Warrington, 4 Brown's Parl. Cases 63, 2 Eng. Repr. 111 (1714). It was not perfectly clear that at the date of this case an action of general assumpsit could have been maintained for restitution of money paid through fraud. In Dewbery v. Chapman, Holt 35, 90 Eng. Repr. 917 (1695), Lord Holt, as part of his vigorous campaign against the further extension of general assumpsit, denied relief in that form of action to a defrauded payor of money. But his own dicta in Tomkyns v. Barnet, Skinner 411, 90 Eng. Repr. 182 (1694), had pointed the other way, as did the dicta in the later case of Astley v. Reynolds, 2 Strange 915, 93 Eng. Repr. 939 (1731). In any event there would have been no very obvious difficulties in the way of an action on the case for deceit, where the measure of damages would certainly have included the amount paid through the defendant's false statements.

The defendant in Booth v. Lord Warrington, after setting up the statute as a bar, asserted that the bill was "in the nature of an action upon the case for monies supposed to have been had and received to the respondent's use." Whether or not Booth v. Lord Warrington must be interpreted as a case where the equitable remedy was exclusive or concurrent has become an important question in modern English cases. See Gibbs v. Guild, 9 Q. B. D. 59 (1882), discussed infra, n. 127.

[18] On appeal to the House of Lords from the decree of the Chancellor, three questions were asked: (1) whether an action could have been maintained at law on these facts, (2) when the "cause of action" would accrue at law, and (3) whether equity could give relief more than six years after the "cause of action" accrued, in a case where the fraud remained undiscovered. The House, unfortunately, made no direct reply to any of these questions, except the reply that could be inferred from its affirmance of the decree for the plaintiff.

And in South Sea Co. v. Wymondsell, 3 P. Wms. 143, 24 Eng. Repr. 1004 (1732), dicta of the Lord Chancellor assumed that non-discovery would be a good reply to a plea of the statute in an equitable action based on defendant's fraud.

[19] 2 Doug. 654, 99 Eng. Repr. 415 (1781). The plaintiff's claim for restitution was founded on a breach of warranty in the assignment of a mortgage. *Scienter* in the defendant was not alleged. Defendant pleaded the statute of limitations, and a general

the same direction,[20] and it was not until the nineteenth century that separate rules for legal and equitable actions were clearly formulated in English cases.[21]

In this country the progress of these ideas was smooth at first. In *First Massachusetts Turnpike Co. v. Field*[22] the Supreme Court of Massachusetts was presented with a case which might have involved a nasty tangle of technical difficulties. The action was assumpsit against persons who had agreed to construct a turnpike road for the plaintiff. In the declaration plaintiff merely alleged non-compliance with the agreed specifications, praying in one count for damages and in the second count for restitution of money paid. The defendants pleaded the statute of limitations, and the plaintiffs replied (1) that the defendants did the work "fraudulently and deceitfully," so that the defects were not discovered for "a long time"; and (2) that after the work was done defendants "falsely and fraudulently affirmed that they had completed the contract." All the elements of an old-fashioned breach of contract were thus presented, with barely a hint of common law fraud. But the court in strong language held the replications to be good. One judge asserted that in this conclusion "the moral sense of all mankind must concur"; and that if another result were reached "every man would be screened from making satisfaction for injuries resulting from the fraudulent execution of his contracts, if his fraud was attended with such circumstances of artful concealment as to elude detection until after a lapse of more than six years." Another judge emphasized the notion that a defendant should not be allowed "to avail himself of his own fraud."

Powerful support for these views came from the personal influence of Justice Story. Sitting on circuit in *Sherwood v. Sutton*,[23] Story presented arguments that had a very great influence on his contemporaries and were echoed in decisions of later decades. The case itself presented

demurrer was sustained to plaintiff's replication which set up plaintiff's non-discovery until within six years. As to the effect of fraud, Lord Mansfield merely threw off the suggestion: "There may be cases, too, which the fraud will take out of the Statutes of Limitations." But this hint was reinforced by the leave which the court granted to the plaintiff to amend, "in case, upon inquiry, the facts would support a charge of fraud."

[20] Bayley and Best, JJ., in Clark v. Hougham, 2 B. & C. 149, 107 Eng. Repr. 339 (1823); Abbott, C.J., in Granger v. George, 5 B. & C. 149, 108 Eng. Repr. 56 (1826); Howell v. Young, 5 B. & C. 259, 108 Eng. Repr. 97 (1826).

[21] Imperial Gas Light and Coke Co. v. London Gas Light Co., 10 Ex. 39, 156 Eng. Repr. 346 (1854).

[22] 3 Mass. 201 (1807).

[23] 5 Mason (C. C. U. S. 1828) 143.

excellent opportunities for so inspired an advocate, opportunities better than those offered in *First Massachusetts Turnpike Co. v. Field.* For instead of a flimsy allegation of fraud in the replication, Story had the support of jury findings of fraud and of subsequent concealment of the fraud.[24] He could also rely on English dicta, which at that date (1828) still pointed to suspension of the statute in legal as well as equitable actions.[25] The case came into the federal court from New Hampshire, which State at that time had no separate equitable jurisdiction; Story could take advantage of this fact and argue that the equitable rule, if applied at all, must be administered through courts of law.[26] In addition to the rather dubious maxim that a defendant should not be allowed "to avail himself of his own fraud," [27] he offered the suggestion that the object of all statutes of limitation was to suppress "fraud" and that this object required an "implied exception" for actions based on fraud.[28] This play on words, supported by the precepts

[24] The report does not state any other facts, so that Story had a further advantage. He could remain throughout on the plane of a higher morality, without being disturbed by problems of application to more lively and concrete fact situations. This willingness of nineteenth century judges to withdraw to a higher plane has undoubtedly served to give us some admirable discussions of "principle."

[25] Supra, note 20.

[26] "There is, indeed, this consideration of no inconsiderable weight, that as there is no State Court in the judicial establishment of New Hampshire, which possesses general equity powers, the remedy, if it is to be administered at all, must be administered through the instrumentality of a court of law; and hence the doctrines of courts of equity, where they are susceptible of incorporation into remedies at the common law, find a more ready admission in the State courts, than perhaps would occur, if courts of chancery had an independent existence." Sherwood v. Sutton, 5 Mason (C. C. U. S. 1828) 143 at 144.

The learned Justice then went on to argue that the decisions of courts of equity, at least in cases of jurisdiction concurrent with that of common law courts, should at all times receive great weight in the construction of the statute, since where jurisdiction is concurrent courts of equity endeavor to apply the common law rule of limitation to "legal" causes of action.

[27] Quoting here from First Mass. Turnpike Co. v. Field, 3 Mass. 201 (1807). Obviously every defendant who pleaded the bar of the statute to a meritorious cause of action, especially where it was founded on his own "fraud," was reprehensible and immoral, but in the statutory language there was nothing to prevent his doing so.

[28] "Every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception. . . . " Sherwood v. Sutton, 5 Mason (C. C. U. S. 1828) 143 at 154.

of a homely morality, became extremely popular.[29]

But a vigorous protest had already been recorded. In *Troup v. Executors of Smith* [30] the New York court faced an action of assumpsit for breach of contract by a surveyor, the breach consisting in negligence in surveying the plaintiff's land. As in *First Massachusetts Turnpike Co. v. Field* the plaintiff's delay in suing was explained in the replication by the surveyor's "fraud and deceit" in reporting that the survey was correct. The court intimated that the plaintiff's failure to discover the defects in the survey was due to his own neglect, but put its judgment for the defendant squarely on the ground that fraud could have no effect at law on the statute of limitations.[31] The "cause of action" accrued, said the court, when the incorrect survey was completed. The statute therefore ran from that date. Whatever might be the case in equitable actions,[32] in courts of law any exception, founded on the plaintiff's inability to sue for a wrong of which he was ignorant, must come from the legislature and not from the judiciary.

If the assumptions of *Troup v. Executors of Smith* were granted, its conclusions were irresistible. There were in fact great difficulties in the way of extending these equity doctrines to common law actions. In earlier equity cases it had been enough to explain the suspension of the statute in cases of fraud by referring to that useful fiction of equity, the "conscience" of the defendant, which was presumably stirred into activity by his own fraud.[33] If pressed further, the Chancellor might have

[29] Though its premise involves an over-simplified view of the policy of the statute, this argument is reproduced in Munson v. Hallowell, 26 Tex. 475 (1863); Bailey v. Glover, 21 Wall. (U. S.) 342 (1874); and numerous other cases.

[30] 20 Johns. (N. Y.) 33 (1822).

[31] The land surveyed had been vacant and unimproved, and the plaintiff alleged this fact to excuse his delay for more than a year and a half in discovering the errors in the surveyor's "field notes." The court pointed out that the mistakes and omissions in the survey were all open to inspection, and then said, "But we wish to be understood, as deciding the case on the ground, that whether there was a fraudulent concealment or not, so as to prevent the plaintiff's discovering the fraud, until within six years before the commencement of this suit, sitting as a court of law and bound by the express provisions of the statute, we could not notice the fraud so as to take the case out of the operation of the statute."

[32] The equitable rule was explained on the theory that where the defendant conceals his fraud, "the conscience of the party is affected"; also by the fact that courts of equity had been left free by the original statute of James I to formulate their own doctrines as to the running of the statutory period.

[33] Lord Redesdale in Hovenden v. Annesley, 2 Sch. & Lef. (Ir. Ch.) 607, 634 (1806): " . . . the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time." And see the quotation in the previous note from Troup v. Executors of Smith.

dodged again by pointing to Parliament's neglect to include bills in equity in the statute of James I, so that even in the field of concurrent jurisdiction the Chancery followed the statute merely "by analogy." [34] In following that analogy courts of equity were still free to fix the accrual of the "cause of action" at whatever point seemed most convenient. The point they chose, of course, was the "discovery" by the plaintiff of the fraud.

How far could these arguments be used by courts of law? The statutes of limitation then in force defined specifically and rather narrowly the types of legal actions to which they would apply. Their operation began when the "cause of action" accrued. Their operation ceased when one mechanical operation was performed, i.e., the filing of suit before certain designated public officials. The application of the statutory provisions seemed to be merely an arithmetical process of computing the passage of time between two apparently fixed points. For a court which had not yet been introduced to the notion of time as merely a fourth aspect of space there seemed to be no loophole.

There was a loophole, but even Justice Story and his followers felt that it was not a wide enough aperture for their imposing persons.[35] At one end of the mathematical formula in limitation acts was the extremely indeterminate phrase "cause of action," on whose accrual the statute began to operate. This phrase is perhaps the most ambiguous of all the

[34] The classic statement is that of Lord Redesdale in Hovenden v. Annesley, 2 Sch. & Lef. (Ir. Ch.) 607 at 630 (1806). See also Kane v. Bloodgood, 7 Johns. (N. Y.) 89 (1823). As to how far equity considered itself bound to adopt the analogy of the statute in cases of concurrent jurisdiction, modern discussion is far from clear. This is perhaps the central point in controversy between majority and minority in Gibbs v. Guild, 9 Q. B. D. 59 (1882), the majority asserting that an action for damages for fraud could have been brought in equity before the Judicature Act, and that equity in such a case would have applied its own tests for the accrual of the "cause of action." This view is approved by Brunyate, "Fraud and the Statute of Limitations," 4 Camb. L. J. 174 (1931). But there is language in other cases pointing the other way. See infra, note 127.

[35] Justice Story did have this to say, however, as to redefinition of "cause of action" as a means of evading the language of the statute:

> "I do not stop to inquire whether it is to be deemed an implied exception out of the words of the statute, or whether the right of action in a legal sense does not accrue until the discovery of the fraud. The authorities present some diversity of judgment in this respect. Perhaps the true mode of considering it would be, that it is a continuing fraud during the whole period of its concealment, thus knitting it to the original wrong." Sherwood v. Sutton, 5 Mason 143 at 148.

But later (pp. 154-5) he describes the suspension of the statute as a result of an "implied exception," resulting from the larger policy of limitation acts.

terms in such legislation.[36] Indeed, it is put to such a variety of uses in other fields as well, that no uniform and consistent definition seems possible or useful.[37] For the purposes of limitation acts, however, it was assumed by the adherents of both points of view that the elements of a "cause of action" could be readily and almost automatically fixed. For example, in a purchase of land induced by misrepresentation it seemed possible to isolate the legally operative facts upon which liability would normally be based. The vendor's misstatement would have no legal effect without some "injury" suffered in reliance on the statement. Perhaps it would be necessary to add to this group of facts a belief by the vendee in the truth of the statement; perhaps also, "intent to deceive" by the vendor. Perhaps there would be some uncertainty as to whether the date of the contract or the date of the vendee's first payment would be the point at which public officials would be willing to intervene. But in any event it seemed clear to everyone that the requirements of liability would be satisfied when all these facts were present.

[36] This does not mean that legislative use of such a phrase is unnecessary or mistaken. On the contrary, it scarcely seems possible to avoid some such catch-all phrase in legislation which cuts across so wide a field of remedies. In continental codes the difficulty is not avoided. The German Civil Code, for example, makes the operation of prescription depend on the "arising" of a "claim" (*Anspruch*). German Civil Code, sec. 198 (1900). The French and Italian Codes are somewhat more specific than our statutes with reference to claims that depend on the occurrence of conditions (French Civil Code, sec. 2257; Italian Civil Code, sec. 2120 (1896)), but in other respects do not undertake any closer definition.

[37] The doctrine of *res judicata* raises in each case the critical question whether the claim involved in the second action is the same "cause of action" as the one on which judgment has already been rendered. The common law and code restriction on amendments of pleadings is likewise to the effect that no amendment will be allowed which introduces a new "cause of action." The Codes have in general given a new emphasis to the formula in their joinder and counterclaim clauses; and especially in the requirement that "the complaint shall contain a plain and concise statement of the facts constituting the cause of action." This last clause has been the subject of vigorous controversy. Charles E. Clark, "The Code Cause of Action," 33 YALE L. J. 817 (1924); O. L. McCaskill, "Actions and Causes of Action," 34 YALE L. J. 614 (1925); B. C. Gavit, "The Code Cause of Action," 30 COL. L. REV. 802 (1930); CLARK, CODE PLEADING 75 at 87 (1928). For other uses to which this phrase has been applied in procedural legislation, see 22 COL. L. REV. 61 (1922).

It is obvious that the purpose for which the phrase is used should in most cases determine the manner of its application in particular cases. For example, its meaning should be altogether different where the question is whether enough "facts" have been stated in a pleading to surmount the obstacle of a demurrer, or whether the "facts" of two or more claims can be examined more conveniently in one trial or more than one, and where the question is whether the merits of a particular controversy have been settled in a prior action or whether there has been unreasonable delay in presenting a claim for litigation.

This analysis was appropriate for what was probably the normal case, where the falsity of the statement became known within the statutory period. But when there was introduced into the legal setting the vendee's non-discovery, it was perfectly possible for any court to add a new requirement to the elements of a "cause of action," that is, the vendee's knowledge or "discovery." There was nothing in statute or legal doctrine to prevent this shift in assumptions as to the meaning of essentially indefinable terms. Indeed, in related fields courts have not hesitated to define "cause of action" with reference to the real obstacles to the prosecution of claims.[38] And in the field of fraud, legislation very often uses a redefinition of "cause of action" to accomplish the suspension of the statute, by providing that "in actions for relief on the ground of fraud, the cause of action shall not be considered as having accrued" until discovery.[39]

But most courts have invoked an implied exception for fraud and have not used the device of redefining "cause of action" to accomplish

[38] In the famous case of Backhouse v. Bonomi, 9 H. L. Cas. 503, 11 Eng. Repr. 825 (1861), the cause of action for injuries due to withdrawal of lateral support was said to accrue only on the actual subsidence of the plaintiff's land. The case has been followed in this country: West Pratt Coal Co. v. Dorman, 161 Ala. 389, 49 So. 849 (1909); Rector, Wardens, and Vestrymen of the Church of the Holy Communion v. Paterson Ext. R. R., 66 N. J. L. 218, 49 Atl. 1030 (1901). *Contra,* Noonan v. Pardee, 200 Pa. St. 474, 50 Atl. 255, 55 L. R. A. 410 (1901).

Compare the case of Davis v. Boyett, 120 Ga. 649, 48 S. E. 185 (1904), where a cause of action for the seduction of the plaintiff's daughter was held not to "accrue" until humiliation and disgrace were suffered by the parent.

Actions for breach of warranty present the technical question in the same form as actions based on fraud. The accrual of the cause of action is ordinarily determined, however, by the form of the warranty, rather than by the obstacles to discovery by the plaintiff. See, for example, Gross v. Kierski, 41 Cal. 111 (1871); Allen v. Todd, 6 Lans. (N. Y.) 222 (1872); Lynn v. Bamber, [1930] 2 K. B. 72; P. H. Sheehy Co. v. Eastern Importing and Mfg. Co., 44 App. D. C. 107, L. R. A. 1916F 810 (1915). On the accrual of the cause of action in contract cases generally, see 27 MICH. L. REV. 826 (1929), 13 COL. L. REV. 441 (1913), 15 L. R. A. (N. S.) 156 (1908). The reasoning in Moore v. Maddock, 251 N. Y. 420, 167 N. E. 572 (1929), shows an admirable approach to this whole problem. The case involved an action for breach of an agent's implied warranty of authority, and the court in formulating its tests for the accrual of the cause of action suggested (at p. 427) that the cases "show a tendency in the courts to extend the implied promise till it gives protection against all damages which naturally flow from continued reliance upon the agent's assertion of authority."

There is special difficulty, and greater room for judicial leniency, in cases where the claimant's power to sue depends on a procedural or substantive condition precedent, such as the appointment of a personal representative, in actions for causing wrongful death (25 COL. L. REV. 240 (1925)), or the setting aside of a will, in an action by heirs to set aside an *inter vivos* transfer (James v. James, 75 Colo. 164, 225 Pac. 208 (1924)). Compare the "fraud on creditors" cases discussed infra, note 63.

[39] See statutes cited supra, note 1.

this broader purpose.[40] As a rule courts, both in legal and equitable actions, have assumed that the "cause of action" in actions based on fraud must be defined in terms of the normal fact-elements of liability, and have extended that assumption to cases of related types.[41] This analysis of "cause of action" seemed even more imperative in cases where the "fraud" exception would not strictly apply, and suspension of the statute was explained through the doctrine of "fraudulent concealment." Where, for example, the defendant's liability arose from a breach of contract, a trespass to land, or a misappropriation of property, it was even more natural to define "cause of action" in terms of the fact-elements of liability in those fields. But the substantial reasons for suspension of the statute were the same, whether liability arose originally from "fraud" or from some other type of misconduct that was affirmatively concealed by the opposite party. In both these situations there were strong moral reasons why the person whose misrepresentation or active concealment induced the delay should not be allowed to set up his own reliance on a supposed abandonment of the claim, particularly where there had been a conscious effort to avoid detection. If the primary purpose of limitation statutes was to exclude "stale" and unreliable evidence, any extension of the statutory period would frustrate that purpose. But if their purpose was rather to guarantee some measure of stability in the shifting web of human relationships, then it might be proper to look beneath the surface of language whose meaning was not too clear, and to provide special treatment for cases outside the normal range of its operation.

To summarize in a single formula these obscure factors of morality and policy would have been difficult both for courts and legislatures. To redefine the phrase "cause of action" might provide a technical de-

[40] Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829 (1895); Davis v. Cummins, (Mo. 1917) 195 S. W. 752; Falls Branch Coal Co. v. Proctor Coal Co., 203 Ky. 307, 262 S. W. 300 (1924).

[41] The well-known case of Howell v. Young, 5 B. & C. 259, 108 Eng. Repr. 97 (1826), was an action for damages against an attorney for negligence in certifying that a mortgage, securing a loan that the plaintiff was about to make, was a sufficient security. In holding the action barred, Bayley and Holroyd, JJ., fixed the date at which the plaintiff made the loan in reliance on the insufficient security, as the latest date for the accrual of the cause of action. Modern decisions in actions against title-abstractors for negligence have followed the same reasoning, in spite of the long-term reliance on expert advice which is contemplated in such situations. Provident Loan and Trust Co. v. Wolcott, 5 Kan. App. 473 (1896); Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545 (1892); Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212 (1893). But see Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912).

vice by which a court could liberate itself from particular statutory provisions. But the same method might be used for other types of obstacles to the prosecution of an action, such as the closure of courts during civil war, the absence of the defendant from the State, etc.[42] If the plaintiff's "discovery" were an essential element of the "cause of action" in actions based on fraud (or in actions fraudulently concealed), then other litigants might clamor for the same indulgence on wholly different grounds.[43] Ultimately, whether the suspension of the statute were achieved through redefinition of "cause of action" or by the device of an "implied exception," the reasons of policy which must justify such abnormal treatment would have to be disclosed and scrutinized.

In view of the dangers and the unrelieved doubt that surrounded the problem, it is remarkable that American decisions went so far without the aid of legislation. The suspension of the statute in actions based on fraud was universally permitted in equitable actions, and was usually allowed at law.[44] The broader doctrine of "fraudulent concealment" met with more vigorous resistance. Conservative decisions rejected it for both legal and equitable actions. But an impressive number of other cases accepted it both at law and in equity.[45]

[42] That American law has gone some distance toward suspension of limitation acts for such reasons is suggested infra, notes 88-91.

[43] A realist, new style, might assert that there was no "cause of action" which limitation acts would bar, wherever the plaintiff's witnesses were dead, the defendant beyond the reach of process, or local officials hostile. Cf. LLEWELLYN, THE BRAMBLE BUSH 82 (1930). But no court has yet suspended the statute of limitations because the plaintiff's witnesses were dead or reluctant to testify.

[44] Suspending the statute in *equitable* actions for relief on the ground of fraud: Henry County v. Winnebago Swamp Drainage Co., 52 Ill. 299 (1869); Pyle v. Beckwith, 24 Ky. 445 (1829), and Donnelly v. Donnelly's Heirs, 47 Ky. 113 (1847); Livermore v. Johnson, 27 Miss. 284 (1854); Hamilton v. Sheppard, 7 N. C. 115 (1819); and Ross v. Henderson, 77 N. C. 238 (1877); Longworth v. Hunt, 11 Ohio St. 194 (1860); Haywood v. Marsh, 14 Tenn. 68 (1834); Payne v. Hathaway, 3 Vt. 212 (1831), and Smith v. Bishop, 9 Vt. 110 (1837); Callis v. Waddy, 2 Munf. (Va.) 511 (1811), and Shields v. Anderson, 3 Leigh (Va.) 729 (1832).

Suspending the statute in *both* legal and equitable actions for relief on the ground of fraud: Snodgrass v. Branch Bank, 25 Ala. 161 (1854); Persons v. Jones, 12 Ga. 371 (1853); Homer v. Fish, 1 Pick. (Mass.) 435 (1823); Welles v. Fish, 3 Pick. (Mass.) 73 (1825); Pennock v. Freeman, 1 Watts (Pa.) 401 (1833); Harrell v. Kelly, 2 McCord (S. C.) 426 (1823); Ripley v. Withee, 27 Tex. 14 (1863); McMahon v. McGraw, 26 Wis. 614 (1870); Bailey v. Glover, 21 Wall. (U. S.) 342 (1874) (bill in equity, strong dicta extending exception to legal actions as well); Williams v. Beltz, 30 Del. 360, 107 Atl. 298 (1919); Lewis v. Denison, 2 App. D. C. 387 (1894).

[45] Recognizing fraudulent concealment as an exception both at law and in equity: First Mass. Turnpike Co. v. Field, 3 Mass. 201 (1807); Harrisburg Bank v. Forster, 8

III

SCOPE OF THE "FRAUD" EXCEPTION

When legislation began, in the latter part of the nineteenth century, to ratify and consolidate the results achieved by judicial decision, the courts were left with a less embarrassing task. They no longer were forced to appeal to a higher morality, or to an undefined and indefinable policy behind limitation legislation. Instead they could rely on the text of positive statute, which was commonly thrown into such general terms as to leave ample room for judicial preconceptions. Indeed, the scope of the "fraud" exception was not controlled in practice by any specific statutory language. An extremely broad construction had been agreed upon before the appearance of any legislation,[46] and has survived in the nine States where the "fraud" exception is recognized without statutory sanction.[47]

In its commonest form the "fraud" exception draws no distinction between legal and equitable actions. The clearest example of an "action for relief on the ground of fraud" within this classification is the common law action for damages for deceit.[48] Almost equally clear is

Watts (Pa.) 12 (1839); Kane v. Cook, 8 Cal. 449 (1857); Campbell v. Vining, 23 Ill. 525 (1860) (dicta); Munson v. Hallowell, 26 Tex. 475 (1863); Voss v. Bachop, 5 Kan. 59 (1869) (dicta); Township of Boomer v. French, 40 Iowa 601 (1875); Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829 (1895) (dicta); Lieberman v. First Nat. Bank, 2 Penn. (Del.) 418, 45 Atl. 901 (1900).

Rejecting fraudulent concealment as an exception both at law and in equity: Cocke and Jack v. McGinniss, 8 Tenn. 361 (1828); Allen v. Mille, 17 Wend. (N. Y.) 202 (1837); Fee's Adm'r v. Fee, 10 Ohio 469 (1841); Baines v. Williams, 25 N. C. (3 Ired. L.) 481 (1843) (dicta); Clarke v. Reeder, 1 Speers (S. C.) 398 (1843); Cook v. Rives, 21 Miss. 328 (1850) (dicta). In Franklin v. Waters, 8 Gill (Md.) 322 (1849), there were dicta making fraudulent concealment an exception only in equitable actions; and the same distinction seems to be assumed by Haynie v. Hall's Executor, 24 Tenn. 289 (1844).

[46] Livermore v. Johnson, 27 Miss. 284 (1854); Snodgrass v. Branch Bank, 25 Ala. 161 (1854); Cock v. Van Etten, 12 Minn. 522 (1867); Meader v. Norton, 11 Wall. (U. S.) 442 (1870); Main v. Payne, 17 Kan. 608 (1877); Todd v. Rafferty, 30 N. J. Eq. 254 (1878).

[47] Williams v. Beltz, 30 Del. 360, 107 Atl. 298 (1919); Lewis v. Denison, 2 App. D. C. 387 (1894); Reardon v. Dickinson, 156 La. 556, 100 So. 715 (1924); Orr Shoe Co. v. Edwards, 111 Miss. 542, 71 So. 816 (1916); Way v. Cutting, 20 N. H. 187 (1849); Lincoln v. Judd, 49 N. J. Eq. 387, 24 Atl. 318 (1892); Peck v. Bank of America, 16 R. I. 710, 19 Atl. 369 (1890) (recognizing exception for equitable actions only); White v. Carlton, (Tex. Civ. App. 1925) 277 S. W. 701; Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 1571 (1918).

[48] Stevens v. Sacramento Suburban Fruit Lands Co., 109 Cal. App. 120, 292 Pac. 699 (1930); Williams v. Beltz, 30 Del. 360, 107 Atl. 298 (1919); Watson v. Jones,

the action for restitution of money paid, after rescission for fraud inducing the payment.[49] When restitution is sought of other types of property, either in specie or in the form of a money equivalent, a wary glance must be cast toward other statutory provisions, particularly if the property in question is land.[50] But on the whole it is clear that where

41 Fla. 241, 25 So. 678 (1899); Newstrom v. Turnblad, 108 Minn. 58, 121 N. W. 236 (1909); Thompson v. Lyons, 281 Mo. 430, 220 S. W. 942 (1920); Carson v. Greeley, 107 Neb. 609, 187 N. W. 47 (1922); Roulston v. Warner, 134 Mis. 459, 234 N. Y. S. 643 (1929); Morrison v. Hartley, 178 N. C. 618, 101 S. E. 375 (1919); Mohr v. Sands, 44 Okla. 330, 133 Pac. 238 (1913); White v. Carlton, (Tex. Civ. App. 1925) 277 S. W. 701; Pratt v. Thompson, 133 Wash. 218, 233 Pac. 637 (1925). See also Young v. Whittenhall, 15 Kan. 436 (1875), and Pilcher v. Flinn, 30 Ind. 202 (1868).

The statutory language applies as well to actions for damages for honest misrepresentation, where the elements of legal liability are present. Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912); Chicago, R. I., and G. Ry. v. Duncan, (Tex. Civ. App. 1925) 273 S. W. 908.

[49] Gillies v. Linscott, 98 Kan. 78, 157 Pac. 423 (1916); McLain v. Parker, 229 Mo. 68, 129 S. W. 500 (1910); Billingslea v. Whitelock, 112 Okla. 192, 240 Pac. 722 (1925); Barbian v. Grant, (Tex. Civ. App. 1916) 190 S. W. 789; McDonald v. McDougall, 86 Wash. 339, 150 Pac. 625 (1915).

[50] By invoking the limitation on actions "for the recovery of real property" claimants are usually able to secure a longer period than by reliance on the "fraud" sections. In California, Nebraska, and Missouri the form of the remedy controls, rather than the operative facts on which the plaintiff relies, and if recovery of *possession* of land is an object of the action, or even if it is merely an incidental consequence, then the "fraud" section does not apply. City of Oakland v. Carpentier, 13 Cal. 540 (1859); Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820 (1903) (where undue influence was assumed to be fraud); Dunn v. Miller, 96 Mo. 324 at 337, 9 S. W. 640 at 645 (1888); Turnmire v. Claybrook, (Mo. 1918) 204 S. W. 178; Names v. Names, 48 Neb. 701, 67 N. W. 751 (1896). In other States this reasoning is rejected, at least in cases where the instrument under which the defendant claims had originally some legal effect, that is, where it was "voidable" rather than wholly void. In such situations these decisions insist that the rescission of the instrument is a necessary preliminary to delivery of possession, so that the action is "for relief on the ground of fraud" and the real property sections are inapplicable. Morgan v. Morgan, 10 Wash. 99, 38 Pac. 1054 (1894); Ackerson v. Elliott, 97 Wash. 31, 165 Pac. 899 (1917); Foy v. Greenwade, 111 Kan. 111, 206 Pac. 332 (1922); Walker v. Rooney, 135 Kan. 158, 9 Pac. (2d) 973 (1932); Boon v. Root, 137 Wis. 451, 119 N. W. 121 (1908); Tomlin v. Roberts, 126 Okla. 165, 258 Pac. 1041 (1927).

But this group of cases is thoroughly penetrated by the distinction between "void" and "voidable" transactions. If the instrument under which the defendant claims is wholly "void," so that an independent action was not historically necessary to set it aside, then the plaintiff can ignore it as an obstacle and sue either "for recovery of real property" or "to remove a cloud from title," and usually secure the benefit of a longer limitation period. Bausman v. Kelly, 38 Minn. 197, 36 N. W. 333 (1888) (deeds derived from mortgage foreclosure under a "void" power of sale); Hutchinson Realty Co. v. Hutchinson, 136 Wash. 184, 239 Pac. 388 (1925) (deed executed by officer of corporation to his wife without authority); Bradbury v. Nethercutt, 95 Wash. 670, 164 Pac. 194 (1917) (absolute deed intended as a mortgage, in which mortgagee forged material alterations); Brown v. Brown, 44 Iowa 349 (1876) (where the real

the transaction was induced by what may be called an "actual" fraud, an action for restitution of property transferred in reliance on the transaction will come within the exception.[51] The only important qualification that need be made is that a theory of pleading which ignores the

property section gave a *shorter* period). This distinction is most important in actions by execution purchasers to set aside prior deeds to third persons in fraud of creditors. If the prior deed is directly attacked by an action in equity, the proceeding is an "action for relief on the ground of fraud." Lemster v. Warner, 137 Ind. 79, 36 N. E. 900 (1893). But where the judgment creditor proceeds to seize the land on execution and sell it, some States hold that the execution purchaser may recover the possession without suing first to cancel the fraudulent deed, on the ground that as to him it is wholly *void*. Several States have applied this reasoning to the limitation of actions, and have held that a suit by the execution purchaser to recover possession or to remove the fraudulent deed as a cloud on title is not an action to be relieved against "fraud." Stewart v. Thompson, 32 Cal. 260 (1867); Wagner v. Law, 3 Wash. 500 (1892); Vanduyn v. Hepner, 45 Ind. 589 (1874). But this reasoning is rejected in a vigorous opinion in Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340 (1902).

Of this whole group of cases it can be said that purely procedural distinctions have been allowed to overshadow the essential bases of relief, and that these distinctions are for the most part of merely historical importance. See discussion in 37 YALE L. J. 388 (1928). In most cases the object of resorting to such distinctions is to secure the rather doubtful advantage of a longer period of limitation, when the fact-elements involved are not essentially different from other cases not involving real estate. But the method is well entrenched and is used with even more important consequences to admit defenses and replications based on fraud. See infra, notes 95-99.

[51] Rescission of deeds for fraud inducing their execution: Cook v. Hardin, (Tex. Civ. App. 1915) 174 S. W. 633; Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685 (1888); Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571 (1918); Brown v. Brown, 62 Kan. 666, 64 Pac. 599 (1901); Kahm v. Klaus, 64 Kan. 24, 67 Pac. 542 (1902). Ejectment for land conveyed through misrepresentation of attorney: New v. Smith, 86 Kan. 1, 119 Pac. 380 (1911). Rescission of agreement for partition of land and of decree founded thereon: Heirs of Brown v. Brown, 61 Tex. 45 (1884). The case of Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571 (1918), was an especially strong case, since the federal statute applicable provided that "suits to vacate and annul patents hereafter issued shall be brought within six years after the issuance of such patents," and contained no express exception for cases of concealed fraud. The court nevertheless held that the doctrine enunciated in earlier Supreme Court decisions must be read into the statutory language by implication.

The same is true where the action is for the money value of the property conveyed: Feenstra v. Feenstra, 124 Wash. 135, 213 Pac. 466 (1923); Weigand v. Shepard, 105 Kan. 405, 184 Pac. 722 (1919); or to impose a constructive trust on the proceeds of property secured through fraud: Hunter v. Hunter, 50 Mo. 445 (1872); Davis v. Cummins, (Mo. 1917) 195 S. W. 752. The same reasoning has been applied to restitution by way of constructive trust of property secured through fraudulent testimony on probate of a will, in Seeds v. Seeds, 116 Ohio St. 144, 156 N. E. 193 (1927); and even to reformation of a writing to strike out clauses inserted through "fraud": Hammond v. Western C. & G. Ins. Co., 100 Kan. 582, 165 Pac. 291 (1917); Provident Savings Life Assur. Soc. v. Withers, 132 Ky. 541, 116 S. W. 350 (1909).

There may be some question as to the date when the "cause of action" accrues in the restitution cases. The above decisions assume that it accrues at the date of the

fraud and emphasizes an independent remedial or substantive right may be outside the ambit of the exception.[52]

The extension of the "fraud" exception over the very wide field of "constructive fraud" was natural though not inevitable. The label "constructive fraud" has been vigorously and justly criticized as an unscientific description of the results accomplished beneath that transparent disguise.[53] If our law had progressed to the point where exact and scientific formulation was desirable, this criticism would carry more weight. But for one who has no faith in the capacity of legal doctrine to describe the results achieved by our judicial machinery, the formula "constructive fraud" is no more objectionable, and certainly no more misleading, than other short-hand descriptions of legal phenomena. Indeed, in the particular field now discussed its usefulness can scarcely be denied. The typical cases of "constructive fraud" in equity were those of non-disclosure by persons upon whom a high standard of conduct was imposed. The reasons for imposing this standard have not been adequately explained or compared with the requirements of disclosure in normal human affairs. But the fact-element common to such situations was a special reliance

payment or transfer. But there is some authority to the effect that the satute runs from the date of the formation of the contract, in pursuance of which subsequent payments are made. Schoolfield v. Provident Savings Life Assur. Soc., 158 Ky. 687, 166 S. W. 207 (1914), where payments of life insurance premiums continued over a period of many years, on a contract executed more than the statutory period before the action was commenced. The case apparently overlooks strong dicta the other way in Johnson v. Equitable Life Assur. Soc., 137 Ky. 437, 125 S. W. 1074 (1910).

[52] For example, an action by a vendor for the agreed purchase price in a sale induced by fraud. Rouss v. Ditmore, 122 N. C. 775, 30 S. E. 335 (1898). Similarly, where the action is brought to foreclose a mortgage or vendor's lien. Murto v. Lemon, 19 Colo. App. 314, 75 Pac. 160 (1904); Rogers v. Crockett, 41 Idaho 336, 238 Pac. 894 (1925). In both the latter cases a more favorable clause of the limitation act was made available by shifting the theory of the action, and recovery was allowed. Where the statute has run on the original debt, resourceful counsel have advanced the theory of subrogation to the rights, not yet statute-barred, of creditors paid off with the defrauded plaintiff's money. Denying subrogation: Clausen v. Meister, 93 Cal. 555, 29 Pac. 232 (1892); applying the exception for actions based on "fraud" and allowing subrogation: Zinkeisen v. Lewis, 63 Kan. 590, 66 Pac. 644 (1901), and Gano v. Martin, 10 Kan. App. 384, 61 Pac. 460 (1900).

The problem here is related to the problem discussed in note 50, supra, as to how far the choice of a particular form of action may make available another clause of the limitation act, although "fraud" is an element in the operative facts. The line between procedural and substantive theories of recovery is certainly none too clear at this point. Where, for example, the plaintiff sues in quasi-contract for recovery of a benefit secured through fraud, and attempts to rely on the "contract" section of the limitation act. Rejecting this method: Weigand v. Shepard, 105 Kan. 405, 184 Pac. 722 (1919).

[53] Jeremiah Smith, "Surviving Fictions," 27 YALE L. J. 317 (1918).

by one person on the moral integrity of another, either because of personal intimacy or because of a legal relationship between the parties in which the common experience of mankind would justify an expectation of fair dealing.[54] In any event the same reasons which would justify the original expectations would justify their continuance, at least until some event which would normally awaken suspicion in the party whose confidence was abused. The connection between common law fraud, with its encrusted rules worked out in the action for deceit, and these more elusive types of "constructive fraud," was a connection that existed in the plane of words and nowhere else. But a purely verbal association was enough. In construing a statute whose meaning could not be fixed by a narrow and specific legislative purpose, "fraud" might mean all types of misconduct to which that abusive epithet had ever been applied. At any rate it was everywhere taken to include those cases which courts of equity had commonly labelled "constructive fraud," that is, misappropriations of property and secret profits by persons in fiduciary or confidential relations.[55] Other types of secret breach of

[54] The doctrine takes its place beside other ancient and modern limitations on the "ancient maxim, caveat emptor," discussed with such illumination by W. H. Hamilton in 40 YALE L. J. 1133 (1931). Developed first in equity, the standards imposed on persons in these special relations are now enforced with equal vigilance in legal actions, as the cases in this field indicate.

[55] Perhaps the clearest cases are those involving actual misrepresentation: Lataillade v. Orena, 91 Cal. 565, 27 Pac. 924 (1891) (false accounts by guardian as to property received); Stearns v. Hochbrunn, 24 Wash. 206, 64 Pac. 165 (1901) (false statements by agent as to purchase price received from purchaser); Halstead v. Florence Citrus Growers' Ass'n, (Fla. 1932) 139 So. 132.

But the decisions are unanimous in extending the "fraud" exception to cases of mere non-disclosure: Todd v. Rafferty, 30 N. J. Eq. 254 (1878), 34 N. J. Eq. 552 (1881) (secret profit by partner); Morris v. Johnstone, 172 Ga. 598, 158 S. E. 308 (1931) (non-disclosure of assets by administrators, plaintiff's brothers); Clover v. Neely, 116 Okla. 155, 243 Pac. 758 (1926) (secret withdrawal of dividend by president and business manager of corporation); Main v. Payne, 17 Kan. 608 (1877), and Ryan v. Doyle, 31 Iowa 53 (1870) (actions to establish remedial trust in land purchased in his own name by plaintiff's "agent" for the purchase); Commissioners of Mower County v. Smith, 22 Minn. 97 (1875) (secret misappropriation of county funds by county treasurer); Meader v. Norton, 11 Wall. (U. S.) 442 (1870) (secret alteration of title by person standing in confidential relation); Dumbadze v. Lignante, 244 N. Y. 1, 154 N. E. 645 (1926) (secret appropriation of money paid to defendant as plaintiff's agent); Guerin v. American Smelting and Refining Co., 28 Ariz. 160, 236 Pac. 684 (1925) (relocation of mining claim jointly owned, in names of some of the joint owners); Ryan v. Leavenworth, Atchison & Northwestern Ry., 21 Kan. 365 (1879) (contract by corporation with partnership in which directors were interested).

Secret purchases by a fiduciary of the beneficiary's property are also within the category of "fraud": Boyd v. Blankman, 29 Cal. 19 (1865) (administrator); Ackerson v. Elliott, 97 Wash. 31, 165 Pac. 899 (1917) (agent); Rosenberg v. Rosenberg, 141

fiduciary obligation, still more remote from the "fraud" of the action for deceit, were also included,[56] and even some cases of participation

Wash. 86, 250 Pac. 947 (1926) (executors); Carroll v. Kennison, 14 Ohio App. 133 (1921) (action for damages for loss of use of land sold by administrator to himself); Toole v. Johnson, 61 S. C. 34, 39 S. E. 254 (1901) (purchase by administrator in name of his wife); Branner v. Nichols, 61 Kan. 356, 59 Pac. 633 (1900) (partner).

At times the fiduciary relation is rather tenuous. Not only is it "fraud" for an agent, who is under a duty at the time to pay taxes, to buy in the principal's land at a tax sale (McMahon v. McGraw, 26 Wis. 614 (1870); Fox v. Zimmerman, 77 Wis. 414, 46 N. W. 533 (1890)), but the same is true of a life tenant who fails to pay taxes with the deliberate object of cutting off the remainder by tax sale. Boon v. Root, 137 Wis. 451, 119 N. W. 121 (1908). The same doctrine has been applied to a purchase at a tax sale by a squatter whom the owner had allowed to occupy the land rent free, the court expressing its disapproval of such "ingratitude." Duffitt v. Tuhan, 28 Kan. 292 (1882).

[56] The category of "fraud" has as wide a sweep here as the ethical standards imposed by equity upon persons who are as a matter of law in a fiduciary relation or in whom as a matter of fact confidence is reposed. In the former class is Bent v. Priest, 86 Mo. 475 (1885), an action to impose a constructive trust on bonds given to a corporation director to influence his vote, the fraud consisting "in professing to act for and in the interest of the corporation, as was defendant's duty, when, in reality, he was acting for himself and for his private gain." Failure to protect the beneficiary's interests may be a "fraudulent" breach of duty, as in Bates v. Winstead, 77 N. C. 238 (1877), where a decree assented to by a guardian in compromise of a non-existent controversy was set aside for the failure of the guardian to protect the ward with proper diligence; Ryan v. Old Veteran Mining Co., 37 Idaho 625, 218 Pac. 381 (1922), where a stockholder was given the benefit of the "fraud" exception in an action against a director for issuing shares of stock without consideration; Stocks v. Van Leonard, 8 Ga. 511 (1850), bill by creditors of insolvent bank against debtors and assignee for creditors, who allowed some debtors to pay their debts to bank in depreciated currency and others not to pay at all; and especially Lang Syne Gold Mining Co. v. Ross, 20 Nev. 127, 18 Pac. 358 (1888), where the general manager of plaintiff corporation through collusion permitted a default judgment to be entered against the corporation and its property to be sold in execution thereof.

There is more doubt about other cases, where confidence was in fact reposed, but the defendant's conduct consisted primarily in breach of contract. Cases which apply the "fraud" exception, but which might not be followed in other jurisdictions are: Larsen v. Utah Loan and Trust Co., 23 Utah 449, 65 Pac. 208 (1901) (investment of plaintiff's money on insufficient security in breach of contract with plaintiff held to be "in the eye of the law a fraud"); Frazier v. Frazier, 211 Ala. 176, 100 So. 118 (1924) (delivery of escrow deed before fulfillment of condition); Cock v. Van Etten, 12 Minn. 522 (1867) (investment of plaintiff's money in defendant's own name, a manner unauthorized by contract, said to be "in the eye of the law a fraud, being a secret and intentional violation of the private confidence imposed in him").

In Finnegan v. McGuffog, 203 N. Y. 342, 96 N. E. 1015 (1911), the widow of a self-declared trustee procured a renewal for herself of the leasehold which was the subject of the trust. Neither the widow nor the beneficiaries of the trust had actual notice of its existence, and the court held there was no "fraud" that could suspend the statute, in the absence of some effort by the defendant to conceal from the beneficiaries their interest in the lease.

by strangers in such violations of confidence.[57] In most of these situations the result could have been explained by using the independent exception for cases of express trust, where the statute is said to operate only after the trustee's repudiation has been brought home to the cestui.[58] This exception, founded on the same considerations of policy as those outlined above, has survived in equity cases independently of statute[59] and has been incorporated in a few modern statutes.[60] It was natural that courts should justify their suspension of the statute by relying on the "fraud" exception in preference to an equitable doctrine

[57] Peck v. Bank of America, 16 R. I. 710, 19 Atl. 369 (1890) (attempt by defendant bank to charge trust property with trustee's personal debt); Livermore v. Johnson, 27 Miss. 284 (1854) (assignment of principal's notes by agent to defendant as security for agent's own debt); Duff v. Duff, 71 Cal. 513, 12 Pac. 570 (1886); McMurray v. Bodwell, 16 Cal. App. 574, 117 Pac. 627 (1911); Pennsylvania Co. for Insurance on Lives v. Ninth Bank & Trust Co., 306 Pa. 148, 158 Atl. 251 (1932).

But where the third person is ignorant of the beneficiary's claim to the fund misapplied, the mere receipt of a benefit through dealings with the fiduciary is probably not "fraud." Price v. Mulford, 107 N. Y. 303, 14 N. E. 298 (1887). See also Model Building and Loan Ass'n v. Reeves, 236 N. Y. 331, 140 N. E. 715 (1923).

[58] Numerous cases suggest that the suspension of the statute can be achieved here by either or both of these exceptions. For example, where a mining claim was jointly owned by several persons, and some of them relocated the claim in their own names, the action of the omitted owner to establish his interest in the relocated claim was held to involve a "trust not cognizable by the courts of common law" in Ballard v. Golob, 34 Colo. 417, 83 Pac. 376 (1905); and to be based on "fraud" in Guerin v. American Smelting and Refining Co., 28 Ariz. 160, 236 Pac. 684 (1925). Secret withdrawals of corporate funds by a president of a corporation would undoubtedly be described as "fraud" in many jurisdictions, but in Coxe v. Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626 (1895), the statute was suspended because the defendant "partook sufficiently of the nature of a trustee" so that full disclosure to the stockholders was required. Similarly in Robertson v. Hirsh, 276 Mass. 452, 177 N. E. 676 (1931), involving a secret profit by an agent for the purchase of land, and Old Dominion Copper, etc. Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193 (1909), where an action to set aside a purchase by a corporation from promoters was held to be within the "trust" exception. (*Contra* to last case, Boyd v. Mutual Fire Ass'n, 116 Wis. 155, 90 N. W. 1086 (1903)).

In some cases the courts have expressly relied on both exceptions in suspending the statute. Dumbadze v. Lignante, 244 N. Y. 1, 154 N. E. 645 (1926); Pennsylvania Co. for Insurance on Lives v. Ninth Bank & Trust Co., 306 Pa. 148, 158 Atl. 251 (1932).

[59] 2 WOOD, LIMITATIONS, 4th ed., ch. XX (1916).

[60] In Colorado, Georgia, and Mississippi the exception applies to cases of trust "solely cognizable in equity." Colo. Ann. Stat. (Courtwright's Mills 1930), sec. 4639; Ga. Ann. Code (Park 1914), sec. 3782; Miss. Ann. Code (1930), sec. 2316. In Ohio it applies to cases of "continuing trust." Ohio Ann. Code (Throckmorton 1930), sec. 11236. In Florida it applies to "money or property held or collected by any officer or trustee." Fla. Comp. Laws (1927), sec. 4647. In Pennsylvania it applies to cases where defendant is "affected with a trust, by reason of his fraud." Pa. Ann. Stat. (Purdon

whose standing was more uncertain. There was the further advantage that a liberal definition of "fraud" would evade the restrictions which equity had imposed on the "trust" exception.[61]

An even freer use of verbal associations appears in the extension of the "fraud" exception to cases of "fraud on creditors." The statute of Elizabeth, a corner-stone in the modern law of creditors' remedies, described as "fraudulent" all transfers intended to defeat creditors.[62] The phrase has had wide currency in modern law, although neither actual misrepresentation nor breach of fiduciary obligation is an essential element. If suspension of the statute is to be justified on grounds of policy it must be because of the peculiar difficulties which lie in the way of the creditor's discovery of transfers normally shrouded in secrecy. But the cases have not been put on any such ground. Almost without discussion it has been assumed that the "fraud" exception embraces "fraud on creditors." [63]

There is less unanimity as to the inclusion of undue influence within the category of "fraud." The characterization of undue influence as "a species of fraud" is a perfectly familiar circumlocution of equity

1931), tit. 12, sec. 83. The New York statute is the most carefully drawn. It provides that the statutory period shall not commence until knowledge of the facts on which depends the right to demand money or property from an "agent, trustee, attorney, or other person acting in a fiduciary capacity." N. Y. Civ. Pr. Act, sec. 15 (1921).

[61] The most serious restriction was that which confined it to actions in form equitable. Hart's Appeal, 32 Conn. 520 (1865); Nicholson v. Lauderdale, 22 Tenn. 199 (1842); Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795 (1895). There was great difficulty with cases of receipt of money by an agent for his principal where an action at law was an appropriate remedy. The cases are in a state of confusion, but a large number of courts have refused to extend the statutory period. See 17 L. R. A. (N. S.) 660 (1909); 40 HARV. L. REV. 493 (1927).

A line was also drawn somewhere between express and constructive trusts, a line that was supposed to indicate whether or not the holding of the "trustee" was from its inception adverse. See 36 HARV. L. REV. 325 (1923).

[62] 13 Eliz., c. 5, 6 Stats. at Large 268 (1570), applying to transfers "devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose, and intent, to delay, hinder or defraud creditors and others of their just and lawful actions."

[63] Snodgrass v. Branch Bank, 25 Ala. 161 (1854); Musselman v. Kent, 33 Ind. 452 (1870); State v. Osborn, 143 Ind. 671, 42 N. E. 921 (1895); Nash v. Stevens, 96 Iowa 616, 65 N. W. 825 (1896); Jones v. Danforth, 71 Neb. 722, 99 N. W. 495 (1904); Erickson v. Quinn, 47 N. Y. 410 (1872); Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884 (1903); Means v. Feaster, 4 S. C. 249 (1879); Foote v. Harrison, 137 Wis. 588, 119 N. W. 291 (1909). See also Albright v. Texas, S. F. & N. R. R., 8 N. M. 110, 42 Pac. 73 (1895), involving a secret agreement with stockholders as to payment of subscriptions "in fraud of the rights" of the corporation's creditors.

No dissent on this question has been found, except in cases where there was no proof of an intent to defeat creditors, and the ground of attack was simply the debtor's insolvency at the time of the transfer. Even here the result depends on the special

cases.[64] But the distinction between improper pressure directing a choice between alternatives, and misleading conduct which sets up false motives for the exercise of volition, is sufficiently clear for legal purposes. To include within the word "fraud" all cases of duress or undue influence is to introduce a class of cases whose relation is no more than etymological. On the other hand, where improper pressure has continued after the date of its original application, courts of equity have traditionally said that the rules of limitation begin to operate only from the removal of the pressure.[65] The claimant's actual inability to sue, resulting directly from the misconduct of the other party, would seem to justify the recognition of continuing pressure, through imprisonment or other improper means, as an independent ground for suspension of

form of the local statute, and not on any expressed reluctance to include the debtor's conduct within the category of "fraud." See Bickle v. Chrisman's Adm'x, 76 Va. 678 (1882), and Vashon v. Barrett, 99 Va. 344, 38 S. E. 200 (1901); and compare Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884 (1903).

Almost the only discussion in the cases of the application of the "fraud" exception to "fraud on creditors," is in Phillips v. Shipp, 81 Ky. 436 (1883), where the court was faced with "a learned philological discussion" by counsel, attempting to confine the "fraud" exception to cases of technical fraud. The court in rejecting this contention pointed out that "fraud" was included in the descriptive language of the statute of Elizabeth (supra, note 62); quoted Story (at p. 440) to the effect that constructive frauds, "by their tendency . . . to deceive or mislead other persons, or violate private confidence," are "equally reprehensible with *positive fraud*"; and asserted that there was *more* reason for an exception in cases of constructive fraud, since it was harder to unearth than actual fraud.

Similar reasoning is occasionally resorted to with transfers intended to defeat other types of claims. For example, "fraud on marital rights"; Williams v. Carle, 10 N. J. Eq. 543 (1856); BIGELOW, FRAUDULENT CONVEYANCES 168 (1911); conveyance by vendor "in fraud of" contract vendee's rights: Muir v. Bozarth, 44 Iowa 499 (1876).

In actions of this character it is often possible to postpone the operation of the statute through redefinition of the "cause of action." Where the recovery of a law judgment with a return of *nulla bona* is a prerequisite to any attack on the transfer, then the "cause of action" may be said not to accrue until the satisfaction of this condition precedent gives a power to sue. Suber v. Chandler, 18 S. C. 526 (1882); McSween v. McCown, 23 S. C. 342 (1885); cf. Bickle v. Chrisman's Adm'x, 76 Va. 678 (1882). Similarly with an action to reach the proceeds of an insurance policy taken out by the insolvent debtor, where the debtor's death is essential for the existence of any such fund. York v. Flaherty, 210 Mass. 35, 96 N. E. 53 (1911). See also Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302 (1893).

[64] Treadwell v. Torbert, 133 Ala. 504, 32 So. 126 (1902); Lavalleur v. Hahn, 152 Iowa 649, 132 N. W. 877 (1911); Smith v. Blakesburg Savings Bank, 182 Iowa 1190, 164 N. W. 762 (1918); BIGELOW, FRAUD 336 ff. (1888).

[65] Sharp v. Leach, 31 Beav. 491, 54 Eng. Repr. 1229 (1862); Oldham v. Oldham, 5 Jones Eq. (N. C.) 89 (1859); Nichols v. Nichols, 79 Conn. 644, 66 Atl. 161 (1907).

the statute.[66] A few cases have not hesitated to apply the "fraud" exception to accomplish the same result.[67]

It is uncertain how far the "fraud" exception will be carried beyond these limits. It has been applied in a few cases to secret misappropriations of property[68] and also to the secret breach of contractual obliga-

[66] Allen v. Leflore County, 78 Miss. 671, 29 So. 161 (1900); Howard v. Carter, 71 Kan. 85, 80 Pac. 61 (1905); Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445 (1904). In the last-cited case the suspension of the statute was achieved without express reliance on the statutory exception, although the four-year statute for "actions for relief on the ground of fraud" was assumed to apply to the case.

It is strange that the effect of physical imprisonment of the plaintiff should be less clear on the authorities than the effect of "undue influence" as involved in the cases above cited. The question as to the effect of imprisonment was expressly left open in the interesting New York case of Brush v. Lindsay, 210 App. Div. 361, 206 N. Y. S. 304 (1924), discussed at length in 34 YALE L. J. 432 (1925). It is often stated that the "cause of action" accrues only on the plaintiff's release from imprisonment. Alexander v. Thompson, (C. C. A. 6th, 1912) 195 Fed. 31; Hackler v. Miller, 79 Neb. 206, 112 N. W. 303 (1907). But the only clear decision on the point seems to be that of the House of Lords in Harnett v. Fisher, [1927] A. C. 573, where it was held that a continuing imprisonment for nine years did not suspend the statute.

[67] Little v. Bank of Wadesboro, 187 N. C. 1, 121 S. E. 185 (1923), an action to reach the proceeds of land conveyed by plaintiff in November, 1914, through undue influence exerted by plaintiff's father, who did not die until September, 1920. The action was brought in August, 1921. Judgment for the plaintiff was reversed, and the case sent back for a finding as to the date when the undue influence was removed, the court saying that the statute of limitations would run from that date and adding that the exception for actions for relief on the ground of fraud

> " . . . has and was intended to have a broader meaning than the ordinary common-law actions for fraud and deceit, and in our opinion clearly applies to any and all actions legal or equitable where fraud is the basis or an essential element of the action. . . . When it is made to appear that one taking advantage of another's weakness has acquired a controlling influence over him, and has exerted it in a given case on an owner of property to such an extent as to entirely supplant the owner's will in the matter, and cause him to make an improvident and harmful disposition of his property that he would not otherwise have made, this is properly considered fraud of a pronounced type, so much so that in such instance 'fraud' and 'undue influence' are generally used together as expressing one and the same idea. . . . "

Similarly, dicta in Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820 (1903); James v. James, 75 Colo. 164, 225 Pac. 208 (1924); Howard v. Farr, 115 Minn. 86, 131 N. W. 1071 (1911); Durazo v. Durazo, 19 Ariz. 571, 173 Pac. 350 (1918). *Contra,* Piper v. Hoard, 107 N. Y. 67, 13 N. E. 632 (1887); and dicta in Haynie v. Hall's Executor, 24 Tenn. 289 (1844).

[68] Algeo v. Algeo, 125 Kan. 245, 263 Pac. 1077 (1928), where the administratrix of the plaintiff's mining partner sold secretly some mining machinery belonging to the partnership and in which plaintiff owned a half interest. Defendant did not disclose plaintiff's interest in the machinery in her accounts to the probate court. It was held that plaintiff's action for the value of his interest in the machinery was based on "fraud" within the statutory exception.

tion[69] where the shadowy elements of a "confidential relation" could be discerned in the relations of the parties. In several cases of underground trespass to land the "fraud" exception has been used for the obvious and persuasive reason that such trespasses involve peculiar obstacles to discovery by the owner of the land.[70] But where no relations of personal intimacy were involved, the courts have been reluctant to extend the category

The important case of Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (1910), held that an action to impose a constructive trust on the money proceeds of some stolen bonds was an "equitable" action for relief on the ground of "fraud" within the statutory exception then in effect in New York. The plaintiff in fact had complete confidence in defendant, his father-in-law and a local banker, but the court did not expressly rely on this fact-element in suspending the statute.

Orr Shoe Co. v. Edwards, 111 Miss. 542, 71 So. 816 (1916), went even further. There the plaintiff company consigned some crates of shoes to defendant Edwards over the branch line of a railroad. These crates were thrown off the train at defendant's station, and were left beside the track for several days until stolen by defendant McKinley. Defendant Edwards later sold his stock in trade to defendant McKinley who added the stolen shoes to the stock and later resold the augmented stock in trade back to defendant Edwards. In the meantime defendant Edwards had insisted that he had not received the consignment, and had surrendered his bill of lading to plaintiff so that a claim could be presented by plaintiff against the railroad. The plaintiff alleged that defendant Edwards knew that the stock of goods repurchased by him included the stolen shoes, and "fraudulently concealed this fact" from the plaintiff. It was held that plaintiff could sue "in equity" for the value of the stolen shoes in Edwards' possession, and that "the statute did not begin to run until the discovery by the complainant of the fraud."

[69] Cases of this type are cited supra, note 56, par. 2.

[70] Lewey v. H. C. Fricke Coke Co., 166 Pa. 536, 31 Atl. 261 (1895); Trustees of Kingston v. Lehigh Valley Coal Co., 241 Pa. 469, 88 Atl. 763 (1913); Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771 (1912); Tom Reed Gold Mines Co. v. United Eastern Mining Co., (Ariz. 1932) 8 Pac. (2d) 449, 32 COL. L. REV. 909 (1932).

In Lightner Mining Co. v. Lane, supra, the court said (at p. 701):

> "In the case of underground mining of a neighbor's ore, nature has supplied the situation which gives the opportunity to the trespasser to take it secretly and causes the ignorance of the owner. Relying upon this ignorance, he takes an unfair advantage of his natural opportunities and thereby clandestinely appropriates another's property while appearing to be making only a lawful use of his own. The act in its very nature constitutes the deceit which makes it a fraud. It is a daily false representation that the ore he is taking is his own, with full knowledge that it belongs to another, and that that other is deceived by the artifice."

In the Lightner case the court found evidence that defendant knew the trespasses were occurring and misled plaintiff by reporting a trespass that occurred at another level and paying for the value of the ore there taken. But in the Tom Reed Gold Mines Co. case this fact-element was absent, and the court went so far as to say that even an unintentional trespass underground was a "constructive fraud."

This reasoning has been rejected, however, in Ohio and Washington. Williams v. Pomeroy Coal Co., 37 Ohio St. 583 (1882); Golden Eagle Mining Co. v. Imperator-Quilip Co., 93 Wash. 692, 161 Pac. 848 (1916). In West Virginia it is apparently by the use of the "fraudulent concealment" exception that the suspension of the statute

of "fraud" to include other types of wrongdoing, either in the form of secret misappropriation of property[71] or secret breach of contractual or statutory obligation.[72]

There was nothing inevitable in these limitations on the scope of the "fraud" exception. Courts have not hesitated in other situations to collect under the label "fraud" the most diverse forms of secret misconduct.[73] It would have been possible to suspend limitation acts by the use of the "fraud" exception wherever the defendant's active concealment or the secret manner of his wrongdoing interfered with the plaintiff's prosecution of an action. But the types of injuries that courts would have had to include would have taken as many forms as human ingenuity could devise or credulity inspire. There was nothing in common law doctrine to encourage so bold a treatment. When courts found themselves outside the shadowy boundaries of "constructive fraud," as defined for other purposes in equity cases, they hesitated.

is achieved. Petrelli v. West Virginia-Pittsburgh Coal Co., 86 W. Va. 607, 104 S. E. 103 (1920). In Kentucky the court felt an insuperable difficulty in describing a mere trespass as "fraud," and explained the suspension of the statute "upon principles analogous to an estoppel," by simply postponing the accrual of the "cause of action" until discovery or a reasonable opportunity for discovery. Falls Branch Coal Co. v. Proctor Coal Co., 203 Ky. 307, 262 S. W. 300 (1924).

[71] Howk v. Minnick, 19 Ohio St. 462 (1869); Doyle v. Callaghan, 67 Cal. 154, 7 Pac. 418 (1885); Havird v. Lung, 19 Idaho 790, 115 Pac. 930 (1911); San Lucas v. Bornn, 175 App. Div. 897, 161 N. Y. S. 1144 (1916).

[72] Cornell v. Edsen, 78 Wash. 662, 139 Pac. 602 (1914); Kelly v. Shropshire, 199 Ala. 602, 75 So. 291 (1917); Hughes v. Reed, (C. C. A. 10th, 1931) 46 F. (2d) 435; McGill's Adm'x v. Phillips, 243 Ky. 768, 49 S. W. (2d) 1025 (1932); Olesen v. Retzlaff, 184 Minn. 624, 238 N. W. 12 (1931). In the last-cited case the court frankly stated its reluctance to add to the statutory liability of bank directors for accepting deposits at a time when the bank was insolvent. The court said (at p. 628) that the statute

> "... imposes a harsh liability upon bank directors. There is no such action as this at common law. A banker, if the statute is understood as it reads, must determine, when deposits are offered at his counter, between the last one which he may take and the first one which he must refuse. Courts enforce the statute as it is written; but there is no policy which suggests that the statute of limitations ... be construed unnecessarily in favor of a depositor so as to permit an action to be brought as an action for relief on the ground of fraud, when there is no actual fraud, but only an offended state policy."

But a demurrer to the complaint was overruled because it contained direct allegations of misrepresentations as to the bank's solvency, made with knowledge of falsity; so that the "fraud" exception could be invoked on that independent ground.

[73] An example is the construction of attachment statutes which allow the privilege of attachment where the debt sued on has been "fraudulently contracted." Piedmont Grocery Co. v. Hawkins, 83 W. Va. 180, 98 S. E. 152, 4 A. L. R. 828 (1919), and cases cited in annotation.

And an excellent reason for this hesitation was the existence of the independent doctrine of "fraudulent concealment," which had been formulated in American decision by the early nineteenth century[74] and which in many jurisdictions exists side by side with the "fraud" exception.[75] Since "fraudulent concealment" applied to all types of actions whether founded on "fraud" or on other types of misconduct, many courts could rely on that device to achieve the same end. Where the doctrine of "fraudulent concealment" is not recognized, the "fraud" exception is stretched somewhat further to take its place.[76] Where both types of legislation exist, the modern cases have developed two bodies of doctrine which are in some respects intimately related, but in others distinct. The two exceptions are clearly based on similar considerations of policy, and they overlap so that many cases fall within the scope of both. In their actual operation they are brought closer together by a qualification that is universally recognized and that applies equally to both. The "discovery" by the plaintiff is everywhere taken to mean something less than actual discovery of the defendant's wrong: the wrong is "discovered" at the point where the facts could have been ascertained by using reasonable diligence.[77] This qualification introduces

[74] Particularly in the case of First Mass. Turnpike Co. v. Field, 3 Mass. 201 (1807), supra, note 22.

[75] See supra, notes 5-7.

[76] Perhaps the best example of this interaction between the two exceptions is the case of Algeo v. Algeo, 125 Kan. 245, 263 Pac. 1077 (1928), discussed supra, note 68. The doctrine of fraudulent concealment had been rejected in Kansas in Atchison, T. & S. F. R. R. v. Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051 (1904).

[77] Actions based on fraud: Ray v. Divers, 81 Mont. 552, 264 Pac. 673 (1928); Coad v. Dorsey, 96 Neb. 612, 148 N. W. 155 (1914); Johnston v. Spokane & Inland Empire R. R., 104 Wash. 562, 177 Pac. 810 (1919); Schuck v. Bramble, 122 Md. 411, 89 Atl. 719 (1914), etc.

Actions fraudulently concealed: Purdon v. Seligman, 78 Mich. 132, 43 N. W. 1045 (1889); McKown v. Whitmore, 31 Me. 448 (1850); Skordski v. Sherman State Bank, 348 Ill. 403, 181 N. E. 325 (1932), etc.

It is of course extremely difficult to fix the point at which circumstances, or information derived from outside sources, should arouse suspicion, particularly where a confidential relation might excuse a neglect to inquire. On the effect of confidential relation, see Monmouth College v. Dockery, 241 Mo. 522, 145 S. W. 785 (1911); McDonald v. McDougall, 86 Wash. 339, 150 Pac. 625 (1915); Kahm v. Klaus, 64 Kan. 24, 67 Pac. 542 (1902); Kirkley v. Sharp, 98 Ga. 484, 25 S. E. 562 (1895); Heap v. Heap, 258 Mich. 250, 242 N. W. 252 (1932).

There is greatest uncertainty as to how far the recording acts give notice which amounts to "constructive discovery." The object of public records is primarily to cut off subsequent purchasers and incumbrancers, so that as between the immediate parties to a recorded deed the record will usually be of no effect. Pels v. Stevens, 187 Iowa 443, 173 N. W. 56 (1918); Modlin v. Roanoke R. R. & Navigation Co., 145 N. C. 218, 58 S. E. 1075 (1907); Madole v. Miller, 276 Pa. St. 131, 119 Atl. 829 (1923);

new variables into the arithmetic of the limitation acts, but it seems imperatively required by their larger social purpose and it is functionally related to the equitable doctrine of "laches" from which these exceptions are historically derived.[78] But similarities in function and purpose of the "fraud" and "fraudulent concealment" exceptions have not prevented some divergences in their operation. The verbal form into which the doctrine of "fraudulent concealment" has been cast has had a subtle influence on the tests for its application by placing an exaggerated emphasis on the method by which the defendant prevented discovery.[79] In any event it is safe to say here, as in other fields of law, that any discussion which fails to take account of legal doctrine and its effects on

Davis v. Monroe, 187 Pa. 212, 41 Atl. 44 (1898); Webb v. Logan, 48 Okla. 354, 150 Pac. 116 (1915). But where third persons rely on the face of the record it may become necessary to charge the defrauded plaintiff with notice of the facts that could have been ascertained therefrom. Smith v. Rector, 135 Kan. 326, 10 Pac. (2d) 1077 (1932); Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94 (1909). How far these doctrines apply to actions of creditors to set aside fraudulent conveyances is by no means clear. Numerous cases have charged such creditors with notice of the facts ascertainable from public records. Nash v. Stevens, 96 Iowa 616, 65 N. W. 825 (1896); Donaldson v. Jacobitz, 67 Kan. 244, 72 Pac. 846 (1903). But all the elements of fraud on creditors will not usually be disclosed by a mere record of the deed. Erickson v. Quinn, 47 N. Y. 410 (1872); Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884 (1903); Forsyth v. Easterday, 63 Neb. 887, 89 N. W. 407 (1902). And the plaintiff's nonresidence, both here and in other types of "fraud," has been held to excuse want of diligence. Hutto v. Knowlton, 82 Kan. 445, 108 Pac. 825 (1910); Foote v. Harrison, 137 Wis. 588, 119 N. W. 291 (1909); Mohr v. Sands, 44 Okla. 330, 133 Pac. 238 (1913); Livermore v. Johnson, 27 Miss. 284 (1854); Claggett v. Crall, 12 Kan. 393 (1874). But see Guerin v. American Smelting & Refining Co., 28 Ariz. 160, 236 Pac. 684 (1925); Van Ingin v. Duffin, 158 Ala. 318, 48 So. 507 (1909). Numerous other cases are collected in 22 L. R. A. (N. S.) 208 (1909).

[78] See, for example, United States v. Diamond Coal & Coke Co., 255 U. S. 323, 41 Sup. Ct. 335 (1921), an action brought by the United States to cancel land patents issued to defendant through the latter's fraud. The statute of limitations applicable barred such actions six years "after the date of the issuance of such patents," but in an earlier case (Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571 (1918)) the Supreme Court had held that the absence of the technical phrase "cause of action" made no difference, and the equitable rule suspending the statute until discovery must be read in, despite the specific language of the statute. In the later case counsel for the government contended that laches could not be attributed to the United States, no matter how great the delay in suing for cancellation. In rejecting this contention the court said (at p. 333):

> "As the statute in express terms deals with the rights of the United States and bars them by the limitation which it prescribes, and as that bar would be effective unless the equitable principle arising from the fraud and its discovery be applied, it must follow, since the doctrine of laches is an inherent ingredient of the equitable principle in question, that the proposition is wholly without merit."

[79] This point must be elaborated in a later discussion of the doctrine of fraudulent concealment.

judicial decision is bound to be misleading.[80] And the influence of doctrine is further reinforced where, as in this field, doctrinal differences are reflected in specific statutory language.[81]

The question may still be asked whether a distinction so artificial as the distinction between "fraud" and "fraudulent concealment" could not have been avoided if judicial attack on the problem of limitations had started from another point of view. On the Continent, for example, medieval commentators had been distressed by the sacrifice of private interests involved in rules of prescription, and had argued interminably whether prescription could be squared with "natural equity."[82] The conclusions of these discussions were quite consistently in the affirmative. But, no doubt as a result of this criticism, the great creative imagination of Bartolus had evolved the formula, *Contra non valentem agere non valet praescriptio* (Prescription does not operate against him who is unable to sue). This maxim has remained the source of the most violent controversy, lasting till modern times. The French Civil Code undertook to reject it, and theoretical writers have attacked it.[83] But decisions of French courts have restored it to respectability,[84] and an

[80] This assertion is not intended as a comment on the debate between Frank and Dickinson. Dickinson, "Legal Rules: Their Function in the Process of Decision," 79 U. PA. L. REV. 833, 1052 (1931); Frank, "Are Judges Human?" 80 U. PA. L. REV. 17, 233 (1931). At least it is clear that when discussions remain on the plane of doctrine they can be extraordinarily confused if they neglect doctrinal distinctions. For example, the extended discussion of Justice Marshall in Pietsch v. Milbrath, 123 Wis. 647, 102 N. W. 342 (1905), reproduced in substance in 17 R. C. L. 852 ff. (1917), and to a less extent in 43 HARV. L. REV. 471 (1930).

[81] See supra, notes 1 and 5.

[82] The canonists were particularly agitated. See the summary of their arguments in BOHIER, DECISIONES BURDEGALENSES, Q.211; and the labored reasoning of Bertrand d'Argentré in the sixteenth century (Opera, ed. 1621, pp. 885-8).

[83] Civil Code, art. 2251. And see Baudry-Lacantinerie & Tissier, XXVIII, sec's 366-79, for a modern attack on Bartolus' formula.

[84] The statement frequently made in French cases is that "prescription does not run against one for whom it is absolutely impossible to sue, as a result of any obstacle whatever, whether due to the law, to contract, or superior force" ("force majeure"). See, for example, Dalloz, 1900.1.422 at 424. Among the grounds for suspension of prescriptive rules that have been recognized as a result of this principle are (1) an extension of the period of payment, requested by the debtor and granted by the creditor (Dalloz, 1900.1.422); (2) an agreement of the creditor not to sue (Sirey, 1855.1.511, and Dalloz, 1870.1.310); and (3) the existence of war which prevented the holding of court sessions (Dalloz, 1856.1.304). In a decree of 27 May 1857 the Court of Cassation allowed an action for damages against a notary for failure to investigate the title to property which the complainant took as security for a loan, the defect in the title not being discovered until 40 years later. The decree stated that prescriptive rules will not operate wherever the creditor "can reasonably in the eyes of the law be ignorant of the

able Italian writer has argued for its preservation in modified form.[85] In the decisions of Louisiana it has continued to show remarkable vitality.[86]

With the aid of some such generalization common law courts might have approached limitation acts more resolutely and courageously.[87] Even without it they have gone some distance toward suspension of the statute where external circumstances have prevented the filing of a

fact which gives rise to his claim." The note in Dalloz, 1857.1.290 indicates the distress that this case has caused to commentators.

The argument in a decision of 1858 is interesting (Dalloz, 1858.2.139). The court says that the Code "is concerned particularly with the cases of inability to sue which result from the state or condition of individuals and contents itself with defining certain cases of inability resulting from exterior causes . . . but it could not undertake to give a complete enumeration of cases of the latter type, since their number is considerable; it therefore merely deduces various consequences of the rule *contra non valentem*, without stating the rule itself at any point, but this is nevertheless the principle of all the provisions of the code regarding suspension of prescription; from which it follows that as to the inability to sue which comes from outside the person it is not necessary, in order to admit it as ground for suspension, that it be expressly stated as such by the law."

The case which comes closest to the situations discussed in this article is the decision of the Court of Cassation on 3 January 1870, in Dalloz, 1872.1.22. One Paul Fialez acquired a half-interest in the succession of Marie Durand, which had been charged with two annuities payable in the locality of St. George-les-Bains. As mayor of the commune of St. George-les-Bains he neglected to pay over the designated sums to the communal treasury for the designated purposes or to inform anyone of his liability. About 45 years later, after his death, the instrument which made him liable to these payments was discovered. It was held that an action for accumulated instalments of the annuities was barred, especially because Fialez had done nothing to conceal his liability; and also because the persons interested could have discovered his breach of duty by reasonable diligence.

[85] GIUSEPPE PUGLIESE, LA PRESCRIZIONE ESTINTIVA, 4th ed., sec. 96 (1924).

[86] The vicissitudes of the principle in Louisiana are described in McKnight v. Calhoun & Lane, 36 La. Ann. 408 (1884). And see Wadlow v. Rose, (C. C. A. 5th, 1927) 20 F. (2d) 662.

[87] Apparently the only American case asserting any doctrine as sweeping as that contained in Bartolus' formula is the underground trespass case of Lewey v. H. C. Fricke Coke Co., 166 Pa. 536, 31 Atl. 261 (1895). After referring to specific exceptions in statutes of limitation for persons under disability and for cases of defendant's absence, the court said (at p. 542) that these exceptions indicate "that the mischief which the statute was intended to remedy was delay in the assertion of a legal right which it was practicable to assert." The court then said (at p. 544) that the equitable exception for cases of undiscovered fraud was based on two considerations: that it would be wrong to allow a defendant to profit by his own fraud, and "that one who can not assert his right, because the necessary knowledge is kept from him, is not within the mischief the statute was intended to remedy. . . . There is no reason, resting on general principles, why ignorance that is the result of the defendant's conduct and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer." But the court then proceeded to bring underground trespass within the "fraud" exception, as other cases likewise have done. See supra, note 70.

claim. Perhaps the clearest case for suspension is the closure of courts on account of civil war or other public disturbance, and here there is strong authority for an "implied exception." [88] A diplomatic immunity from suit which prevented the commencement of an action has been held enough,[89] and similarly where there was no suable defendant in existence during the statutory period.[90] Specific statutory provisions now cover, as a rule, the impediments to suit presented by judicial injunction and absence of the defendant from the jurisdiction.[91] Where the defendant's affirmative interference has prevented the start of suit, results of American cases are far from clear. For example, an elaborate scheme to evade service of process on the officers of a defendant city was held to be an insufficient ground for suspension in the remarkable case of *Amy v. Watertown*.[92] Where the plaintiff was physically imprisoned by the defendant some cases have admitted an "implied exception" or achieved the same result by the use of the "fraud" exception.[93] On the other hand, mere ignorance of the existence of a claim is not enough, if one may trust the sweeping assertions found in a multitude of cases.[94] There seems to be a strong feeling in American cases that some element of misconduct on the opposite side must coöperate with the plaintiff's ignorance in preventing the start of suit. But the "fraud" exception has been so broadly interpreted and the types of misconduct that it includes are so diverse, that American courts have surely gone very far toward the conclusion of Bartolus. If some such doctrine had been frankly stated at the outset, they might have reached more desirable results in related fields.

[88] See cases cited by C. N. Gregory, "The Effect of War on the Operation of Statutes of Limitation," 28 HARV. L. REV. 673 (1915); also Peak v. Buck, 62 Tenn. 71 (1873), and Wirtele v. Grand Lodge, 111 Neb. 302, 196 N. W. 510 (1924). *Contra*, Smith v. Stewart, 21 La. Ann. 67 (1869).

[89] Munsurus Bey v. Gadban, [1894] 2 Q. B. 352.

[90] Broadfoot v. City of Fayetteville, 124 N. C. 478, 32 S. E. 804 (1899).

[91] See the analysis of statutes and decisions in 1 WOOD, LIMITATIONS, 4th ed., ch. 22 (1916).

[92] 130 U. S. 320, 9 Sup. Ct. 537 (1889). The case came up on demurrer to a plea of the statute, plaintiffs' complaint having alleged that the officers, agents, and residents of the defendant city conspired together to prevent service of process, under an arrangement by which the newly elected mayor and common council would secretly qualify for office after their election each year and then resign immediately; and that this plan was carried out until after the statutory period had run. The judgment of the lower court dismissing the complaint was affirmed. Cf. Linn & Lane Timber Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440 (1915).

[93] See supra, notes 65-67.

[94] For citations see American Digest, Limitation of Actions, key number 95 ("Ignorance of Cause of Action").

1. Application of the "Fraud" Exception to Defenses of Fraud

The absence of a satisfactory theory of decision appears clearly in the common law treatment of the *defense* based on fraud. By strict construction of statutory language American courts have succeeded in withdrawing defenses from the operation of limitation acts, asserting that the phrase "action for relief on the ground of fraud" implies *affirmative* action. This reasoning requires exceedingly narrow and technical distinctions between affirmative and defensive use of the same operative facts. But there is abundant authority for defeating[95] or reducing[96] a plaintiff's recovery by a defensive showing of fraud, long after affirmative recovery on the same facts would be barred. One further and very remarkable step is also taken. If the plaintiff can suggest a remedial right existing independently of the original "fraud" and not itself statute-barred, then he may use the "fraud" defensively in a *replication.* That is to say, if the defendant to defeat plaintiff's recovery relies on a transaction in which some "fraud" can be found, the transaction may be removed as an obstacle to recovery by a defensive rescission for "fraud." [97] In such a tangled web of pleading-logic

[95] Misrepresentation by a mortgagee as to the character and contents of a mortgage is a "pure defence" to a foreclosure suit, available more than the statutory period after the execution of the mortgage. Robinson v. Glass, 94 Ind. 211 (1883); Alsdorf v. Hampton, 33 Ariz. 506, 266 Pac. 16 (1928). Other cases applying similar reasoning are McColgan v. Muirland, 2 Cal. App. 6, 82 Pac. 1113 (1906); Goforth v. Goforth, 47 S. C. 126, 25 S. E. 40 (1896); Nasby Building Co. v. Walbridge Building Co., 6 Ohio App. 104 (1916).

Two cases which apparently reject this reasoning altogether are Railroad Co. v. Smith, 48 Ohio St. 219, 31 N. E. 743 (1891), and Parker v. Kuhn, 21 Neb. 413, 32 N. W. 74 (1887). And it seems fairly clear that an affirmative decree rescinding a purchase money mortgage for fraud can not be given after the statute of limitations has run. Williams v. Shrope, 30 Idaho 746, 168 Pac. 162 (1917); Evans v. Duke, 140 Cal. 22, 73 Pac. 732 (1903).

[96] The typical case is the suit by a vendor of land for the balance of the purchase price, where the sale was induced by misrepresentation as to the quality or quantity of the land. Allowing an abatement of the purchase price after the statute had run on any affirmative action by the vendee: Mason v. Peterson, (Tex. Comm. App. 1923) 250 S. W. 142; Evans v. Duke, 140 Cal. 22, 73 Pac. 732 (1903); Peterson v. Feyereisen, 203 Wis. 294, 234 N. W. 496 (1931). In the last case the court allowed an "equitable reduction" of the plaintiff's recovery, in the face of a statute providing that "a cause of action upon which an action can not be maintained can not be effectually interposed as a defense, counterclaim, or set-off." Similarly in Caples v. Morgan, 81 Or. 692, 160 Pac. 1154 (1916), an action by a lessor for instalments of rent.

There is some authority for an injunction in equity against the execution of a law judgment which fails to provide for abatement on these facts. Ransom v. Shuler, 43 N. C. 304 (1852). Awarding an injunction in the related case of breach of warranty, Williams v. Neely, (C. C. A. 8th, 1904) 134 Fed. 1.

[97] An example is the action brought by an execution purchaser against a transferee

as this, many courts and more lawyers have inevitably gone astray, so that results are very far from predictable.[98] The effect of such reasoning, however, is clearly to grant a further indulgence to plaintiffs who had delayed too long after discovery of the "fraud." The second and

from the judgment defendant, whose transfer was intended to defeat creditors. Relying on his title derived from the execution sale, the purchaser in some States need not attack the fraudulent transfer directly in an independent action but can sue for possession of the land. If the fraudulent transfer is set up as an obstacle by the defendant, the plaintiff can repel the defense with a showing of "fraud," which is said to make the transfer wholly void. (Compare the reasoning on this point in cases cited supra, note 50.) The case most frequently cited to this effect is Amaker v. New, 33 S. C. 28, 11 S. E. 386 (1889), followed in Jackson v. Plyler, 38 S. C. 496, 17 S. E. 255 (1892), an action to foreclose a mortgage in which the defendant was the transferee in a fraudulent transfer by the mortgagee. It was also followed in State ex rel. Cardwell v. Stuart, 111 Mo. App. 478, 86 S. W. 471 (1905), involving a release of a cause of action which had been induced by fraud, the court emphasizing a recent reform in Missouri practice which allowed such fraud to be set up by way of reply without an independent suit in equity to set the release aside.

The Kansas cases are in some confusion. In Brown v. Cloud County Bank, 2 Kan. App. 352, 42 Pac. 593 (1895), a creditor was allowed to garnishee his debtor's bank account, incidentally repelling a claim to the fund set up by the transferee of a fraudulent transfer. Thomas v. Rauer, 62 Kan. 568, 64 Pac. 80 (1901), allows a suit by an execution purchaser in ejectment, against a transferee in the same position, on reasoning similar to that in Amaker v. New, supra. But in Nelson v. Stull, 65 Kan. 585, 68 Pac. 617 (1902), a garnishment against the transferee of the fraudulent transfer was held to be substantially a direct attack on the transfer and therefore barred by the statute of limitations, since "legal proceedings, like things, are what they are in essence and not what they may be named."

[98] This reasoning would normally fail where recovery on the alternative theory was already barred. For example, where a cause of action for the conversion of personal property had been released through fraudulent representations of the converter, a rescission of the release might not help the plaintiff's case if the main cause of action was statute-barred. Doyle v. Callaghan, 67 Cal. 154, 7 Pac. 418 (1885). Similarly, Richardson v. Whitaker, 103 Ky. 425, 45 S. W. 774 (1898), and Fox v. Hudson, 150 Ky. 115, 150 S. W. 49 (1912).

But in some cases courts have concentrated on the fraud inducing the release, ignoring the statute as an obstacle to relief on the original liability. The fact situations here are various. An important case is Ludington v. Patton, 111 Wis. 208, 86 N. W. 571 (1901), where a widow had been induced to abandon her statutory rights in her husband's estate, and an action to reassert them was brought later than the year provided by statute for her election. Relief was given in reliance on the very similar case of Smart & Wife v. Waterhouse, 18 Tenn. 94 (1836).

Logical difficulties were likewise ignored in Muir v. Bozarth, 44 Iowa 499 (1876), where a vendee sued for specific performance more than 15 years after the execution of the contract of sale, excusing his delay by showing the vendor's fraudulent representation that he had sold the property to a bona fide purchaser. The court allowed specific performance, asserting that the conveyance had been "in fraud of" the vendee's rights, and ignoring whatever limitation was applicable to actions for specific performance. Similarly in Relf v. Eberly, 23 Iowa 467 (1867), where the plaintiff was induced to accept a conveyance of land in satisfaction of a debt, through misrepresentations as to the condition of the land; and on discovering the fraud was allowed to

more important consequence is to permit evasion of the statutory purpose by exceedingly technical reasoning, without a serious attempt to consider the larger factors of policy that ought to control.[99]

2. *Modern Survival of the Distinction Between Legal and Equitable Actions*

There remains to consider the surviving distinctions between law and equity in the application of the "fraud" exception, distinctions expressly preserved in the legislation of four American States. This legislation suspends the statute until discovery in "actions solely cognizable in equity." [100] The immediate source of this provision was the Field Code of New York, of 1848.[101] While attempting for most purposes to abolish the distinction between law and equity actions, the New York Code preserved the distinction at this critical point.[102] In the California Code, and in legislation that imitated it, the distinction was

sue for the original debt, after rescinding the contract of settlement. Another case of the same type is Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34 (1910).

But in Carr v. Thompson, 87 N. Y. 160 (1881), a more strictly logical analysis prevailed, and relief was denied. An agent had rendered false accounts to his principal over a period of years and the principal sued to reopen the accounts and collect sums improperly retained. The court held that the action was not essentially one for relief on the ground of fraud, but an action for breach of a contract duty to account, with the fraud asserted merely as a ground for setting aside accounts that would otherwise remain closed. It followed that the limitation period applicable was the limitation for contracts express and implied, which contained no exception for cases of non-discovery. The same logical analysis is to be found in Benedict v. Hall, 201 Iowa 488, 207 N. W. 606 (1926). See also Roether v. National Union Fire Ins. Co., 51 N. D. 634, 200 N. W. 818 (1924); Boyer v. Barrows, 166 Cal. 757, 138 Pac. 354 (1914).

[99] The notion that limitation acts should not apply to defenses, but should be restricted to *actions* is certainly not wrong or absurd. In some of the cases cited in notes 95 and 96 it would have been shocking to allow full recovery to the fraudulent plaintiff without deduction for discrepancies in his own performance. The fact that misrepresentations, "fraud," had intervened to mislead the defendant should not preclude defensive proof of such discrepancies. But that is another way of saying that this group of cases does not cut beneath the surface with its logic, and could reach more acceptable results in a difficult situation by invoking a wholly different conceptual apparatus.

[100] Iowa, North Dakota, South Carolina, and South Dakota. See statutes cited supra, note 1, par. 2. At the same place reference is also made to the special statutes of Mississippi and Pennsylvania, applying the "fraud" exception to certain types of equitable actions.

[101] N. Y. Sess. Laws, 1849, p. 635; Code of Proc. (Voorhies, 2d ed., 1852), sec. 91, § 6.

[102] The explanation, no doubt, was the anxiety of the Commissioners not to alter substantive rules in the reform of procedure. The rule applying the "discovery" clause to actions "solely cognizable" in the Chancery was substantially a re-enactment of the provisions of 2 N. Y. Rev. Stat. (1829), sec's 49, 50, 51.

rejected.[103] But the New York rule was widely copied in other code States, and has been a constant source of embarrassment. In New York itself the statutory language was soon modified,[104] and in 1921 the suspension of the statute was extended to legal as well as equitable actions.[105] In other States that had followed New York the same change has been made.[106] In at least one State where the distinction remains, its effect has been very largely destroyed by judicial recognition of "fraudulent concealment" as an independent ground for suspension of the statute.[107] Indeed, a distinction so arbitrary and so largely discredited would not deserve especial notice were it not for the fact that it has generated some tests for the scope of modern equity jurisdiction,[108] and may still affect the development of the related doctrine of "fraudulent concealment." [109]

[103] Calif. Stat. (1850), c. 127, sec. 17. This clause was very widely copied in western States. See statutes collected supra, note 1.

[104] Amendment of 1876, providing a six-year period of limitation for "an action to procure judgment, other than for a sum of money, on the ground of fraud, in a case which, on the 31st day of December, 1846, was cognizable by the court of Chancery. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." N. Y. Laws of 1876, c. 448, sec. 382(5).

[105] N. Y. Civ. Pr. Act (1921), sec. 48, § 5.

[106] The New York rule was in force in North Carolina from 1868 to 1889, when the "discovery" clause was made applicable to all actions for relief on the ground of fraud. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172 (1900). An amendment of 1929 achieved the same result in Wisconsin, Laws of 1928-9, c. 24.

In Iowa the legislature apparently attempted the same change in 1870, but the language which now survives in the Iowa Code (1931), sec's 11007(5) and 11010 was not perfectly clear, and the supreme court held that the old rule was unchanged. Phoenix Ins. Co. v. Dankwardt, 47 Iowa 432 (1877).

[107] Faust v. Hosford, 119 Iowa 97, 93 N. W. 58 (1903). In North Dakota the question was expressly left open in Roether v. National Union Fire Ins. Co., 51 N. D. 634, 200 N. W. 818 (1924). Fraudulent concealment as a ground for suspension has been rejected in Wisconsin. Sander v. Newman, 174 Wis. 321, 181 N. W. 822 (1921), and cases cited.

[108] One may be permitted some doubt as to whether tests for equity jurisdiction formulated under the pressure of this archaic provision should be entitled to any weight where equitable relief is sought for other purposes. For example, in Bosley v. National Machine Co., 123 N. Y. 550, 25 N. E. 990 (1890), the court described as an equitable action "to procure judgment other than for a sum of money," a suit by a defrauded purchaser of stock for restitution of money paid, the equitable relief consisting in cancellation of the corporation's record of plaintiff's ownership of the stock. The case has been followed in similar fact situations where the reasons for an appeal to equity were quite different. Corbitt v. Transportation Shares, Inc., 256 N. Y. 685, 177 N. E. 193 (1931); Willis v. Fowler, (Fla. 1931) 136 So. 358; Heater v. Lloyd, 85 W. Va. 570, 102 S. E. 228 (1920). A more striking example is the New York "constructive trust" case of Lightfoot v. Davis, discussed infra, note 117.

[109] A distinction between legal and equitable actions is maintained to some extent

The exception was limited in the original clause to actions "solely cognizable" in equity before the codes. It naturally followed from such language that if legal and equitable remedies were concurrent the exception could not apply. The actions to which the exception most clearly did not apply were actions for damages for deceit, and for restitution of money paid through fraud.[110] On the other hand, if the relief sought by the plaintiff was wholly beyond the powers of a court of law, the running of the statute could be postponed. Where full relief required an order for the conveyance of land,[111] a decree for reformation

in cases of fraudulent concealment, in England, New Jersey, and New York. These cases will be discussed in a subsequent article.

[110] Jacobs v. Frederick, 81 Wis. 254, 51 N. W. 320 (1892); Stahl v. Broeckert, 170 Wis. 627, 176 N. W. 66 (1920); McGinnis v. Hunt, 47 Iowa 668 (1878). In the last case a vendor sued his vendee, who had induced the sale through fraud and who had then resold the land to others. The original petition prayed for cancellation and reconveyance, with the obvious purpose of making it an action "equitable" in character; but by an amendment the petition was dismissed as to all except the original vendee, against whom the plaintiff asked only damages. A demurrer to the complaint was then sustained, on the ground that the complaint had necessarily become one "at law." And compare Miller v. Wood, 116 N. Y. 351, 22 N. E. 553 (1889), and Ball v. Gerard, 160 App. Div. 619, 146 N. Y. S. 81 (1914), aff'd 221 N. Y. 665, 117 N. E. 1060 (1917), where the "discovery" clause was held inapplicable to an action for damages for deceit under the modified clause quoted supra, note 104.

For cases indicating that the same was true of an action for restitution of money paid through fraud, see Higgins v. Mendenhall, 51 Iowa 135 (1879), and Wagner v. Standard Seed Tester Co., 194 Iowa 1330, 191 N. W. 314 (1923); Pullan v. Struthers, 201 Iowa 1179, 207 N. W. 235 (1926).

[111] Muir v. Bozarth, 44 Iowa 499 (1876), where the plaintiff sued "in equity" for specific performance of a contract to convey land. The plaintiff had sued for the same relief fifteen years earlier, and defendant had testified that the land had been sold to *G*, a bona fide purchaser, by a deed which was in fact a mortgage. After defendant had procured a reconveyance from *G*, through payment of the mortgage debt, plaintiff discovered defendant's perjury and sued at once for specific performance. The court said (at p. 502): "Where there has been such a gross violation of every principle of honesty, equity will discover some means of affording relief, unless some well-defined principle of law obstructs the pathway to justice." The "well-defined principle of law" which the court was forced to evade was the Iowa statute of limitations, but the court was able to persuade itself that the conveyance to *G* was "in fraud of" plaintiff's rights, so that the statute would run only from plaintiff's discovery of the "fraud." This rather dubious reasoning was apparently the only device left for suspension of the statute, since more than the statutory period had elapsed from defendant's perjured statements, so that it would not have helped to describe them as an independent and actionable fraud. Cf. Ott v. Hood, 152 Wis. 97, 139 N. W. 762 (1913).

In another Iowa case the statute was suspended where the plaintiff sued to enforce a conveyance of land, title to which was taken by plaintiff's agent in his own name, in violation of his obligation to the plaintiff. Ryan v. Doyle, 31 Iowa 53 (1870). Similarly where the plaintiff sought to set aside for fraud some court orders for an executor's sale of land. Cowin v. Toole, 31 Iowa 513 (1871).

of a deed,[112] or a decree cancelling the plaintiff's deed,[113] the exception quite clearly applied. Where a transfer by the defendant to a third person was attacked, equitable relief would normally be indispensable,[114] but where the voidable transfer had been made to the plaintiff there was more doubt, since a tender of reconveyance by the plaintiff himself would ordinarily remove the transfer as an obstacle to rescission.[115]

But this does not exhaust the supply of distinctions. What if several remedies, some of them legal in form, are available, but the plaintiff to escape the statutory bar chooses a specific equitable remedy? Where the plaintiff chose specific restitution on a theory of rescission, the availability of damages at law on a theory of affirmance was not usually considered fatal.[116] But where specific restitution was impos-

[112] Day v. Day, 84 N. C. 408 (1881).

[113] O'Dell v. Burnham, 61 Wis. 562, 21 N. W. 635 (1884); Pels v. Stevens, 187 Iowa 443, 173 N. W. 56 (1919); Mullen v. Callanan, 167 Iowa 367, 149 N. W. 516 (1914). In O'Dell v. Burnham, Mullen v. Callanan, and Muir v. Bozarth (44 Iowa 499 (1876)), no question was raised as to the propriety of including with such specific relief an accounting for rents and profits.

[114] Erickson v. Quinn, 47 N. Y. 410 (1872) (bill to set aside fraudulent transfer by debtor); Foote v. Harrison, 137 Wis. 588, 119 N. W. 291 (1909) (judgment creditor's bill to reach land purchased by judgment debtor in names of his children); Toole v. Johnson, 61 S. C. 34, 39 S. E. 254 (1901) (action to set aside deed of administrator to his wife, executed after judgment sale at which bidding had been "chilled" by administrator's attorney). Similarly where creditors seek to set aside as "fraudulent" a confession of judgment by their debtor, Beattie v. Pool, 13 S. C. 379 (1879).

Also where a life tenant, by his failure to pay taxes, exposed the property to tax sale, and took a tax deed in his wife's name, with the "fraudulent" object of cutting off the plaintiff's remainder interest; the court saying that a cancellation of the tax deed was essential, since an action of ejectment could not prevail against it. Boon v. Root, 137 Wis. 451, 119 N. W. 121 (1908). (But cf. ejectment suit on similar facts in Fox v. Zimmerman, 77 Wis. 414, 46 N. W. 533 (1890).)

[115] Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581 (1907) (suit by minority stockholder to set aside sale to the corporation by a director, barred since the corporation's power to disaffirm "accrued" immediately); Wagner v. Standard Seed Tester Co., 194 Iowa 1330, 191 N. W. 314 (1923) (action "in equity" to cancel certificates of stock purchased by plaintiff through fraud, and to recover the purchase price paid). But cf. Shank v. Teeple, 33 Iowa 189 (1871), and especially Bosley v. National Machine Co., 123 N. Y. 550, 25 N. E. 990 (1890) where an action to rescind the plaintiff's purchase of stock was held to be equitable for the purpose of the modified New York statute, inasmuch as the plaintiff asked not only for a money judgment but for the cancellation of her name on the corporation's books, felt by the court to be necessary to protect plaintiff from possible liability to creditors and employees of the corporation.

[116] This was the assumption of most of the cases cited supra, notes 111 and 113. In Relf v. Eberly, 23 Iowa 467 (1867), the defendant induced the plaintiff to accept a conveyance of land in satisfaction of a debt, through misrepresentation as to quality.

sible, so that a money judgment was required, the availability of quasi-contract relief for that purpose made the exception inapplicable. In one New York case the court evaded the difficulty by the magic of a "constructive trust," thereby contributing greatly to the development of constructive trust doctrine for other purposes.[117] In Iowa, by a peculiar twist in judicial reasoning, the breach of a fiduciary obligation was said to give equity exclusive jurisdiction and thus to extend the statute.[118]

On discovering the misrepresentation plaintiff sued for the original debt, praying that the contract of discharge be rescinded. The court said that the exception was not excluded in all cases where *some* relief could be given at law, since that was almost always true, but that the question was whether the particular relief sought could be given only in equity, adding that a decree "rescinding" the contract could not be given at law. There were dicta pointing the other way, however, in Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754 (1915).

[117] Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (1910), where bonds were stolen from the plaintiff by his father-in-law, a local banker, who collected them at maturity some time before his death 24 years later. The identity of the thief was then discovered, and the plaintiff brought an action against the administrator of the deceased, praying for an accounting for the amount of the bonds and the income therefrom that could be traced, and if none could be traced, then for a money judgment. The modified New York statute, referred to supra, note 104, was held to be no bar to relief on a theory of constructive trust. The court emphasized the dangers in a strict application of the statute of limitations to secret thefts, particularly where long-term bonds were involved, since detection might be impossible until an attempt was made by the thief to collect the principal. But since an action of trover would clearly have been barred, the court was forced into the strenuous argument that *if* the plaintiff had been able to trace the proceeds of the theft he could have imposed a constructive trust, so that *therefore*, since tracing was impossible, he was entitled to an accounting in equity with a personal judgment against the constructive trustee.

Criticism of the case should not lose sight of the wholly desirable result on the particular facts which were clearly proved; or of the equally desirable relaxation of the strict requirements of tracing which it facilitated in later New York decisions. Falk v. Hoffman, 233 N. Y. 199, 135 N. E. 243 (1922); Fur & Wool Trading Co. v. Fox, 245 N. Y. 215, 156 N. E. 670 (1927), discussed in 37 YALE L. J. 654 (1928). But in the application of the statute of limitations Lightfoot v. Davis might have opened up a wide avenue for evasion, in cases whose facts were far less clear, by applying the label "constructive trust" to actions for money judgments. What could be done with the help of Lightfoot v. Davis was shown by Seely v. Seely, 164 App. Div. 650, 150 N. Y. S. 66 (1914), where, however, some of the elements of an express trust had been present and the plaintiff merely sought an accounting for the proceeds of a wrongful sale of the trust property. On the whole it is surprising that the reported cases in the lower courts of New York made so little use of Lightfoot v. Davis, prior to the extension of the statutory exception to all types of action, in 1921.

[118] Faust v. Hosford, 119 Iowa 97, 93 N. W. 58 (1903), where money had been delivered to an agent for investment in first mortgages, but had subsequently been invested by the agent in second mortgages. Judgment for the plaintiff was reversed on other grounds, but the court said that since the relationship between principal and agent was fiduciary in character, the action for restitution of the money paid by the principal was "heretofore solely cognizable in a court of equity," so that the statutory

But in a large number of other cases the courts applied the statutory distinction with a ruthlessness that provokes respect, refusing to be misled by prayers for an accounting,[119] for the imposition of constructive

exception applied. These dicta were even less persuasive in Faust v. Hosford, in view of the court's statement that the suspension of the statute could have been achieved equally well through the doctrine of fraudulent concealment, which had been recognized in earlier Iowa cases. But this suggestion was taken up in later cases, involving other types of fiduciary relation. Caffee v. Berkley, 141 Iowa 344, 118 N. W. 267 (1909), and Cress v. Ivens, 155 Iowa 17, 134 N. W. 869 (1912) (corporation and promoters). (Cf. Wagner v. Standard Seed Tester Co., 194 Iowa 1330, 191 N. W. 314 (1923).) With the aid of this remarkable doctrine, and with further aid from the doctrine of fraudulent concealment, the statutory distinction between legal and equitable actions seems to have occasioned very little discomfort in Iowa.

For a brief period the Wisconsin cases appeared to develop in the direction suggested by Faust v. Hosford. In the *cause célèbre* of Ludington v. Patton, 111 Wis. 208, 86 N. W. 571 (1901), the executors of a prominent Wisconsin citizen induced his widow to accept the provision made for her in his will, preventing an election within the statutory year of her widow's rights in his estate. The only misrepresentation considered by the court to be material was the indirect representation of the executors that the widow as a matter of law could not secure a larger share by renouncing her rights under the will and claiming her widow's rights in the estate. The court found that a fiduciary relation existed as a matter of law between the executors and the plaintiff, and a confidential relationship in fact, and concluded that the estate still in their hands was held on constructive trust and that the heirs and executors must account to the plaintiff for the share which she would have taken if her election had been exercised in time. In later cases Ludington v. Patton was confidently relied on by counsel as extending the statutory period in accounting between persons in a fiduciary relation, but the reaction came in Pietsch v. Milbrath, 123 Wis. 647, 102 N. W. 342 (1905), the first of a series of extremely strict decisions. (See note 121 infra.)

[119] The prayer for an equitable accounting was the most popular pretext urged by litigants for extension of the statutory period. Cases rejecting this device are Benedict v. Hall, 201 Iowa 488, 207 N. W. 606 (1926) (suit for royalties by vendor of patent); Lenhardt v. French, 57 S. C. 493, 35 S. E. 761 (1899) (counter-claim by residuary legatee for sum retained by widow and not accounted for); Mason v. Henry, 152 N. Y. 529, 46 N. E. 837 (1897) (action by receiver of insolvent insurance corporation against trustees for misapplication and waste of corporate assets); Foot v. Farrington, 41 N. Y. 164 (1869) (action for an accounting by partner for sums secretly withdrawn and not recorded on partnership ledger). Other actions for accounting for secret profits, treated in the same way: Sander v. Newman, 174 Wis. 321, 181 N. W. 822 (1921) (joint enterprisers); Pietsch v. Milbrath, 123 Wis. 647, 102 N. W. 342 (1905) (promoters); Pietsch v. Wegwart, 178 Wis. 498, 190 N. W. 616 (1922) (directors). Cf. State v. Chicago & Northwestern Ry., 132 Wis. 345, 112 N. W. 515 (1907), an action by the State for license fees, computed on the basis of defendant's gross earnings, which were alleged to have been misrepresented in annual statements to the state treasurer. The action was held to be an equitable action for an accounting, so that defendant was not entitled to a jury trial but barred, since not "solely cognizable" in equity.

The result was the same under the modified New York statute in force from 1877 to 1921. Model Bldg. & Loan Ass'n v. Reeves, 236 N. Y. 331, 140 N. E. 715 (1923), an action by a corporation for money abstracted by its director, defendant's law partner, and applied for the benefit of the law partnership, with prayers added for an accounting, for discovery, and for the appointment of a receiver. Cf. dicta to the

trust or equitable lien,[120] or by the hardship of particular cases.[121]

Apart from statutes that expressly preserve the distinction between legal and equitable actions based on fraud, this historical test has almost completely disappeared. With it has also gone from this field the doctrine of laches, except as that equitable doctrine is reflected in the requirement of diligence in "discovering" the defendant's fraud.[122] To this last statement an important qualification is necessary as to federal courts, which have developed a special federal rule with the aid of the doctrine of laches.[123] And finally, a reservation must also be made for

contrary in Carr v. Thompson, 87 N. Y. 160 (1881), and decision in Slayback v. Raymond, 93 App. Div. 326, 87 N. Y. S. 931 (1904).

[120] Daugherty v. Daugherty, 116 Iowa 245, 90 N. W. 65 (1902) (action against purchaser with notice of fraud on plaintiff by plaintiff's grantees, to reach proceeds of purchaser's sale of the land); Darling v. Nelson, 171 Wis. 337, 176 N. W. 847 (1920) (action for lien to extent of money value of plaintiff's interest in land jointly owned, surrendered to defendants through mistake); Seitz v. Seitz, 59 App. Div. 150, 69 N. Y. S. 170 (1901) (action for an accounting for money deposited with defendant for investment, with prayer for lien on property in which money was improperly invested).

Contra, Lightfoot v. Davis, 198 N. Y. 216, 91 N. E. 582 (1910); Slayback v. Raymond, 93 App. Div. 326, 87 N. Y. S. 931 (1904) (action for an accounting for stock delivered to defendant for redelivery to another, held to be based on a fiduciary relation and on a right to restitution of the specific shares, so that action was "other than for a sum of money" although specific restitution was no longer possible).

[121] The cases in the preceding notes involve, in some instances, very great hardship, but perhaps no more than is usually involved in the application of statutes of limitation to cases of misplaced confidence. But an extreme example of rigorous logic is Pietsch v. Milbrath, 123 Wis. 647, 102 N. W. 342 (1905), the case which turned the tide in Wisconsin (see supra, note 118). There the plaintiffs were stockholders suing for restitution of secret profits made by promoters of a corporation through sale of property to the corporation at an inflated valuation. Plaintiffs contended that defendants were "estopped" to rely on the statute of limitations, since they had been throughout in control of the corporation; also that the plaintiffs' action, a stockholders' bill, was necessarily equitable in form; and that the fiduciary relation of promoter to corporation suspended the statute. All these contentions were rejected, the court emphasizing the cause of action at law for damages that immediately accrued to the corporation on defendants' breach of duty, and adding that plaintiffs sued only to enforce the corporation's claim. In accord on the last point: Figge v. Bergenthal, 130 Wis. 594, 109 N. W. 581 (1907), and Pietsch v. Wegwart, 178 Wis. 498, 190 N. W. 616 (1922). *Contra*, Stoltz v. Scott, 23 Idaho 104, 129 Pac. 340 (1913) (creditors suing directors for illegal declaration of dividend).

[122] Asserting that the doctrine of laches has been supplanted by definite statutory periods of limitation: McPhee v. Tennant & Miles, 124 Wash. 617, 215 Pac. 16 (1923) (action for damages for deceit); Pollitz v. Wabash R. R., 207 N. Y. 113, 100 N. E. 721 (1912) (action for secret profits by directors of corporation); Victor Oil Co. v. Drum, 184 Cal. 226, 193 Pac. 243 (1920) (action for secret profits by promoters). But cf. Newport v. Hatton, 195 Cal. 132, 231 Pac. 987 (1924). The connection between laches and the requirement of diligence in "discovering" a concealed cause of action is suggested supra, note 78.

[123] This doctrine originated in Kirby v. Lake Shore & Michigan Southern R. R., 120 U. S. 130, 7 Sup. Ct. 430 (1887), an action brought in the federal court sitting

English cases which have developed without much aid from statute[124]

in New York to set aside settlements with the defendant railroad by the plaintiff, a shipper. Plaintiff claimed that the settlements had been induced by false representations as to the rates charged by defendant's competitors, which were material because of a contract with plaintiff that defendant would charge plaintiff no more than defendant or any competitor charged for the same service. Under the original New York statute then in force (see supra, note 101), the suspension of the statute until discovery was permitted only in actions "solely cognizable" in equity. An earlier New York case (Carr v. Thompson, 87 N. Y. 160 (1881)) had intimated on similar facts that the statutory exception could not apply, since the jurisdiction of law and of equity was concurrent. The Supreme Court of the United States held that plaintiff's action in equity for an accounting was barred, since the misrepresentation had been discovered for more than the period prescribed by New York statutes for that type of action. The court indicated its willingness to follow, by way of *analogy*, the local state rules of limitation, but in the course of its discussion said (at p. 138):

> "It is clear that the statute of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was, or should with due diligence, have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state. It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States can not be impaired by the laws of the respective states in which they sit. It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud."

These dicta have been employed by lower federal courts to emancipate themselves from state statutes which gave too narrow a scope to concealed fraud as a ground for suspension of the statute. Lopez v. Gautier, (C. C. A. 1st, 1930) 41 F. (2d) 914; Schindler v. Spackman, (C. C. A. 8th, 1926) 16 F. (2d) 45; Tilden v. Barber, (D. C. N. J. 1920) 268 Fed. 587. But the confusion which might have been expected from this development of a "Federal common law" (see dissent of Holmes, J., in Black & White Taxi Co. v. Brown & Yellow Taxi Co., 276 U. S. 518, 48 Sup. Ct. 404 (1927)) has been mitigated by a liberal use of the doctrine of laches. Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942 (1889); Humphreys v. Walsh, 248 Fed. 414 (1918); Newberry v. Wilkinson, (C. C. A. 9th, 1912) 199 Fed. 673; United States v. Diamond Coal & Coke Co., 255 U. S. 323, 41 Sup. Ct. 335 (1920). It has in fact been suggested that in the absence of extraordinary circumstances the state statute will be applied under the guise of the laches doctrine, particularly if the statute recognizes concealed fraud as a ground for suspension. Redd v. Brun, (C. C. A. 8th, 1907) 157 Fed. 190. See also Benedict v. City of New York, 250 U. S. 321, 39 Sup. Ct. 476 (1919).

[124] There was a statutory provision in 3 and 4 William IV, c. 27, sec. 26, 73 Stats. at Large 146 (1833), suspending the statute of limitations in equity until discovery, in cases of "concealed fraud" where recovery was sought of "any land or rent." This extremely narrow provision has not influenced later decisions materially, and its

and have now reached a state of almost indescribable confusion.[125]

The obsolescence of the distinction between legal and equitable rules for the operation of the statute has left unanswered two important questions as to the relations of law and equity. First, will the refusal of courts of law to suspend the statute until discovery justify equity in assuming jurisdiction because the legal remedy is inadequate? Surely the bar of the statute is enough to make the legal remedy valueless for most purposes. On the other hand, for equity to assume jurisdiction on this ground alone, when no other grounds for equitable relief were present, would undermine the whole system of legal rules and the interests which they undertook to protect. In a few cases there are intimations that equity might assume jurisdiction in this type of case, and then proceed to administer legal relief.[126] The early English authori-

meaning is not yet perfectly clear. See Lindley, L.J., in Willis v. Lord Howe, [1893] 2 Ch. 545.

[125] See Gibbs v. Guild, 9 Q. B. D. 59 (1882), and Lynn v. Bamber, [1930] 2 K. B. 72, discussed infra.

[126] Blair v. Bromley, 5 Hare 542, 67 Eng. Repr. 1026 (1846), where plaintiffs left funds with a firm of solicitors to be used in the purchase of a particular mortgage. The solicitors appropriated the money, but represented that the mortgage had been purchased and then accounted regularly for interest supposedly received therefrom. The court said that the bill in equity brought against one of the partners presented prima facie a case cognizable at law, but pointed out (at p. 559) that "there is no proceeding at law by which they (plaintiffs) could have avoided the effect of the statute." The court allowed the bill, saying: "The consequence is that the plaintiffs have lost their remedy at law; and they are remediless unless relief be given in this court. The jurisdiction of this court is assumed on the ground of the fraud, and the time will run only from the discovery of the fraud."

In Kirby v. Lake Shore & Mich. Southern R. R., 120 U. S. 130, 7 Sup. Ct. 430 (1886), the case originating a "federal equity" operating independently of state legislation (see supra, note 123), the result seems to point in the same direction. The action was brought in the New York district to set aside settlements of accounts with defendant railroad, alleged to have been based on misrepresentations as to the rates commonly charged by defendant for shipments of live stock. New York decisions as to the effect of the "discovery" clause were obscure, but the Supreme Court of the United States asserted confidently that the case was cognizable in equity, since the accounts involved were too complicated for a jury and there was a charge of "actual concealed fraud." The court then concluded that, since it was an equity case, a court of equity could apply its own tests for the running of the statute on defendant's fraud. This bootstrap reasoning does not seem to have been imitated in later federal decisions.

In Lincoln v. Judd, 49 N. J. Eq. 387, 24 Atl. 318 (1892), a court of equity asserted a "concurrent" jurisdiction with courts of law over reopening an agent's accounts for fraud; and gave, as one of the reasons for equity to assume jurisdiction, the fact that at law the action would be barred. This reasoning is rejected in Keys v. Leopold, 241 N. Y. 189, 149 N. E. 828 (1924), discussed in 26 COL. L. REV. 362 (1926). See also Rawll v. Baker-Vawter Co., 187 App. Div. 330, 176 N. Y. S. 189 (1919).

ties were obscure. The only conclusion that could be drawn from them with any confidence was that where there were independent grounds for equitable relief, even though jurisdiction was concurrent with that of common law courts, the equitable rule could be applied to equitable actions.[127]

The English cases were even more confused as to the second question, whether equity would enjoin a plea of the statute of limitations in legal actions if the equitable doctrine suspending the statute was not adopted at law. This appeared to be an even more drastic step, since it was a perfectly clear attempt by courts of equity to impose their own views of morality and policy on courts of law. But it was possible to argue, as in the previous case, that a plea of the statute operated to defeat a meritorious claim which would have been preserved if it had been presented as an "equitable" action. To enjoin a plea of the statute and then allow the law action to proceed along its normal course was even simpler, and certainly more direct, than for equity to assume jurisdiction of the whole case. Unfortunately the question was not decided in England before the passage of the Judicature Act. Inability to agree as to whether that step would have been taken by the Chancery before the Judicature Act helped to divide the Court of Appeal in the leading case of *Gibbs v. Guild*,[128] and to perpetuate a profound confu-

[127] This conclusion could be drawn from Booth v. Lord Warrington, 4 Bro. P. C. 163, 2 Eng. Repr. 111 (1714), discussed supra, note 17. But Holker, L.J., dissenting in Gibbs v. Guild, 9 Q. B. D. 59 (1882), was unwilling to accept this conclusion, and said of Booth v. Lord Warrington: "I know not whether it was rightly decided or not, but it is very vaguely reported, and as so reported it is very difficult to understand. . . . It may be that the House of Lords imagined that there was no sufficient remedy at law (although I am bound to say I should not think so myself), and that the only remedy was in equity. . . . " (p. 74.)

The dispute at this point was extremely important. The Judicature Act of 1873 had provided that in cases of conflict between law and equity the equitable rule was to prevail. If it could be inferred that jurisdiction of law and equity courts was concurrent in all cases based on fraud, and if equity suspended the statute until discovery in equitable actions, then there was a "conflict" in all actions based on fraud, and this "conflict" might be resolved in favor of the equity doctrine. This was in substance the conclusion of the majority in Gibbs v. Guild, but the decision is not clear-cut, since the court relied expressly on the element of fraudulent concealment alleged by the plaintiff.

[128] 9 Q. B. D. 59 (1882), an action for damages for fraudulent misrepresentations inducing plaintiff's purchase of shares of stock, with allegations in the replication that defendant "in order to prevent the plaintiff from discovering the fraud, actively and deliberately concealed the same until within six years." Brett, L.J., one of the two majority judges, argued that equity might have enjoined a plea of the statute under such circumstances, but left the point open as unnecessary for decision. Against him was a decision of the Exchequer of Pleas, a decision that was not binding on the Court of Appeal. Hunter v. Gibbons, 1 H. & N. 459 (1856). It is clear that if equity would

sion ever since.[129] In this country New Jersey is the only State where that method has been used to introduce the "fraud" exception in legal actions.[130] In other States so bold a step was either not considered,[131] or else was made unnecessary by the acceptance of equity doctrines in courts of law. But this device remains as the last resource of an outraged morality, and in New York it has recently been used, in the face of formidable obstacles, to insure the triumph of the " fraudulent concealment" doctrine.[132]

It appears, then, that the "fraud" exception has made its way into the main body of common law doctrine after an earlier history among the ghostly creations of Chancery morality. Its standing in courts of law was for a long period somewhat doubtful. But in modern times, largely with the help of statute, it has in most States become an essential element in the statutory system for the limitation of actions. That it reflects important factors of morality and policy is indicated not only by the willingness of many courts to adopt it without the aid of statute, but more especially by the wide sweep of the category of "fraud" in judicial

have given such an injunction the "conflict" between law and equity would have been much sharper, and the equity doctrine would certainly have prevailed.

[129] Uncertainty as to whether equity would have enjoined a plea of the statute at law was not the only source of confusion. In Gibbs v. Guild there was the element of fraudulent concealment, as to which the authorities raised still more difficult questions. The hierarchy of English courts added another complicating factor, since the Court of Appeal was not bound by the earlier decision in Hunter v. Gibbons (see supra, note 128), and the Irish courts, while purporting to apply English doctrine, were free to reject Gibbs v. Guild. Barber v. Houston, 18 L. R. Ir. 475 (1885). To these competing jurisdictions should be added the Privy Council, whose decision in Bulli Coal Mining Co. v. Osborn, [1899] A. C. 351, reflected an extremely liberal point of view but was not binding on other English courts. In Lynn v. Bamber, [1930] 2 K. B. 72, McCardie, J., attempted in elaborate dicta to formulate some general conclusions, but it is doubtful whether these can be relied on as a statement of "the law" until a higher court has been smoked out into the open. See Brunyate, "Fraud and the Statutes of Limitations," 4 CAMB. L. J. 174 (1931).

Perhaps the greatest source of confusion is the practice of English judges in quoting mellifluously the most casual dicta of their distinguished colleagues on the bench. In sharp contrast with this practice are their narrow views as to what is really "binding" precedent, particularly where it comes from remote branches of the judicial hierarchy.

[130] Holloway v. Appelget, 55 N. J. Eq. 583, 40 Atl. 27 (1897). The result of such an injunction is clearly to make the equitable rule prevail, and the question will at once arise whether circuity would not be avoided by admitting a replication of non-discovery in a law action. In Freeman v. Conover, 95 N. J. L. 89, 112 Atl. 324 (1920), the Court of Errors and Appeals divided eight to five on this question, but the majority concluded that the distinction between law and equity must be preserved.

[131] Under the New York statute expressly restricting the suspension until discovery to actions "solely cognizable" in equity, a court would have been extremely courageous to have evaded by this means the statutory classification of actions to which the "discovery" clause applied.

[132] Dodds v. McColgan, 229 App. Div. 273, 241 N. Y. S. 584 (1930).

decision. It is fair to say that by this means most courts have suspended limitation acts wherever the plaintiff's ignorance of the existence of his claim was justified by the direct misrepresentation of the opposite party or by the breach of moral obligation by a fiduciary. There remain some types of secret wrongdoing whose inclusion in the category of "fraud" is more doubtful. The scope of the "fraud" exception has certainly not been determined by any general theory as to the purposes of limitation legislation. Whether or not any such theory can ever be evolved, its absence has brought timidity in cases which were not, in common usage, tagged with the label "fraud." It has also resulted in the creation of an independent exception for actions "fraudulently concealed," and thereby added new difficulties in a field where obscure and conflicting factors of policy must in any case have brought confusion.