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IN a recent article the writer has discussed a common exception to statutes of limitation — the exception for claims based on undiscovered "fraud."[1] It was there pointed out how useful this exception has been made through the wide definition of "fraud" that is now fully established. By judicial decision "fraud" has been extended far beyond the field of misrepresentation of fact into the twilight zones of "constructive fraud" and out toward the open spaces of naked tort. But some boundaries had to be fixed even to the extension of substantive principles by the painless process of definition. There remained important types of wrongdoing, accomplished characteristically in secret, which courts hesitated to describe as "fraud" and which they refused to bring within the "fraud" exception. In these cases the essential reasons for suspension of the statute might exist in equal degree. That is to say, the plaintiff's ignorance of the existence of a claim might in fact prevent the commencement of suit, and at the same time might appear to be excused by the character of the defendant's wrong. It is the purpose of this paper to inquire how far cases of the latter type have been cared for by direct legislation and judicial manipulation of limitation acts.

In early cases[2] there had appeared the broad notion that in all types

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[1] "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 (1933).

[2] First Massachusetts Turnpike Co. v. Field, 3 Mass. 201 (1807); Harrisburg Bank v. Forster, 8 Watts (Pa.) 12 (1839); Kane v. Cook, 8 Cal. 449 (1857); Munson v. Hallowell, 26 Tex. 475 (1863); Voss v. Bachop, 5 Kan. 59 (1869) (dicta); Township of Boomer v. French, 40 Iowa 601 (1875). *Contra*: Troup v. Executors of Smith, 20 Johns. (N. Y.) 33 (1822); Cocke and Jack v. McGinnis, 8 Tenn. 361

of actions,[3] legal as well as equitable,[4] the operation of statutes of limitation might be suspended by fraudulent concealment of the cause of

(1828); Fee's Adm'r v. Fee, 10 Ohio 469 (1841); Cook v. Rives, 21 Miss. 328 (1850).

[3] In succeeding parts of this paper will be found ample references to the very wide variety of actions saved from extinction by the "fraudulent concealment" exception: actions based on "contract," actions for restitution of personal property, actions for damages for torts to person or property, etc. Even where statutory language appears to exclude such exceptions it has been read in, as in a statute providing that no will shall be probated "after twenty years from the death" of the testator. Appeal of Deake, 80 Me. 50, 12 Atl. 790 (1888). Likewise, where a special 4-month limitation was applied to causes of action accruing after the death of the person liable: Eising v. Andrews, 66 Conn. 58, 33 Atl. 585 (1895); and under the special 2-year limitation of the Federal Bankruptcy Act, applying to all actions by or against the assignee in bankruptcy. Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155 (1885).

[4] The procedural distinction between legal and equitable actions has never been prominent in the application of the "fraudulent concealment" exception, as it was for some time in actions founded on undiscovered "fraud." See Dawson, "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 at 597 ff. (1933). In the earliest American cases the problem of suspension for fraudulent concealment was faced in its wider aspects, as a question of morality and policy, very little influenced by the peculiar doctrines of the English Chancery. See *ibid.* at p. 606.

In modern cases there are only two States that admit a distinction between legal and equitable actions in the operation of the "fraudulent concealment" exception. New Jersey is now thoroughly committed to the circuitous device of enjoining a plea of the statute at law, by separate bill in equity. Holloway v. Appelget, 55 N. J. Eq. 583, 40 Atl. 27 (1897); Freeholders of Somerset v. Veghte, 44 N. J. L. 509 (1882); Freeman v. Conover, 95 N. J. L. 89, 112 Atl. 324 (1920); Weinstein v. Blanchard, 9 N. J. Misc. 113, 152 Atl. 787 (1930). But *cf.* Chemical Nat. Bank v. Kissane, (C. C. N. D. Calif. 1887) 32 Fed. 429. The New York cases have gone through a long process of evading and undermining the early case of Troup v. Executors of Smith, 20 Johns. (N. Y.) 33 (1822), in which fraudulent concealment was held to be an insufficient ground at law for suspension of the statute. As early as Miller v. Wood, 116 N. Y. 351, 22 N. E. 553 (1889), there were intimations that a defendant might be "estopped" in equity where he had "intentionally and successfully" prevented discovery by the plaintiff. In the important case of Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (1910), fraudulent concealment was one of the grounds for allowing an "equitable" action to reach the money proceeds of stolen bonds. In the similar case of Clarke v. Gilmore, 149 App. Div. 445, 133 N. Y. S. 1047 (1912), an action "in equity" was allowed "to prevent the defendant from resorting to the statute of limitations." And the process of evolution seems to be completed by Dodds v. McColgan, 229 App. Div. 273, 241 N. Y. S. 584 (1930), where an action "in equity" was allowed for the collection of a money debt, the court intimating that it would have enjoined a plea of the statute if plaintiff had sued "at law" but asserting that this circuity was not necessary in order for equity to relieve against the unjust operation of the statute of limitations.

The earlier English cases leave open the question whether a court of equity would have enjoined a plea of the statute in a legal action, on the ground of fraudulent concealment. See Hunter v. Gibbons, 1 H. & N. 459 (1856); Re Arbitration Between the Astley and Tyldesley Coal Co. and the Tyldesley Coal Co., 80 L. T. R. 116, 15 T. L. R. 154 (1899); Lynn v. Bamber, [1930] 2 K. B. 72.

action. This notion has been expressly adopted by legislation as an exception to limitation acts in 13 States,[5] and has been recognized independently of statute in 15 jurisdictions.[6]

I

RELATION OF "FRAUDULENT CONCEALMENT" EXCEPTION TO EXCEPTION FOR UNDISCOVERED "FRAUD"

In the two exceptions for undiscovered "fraud" and "fraudulent concealment" there is not only similarity of essential purpose but some

[5] 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 such 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), c. 83, sec. 23; Ind. Ann. Stat. (Burns 1926), sec. 301(4); Mass. Gen. Laws (1932), c. 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), c. 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 Pen. (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, 229 App. Div. 273, 241 N. Y. S. 584 (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); Peteler v. Robison, (Utah 1932) 17 Pac. (2d) 244.

In five 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 462 (1869); Cornell v. Edsen, 78 Wash. 662, 139 Pac. 602 (1914); Ott v. Hood, 152 Wis. 97, 139 N. W. 762 (1913). 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). In all five of these States, however, there is an express statutory exception for cases of "fraud." See Dawson, "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591, n. 1 (1933).

duplication of effort. In 13 States both exceptions are recognized.[7] Here suspension of the statute can be explained in most cases by the use of either formula and the problem is simply one of choice. But the "fraudulent concealment" exception is the only device recognized by statute or judicial decision in at least 11 States.[8] And in both types of jurisdiction the principal question is how far the broader exception for "fraudulent concealment" may lead to results essentially different from those accomplished with the aid of the exception for undiscovered "fraud."

Obviously any sharp distinction between the two exceptions is artificial. It has already been pointed out that in actual operation they are assimilated by a fundamental restriction that applies to both: that the statute will begin to run, not merely on actual discovery, but when the plaintiff *might* have discovered the existence of the claim by exercising reasonable diligence.[9] In claims falling within the undiscovered fraud exception the obstacles to discovery interposed by the defendant will

[7] The Maine statutes are the only ones that expressly incorporate both exceptions. Me. Rev. Stat. (1930), c. 95, sec. 103, provides for suspension "if a person liable to any action mentioned herein, fraudulently conceals the cause thereof from any person entitled thereto, or if a fraud is committed which entitles any person to an action." The statutes of Georgia and Maryland can probably be construed to arrive at the same result. Georgia Ann. Code (Park 1914), sec. 4380: " . . . 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. . . . " Maryland Ann. Code (Bagby 1924), art. 57, sec. 14: " . . . where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party. . . . "

In Kentucky and Missouri there are statutory provisions for suspension of the statute in actions for relief on the ground of "fraud." Ky. Stat. (Carroll 1930), sec. 2519; Mo. Rev. Stat. (1929), sec. 862. In those two States there are also provisions for suspension 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." Ky. Stat. (Carroll 1930), sec. 2532; Mo. Rev. Stat. (1929), sec. 879. The latter type of provision has been construed as including "fraudulent concealment" of the cause of action. Newberger v. Wells and Leonard, 51 W. Va. 624, 42 S. E. 625 (1902); Culpeper Nat. Bank v. Tidewater Improvement Co., 119 Va. 73, 89 S. E. 118 (1916); Reuff-Griffin Decorating Co. v. Wilkes, 173 Ky. 566, 191 S. W. 443 (1917).

Of the States referred to in the preceding note, which have recognized the fraudulent concealment exception independently of statute, it will be observed that the following have statutory provisions for actions based on "fraud": Alabama, California, Iowa, Minnesota, Nebraska, New York, Oklahoma, and Utah. See statutes cited, Dawson, "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 (1933).

[8] See the States cited in note 4, supra; exceptions being made for Kentucky and Missouri.

[9] Dawson, "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 at 619 (1933).

help very greatly to excuse delay.[10] Likewise in causes of action "fraudulently concealed" an important question in every case is whether the plaintiff could reasonably have been expected to discover the facts at an earlier date; any circumstances, such as personal inequality or "fiduciary" or confidential relationship, which would tend to explain credulity in actions based on fraud will have the same effect in claims that were fraudulently concealed.[11] Indeed, from one point of view it might

[10] See, for example, Coxe v. Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626 (1895); Branner v. Nichols, 61 Kan. 356, 59 Pac. 633 (1900); Zinkeison v. Lewis, 63 Kan. 590, 66 Pac. 644 (1901); Farmers' Co-operative Mercantile Co. v. Shultz, 113 Neb. 801, 205 N. W. 288 (1925); Irwin v. Holbrook, 26 Wash. 89, 66 Pac. 116 (1901). In Farnam v. Brooks, 26 Mass. 212 (1830), a bill in equity was brought to set aside for fraud a settlement of accounts between an insurance broker and a customer nearly 20 years after the settlement had been agreed upon. In holding the action barred the court said at p. 245:

> "If the aggrieved party *knew of the fraud* when it was committed, or had full possession of the means of *detecting it*, which is the same as knowledge, neglect to bring forward his complaint for more than six years will deprive him of his remedy, and ought to, upon the very principles and reasons on which the statute of limitations was enacted. We apprehend, that if we should sustain a bill founded on fraud committed more than six years before the filing of the bill, without any proof of an actual concealment of it and a discovery only within the time of limitation, we should, to a great extent and in a large class of cases, judicially repeal the statute. . . . "

[11] For cases arising under the "fraud" exception see Dawson, "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 at 610-14 (1933). The "fraudulent concealment" cases reflect the same anxiety of the courts to protect expectations aroused by "fiduciary" relationship. See for example Faust v. Hosford, 119 Iowa 97, 93 N. W. 58 (1903), misrepresentation by agent as to nature of security in which principal's money was invested; Atlantic Nat. Bank v. Harris, 118 Mass. 147 (1875), misrepresentation by president of bank inducing payment as reimbursement for expenses not in fact incurred; Bayley v. Coy, 195 Ill. App. 433 (1915), misrepresentation by agent for purchase of stock as to amount of purchase price paid; Caffee v. Berkley, 141 Iowa 344, 118 N. W. 267 (1909), misrepresentation by promoters as to value of property sold to corporation.

There are several other cases where the plaintiff's reliance was justified, not by the "fiduciary" character of the defendant's obligation inferred as a matter of law, but by an expectation of good faith known to the other party and abused. For example, in Comfort v. Robinson, 155 Mich. 143, 118 N. W. 943 (1908), defendant was a business associate of plaintiff's husband, recently deceased, and a personal friend of plaintiff who was left in a weakened and nervous condition after her husband's death. Plaintiff's continued expectation of performance by defendant was held in these circumstances to be justified. Somewhat similar circumstances appear in Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651 (1886). See also, Barnes v. Huffman, 113 Ill. App. 226 (1903) (father and daughter); Cameron v. Cameron, (W. Va. 1931) 162 S. E. 173 (husband and wife); Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208 (1894) (minor girl and experienced business man); Heap v. Heap, 258 Mich. 250, 242 N. W. 252 (1932). In Herndon v. Lewis, (Tenn. Ch. App. 1896) 36 S. W. 953, this doctrine was applied to the relations of two Tennessee "gentlemen"

appear that the doctrine of fraudulent concealment was merely a broader formulation of the exception for undiscovered "fraud."

But, as in so many instances, the verbal form in which these concepts were cast has had a subtle influence on their application. Where undiscovered "fraud" was the basis of liability, it was universally agreed that no new concealment was necessary and the wrongdoer might remain wholly passive, provided no avenues were open to the plaintiff for discovery of the fraud.[12] But in cases that fell outside the elastic boundaries of the "fraud" exception new difficulties appeared. To permit suspension of the statute of limitations in all cases where the suitor was ignorant of his claim must have seemed hazardous. Behind the decisions there must have lain a conviction that for suspension of the statute outside the field of "fraud" there should be added to the suitor's ignorance some affirmative misconduct by the opposite party, preventing discovery and excusing delay. And when the "fraudulent concealment" exception had once been formulated, the language of the formula itself gave a new direction to judicial inquiries. In examining the factual bases for suspension of the statute they were led beyond a scrutiny of the original cause of action and of the *plaintiff's* later opportunities for *discovery*, to an emphasis on the means by which the *defendant obstructed* discovery.[13]

There can be found in the cases innumerable statements that "fraud-

in a contract to purchase land, the court emphasizing the high standards of honor then prevailing in Tennessee but presumably abandoned since.

[12] Bailey v. Glover, 21 Wall. (U. S.) 342 (1874); Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571 (1918); Williams v. Beltz, 30 Del. 360, 107 Atl. 298 (1919); Newstrom v. Turnblad, 108 Minn. 58, 121 N. W. 236 (1909); Pratt v. Thompson, 133 Wash. 218, 233 Pac. 637 (1925); Gillies v. Linscot, 98 Kan. 78, 157 Pac. 423 (1916); Billingslea v. Whitelock, 112 Okla. 192, 240 Pac. 722 (1925); Gerry v. Dunham, 57 Me. 334 (1869); Lewis v. Denison, 2 App. D. C. 387 at 393 (1894); Oelkers v. Ellis, [1914] 2 K. B. 139; Lynn v. Bamber, [1930] 2 K. B. 72. It can safely be said that the main body of "fraud" cases rests on this assumption.

[13] The process here involved has been eloquently described by Llewellyn, "Legal Tradition and Social Science Method," in BROOKINGS INSTITUTION ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES 89 at 112:

> "Yet if I were to pick out the biggest single message which the orthodox approach to law voices to social science, it would be the importance of concepts. . . . The concrete demonstration in heaped-up recorded experience of the truth announced by the metaphysicians that you see in terms of your own eyes, observe in terms of your own prior thinking, approach a fresh set of phenomena to see not what is there, in point either of existence or of arrangement or of working interrelation, but to see *almost* exclusively that which you are looking for, and to see *almost* exclusively in terms of the categories with which you start to look."

ulent concealment" involves affirmative efforts by the defendant to prevent discovery.[14] But qualifications are often attached. It is said that the defendant's concealment need not be subsequent to the original wrongdoing, but may precede or accompany it, provided all his conduct taken together is calculated to mislead or allay suspicion.[15] It is sometimes added that all requirements are satisfied if the original misconduct was of such a kind as to "conceal itself." [16] And finally, in some cases the further requirement is added that defendant's efforts must include some element of "fraud" or moral turpitude,[17] though numerous de-

[14] The strongest statement is in Smith v. Blachley, 198 Pa. 173, 47 Atl. 985 (1901):

> "The cases which hold that where fraud is concealed or as sometimes added, conceals itself, the statute runs only from discovery, practically repeal the statute pro tanto. Fraud is always concealed. If it was not no fraud would ever succeed. But when it is accomplished and ended, the rights of the parties are fixed. The right of action is complete. If the plaintiff bestirs himself to inquire, he has ample time to investigate and bring his action. If both parties rest on their oars the statute runs its regular course. But if the wrongdoer adds to his original fraud, affirmative efforts to divert or mislead or prevent discovery, then he gives to his original act a continuing character by virtue of which he deprives it of the protection of the statute until discovery."

To the same effect see Wood v. Carpenter, 101 U. S. 135 (1879); Keithley v. Mutual Life Ins. Co., 271 Ill. 584, 111 N. E. 503 (1916); Miller v. Powers, 119 Ind. 79, 21 N. E. 455 (1888); Walker v. Soule, 138 Mass. 570 (1885); Dalzell v. Lewis, 252 Pa. 283, 97 Atl. 407 (1916); Roether v. Nat. Union Fire Ins. Co., 51 N. D. 634, 200 N. W. 818 (1924); Nat. Coal Co. v. Overholt, 81 W. Va. 427, 94 S. E. 735 (1917), with which compare Newberger v. Wells & Leonard, 51 W. Va. 624, 42 S. E. 625 (1902). Perhaps the most remarkable statement of this point of view is that of Stanley v. Stanton, 36 Ind. 445 at 449 (1871): "It seems to us to be a contradiction in terms to talk of concealing a cause of action before the same has any existence."

[15] Jackson v. Jackson, 149 Ind. 238, 47 N. E. 963 (1897); Fidelity-Philadelphia Trust Co. v. Simpson, 293 Pa. 577, 143 Atl. 202 (1928).

[16] Watts v. Mulliken's Estate, 95 Vt. 335, 115 Atl. 150 (1921); Athey v. Hunter, 65 Ill. App. 453 (1895).

[17] Usually these statements require an intention to deceive on the part of the defendant. See for example, Armstrong v. Milburn, (Ct. of App.) 54 L. T. R. 723 (1886); the malpractice cases of Murray v. Allen, 103 Vt. 373, 154 Atl. 678, (1931); Capucci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929); and Bodne v. Austin, 156 Tenn. 366, 2 S. W. (2d) 104 (1927); and, a case involving misrepresentation by an agent, Wood v. Williams, 142 Ill. 269, 31 N. E. 681 (1892).

In Georgia a peculiar doctrine has grown up, expressly requiring "moral turpitude" for the suspension of the statute. It originated in the case of Austin v. Raiford, 68 Ga. 201 (1881), involving the construction of a special statute of limitations passed after the Civil War. This statute barred actions against administrators, guardians, or trustees for maladministration, with an exception for cases where the defendant had acted "fraudulently and corruptly" in the management of the estate. Ga. Acts of 1869, 133-4. Austin v. Raiford, supra, was an action against an administrator, held barred by

cisions reject such a test.[18] From such a welter of conflicting generalities one can only draw the conclusion that generalities are being overworked, that in each case too wide a variety of fact situations is being included in a single formula. The only way to determine the factors that have really influenced decision is to examine separately the diverse type situations to which these concepts have been applied.

1. Claims Founded on Actual Fraud as the Original Cause of Action

A place to start is with the case where the original liability arises out of actual fraud. This is the situation to which the "undiscovered fraud" exception in its usual form most obviously applies.[19] How does the "fraudulent concealment" exception operate in such a case? To require affirmative concealment, in addition to the original fraud from which the claim arises, seems quite unnecessary here. If elements of immorality on the defendant's part should be desired, those elements may be found in the original injury. If the interests of society impose high standards of diligence on the plaintiff in discovering the wrong and

this special statute, the court adding that the "fraud and corruption" must be such "as imputes moral turpitude to the conduct of the administrator." This formula was adopted in Downs v. Harris, 75 Ga. 834 (1885), an action against a trustee for mismanagement of the trust estate; and was then applied to a case altogether outside the language of the statute of 1869, in Maxwell v. Walsh, 117 Ga. 467, 43 S. E. 704 (1903). But the requirement of "moral turpitude" may not mean anything essentially different from the breach of moral obligation which in other States is enough to suspend the statute. Morris v. Johnstone, 172 Ga. 598, 158 S. E. 308 (1931); American Nat. Bank v. Fidelity & Deposit Co., 131 Ga. 854, 63 S. E. 622 (1908).

[18] There have been cases where the statute has been suspended for honest misrepresentation. Hathaway v. Hudson, 256 Mich. 694, 239 N. W. 859 (1932), vendor's misrepresentation in sale of land; Appeal of Marsden, 102 Pa. 199 (1883), probating of forged will by beneficiary not shown to have known of the forgery.

Where the misrepresentation or other misconduct has been by an agent, this requirement has caused some difficulty. In Wood v. Williams, 142 Ill. 269, 31 N. E. 681 (1892), defendants undertook to invest plaintiff's money in a mortgage, but turned it over to an agent who forged a note and mortgage and caused payments of interest to be made, ostensibly by the supposed borrower. The court emphasized the absence of an allegation that defendants themselves knew of the forgery, and said at p. 280: "How appellees can be guilty of affirmative fraudulent concealment of a matter of the existence of which they themselves had no knowledge, we are unable to comprehend." See also Stevenson v. Robinson & Brooks, 39 Mich. 160 (1878). But there are cases where the agent's intention to deceive has been charged to the principal on familiar notions of agency. New England Mutual Life Ins. Co. v. Swain, 100 Md. 558, 60 Atl. 469 (1905); Dorsey Machine Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208 (1894); Leslie v. Jaquith, 201 Mass. 242, 87 N. E. 480 (1909). *Cf.* Abbott v. Inhabitants of North Andover, 145 Mass. 484, 14 N. E. 754 (1888).

[19] 31 MICH. L. REV. 519 at 607 (1933).

asserting his claim, those standards are to be found both in the requirements of the law of deceit and in the independent requirement of diligence attached to the fraudulent concealment exception by judicial inference. Furthermore, in States which employ the "fraud" exception no new concealment is required in actions for relief on the ground of fraud, provided no adequate opportunities for discovery exist.[20] Accordingly there are several States which assert that for fraudulent concealment no affirmative efforts to mislead are required beyond the original injurious misrepresentation.[21] In other States there are intimations that claims based on actual fraud will receive special treatment.[22] But in most decisions attention is directed, not only to the character of the original wrong but to the whole course of defendant's conduct, with an apparent desire to find some new and independent concealment of the cause of action.

The types of concealment that courts have held sufficient take as many forms as human obliquity. Where a purchase of land is induced by false representations as to the quantity in the tract, a repetition of original misstatements may constitute a fraudulent concealment.[23] But

[20] See supra, n. 12.

[21] Way v. Cutting, 20 N. H. 187 (1849); Gerry v. Dunham, 57 Me. 334 (1869); New England Mutual Life Ins. Co. v. Swain, 100 Md. 558, 60 Atl. 469 (1905); Newberger v. Wells & Leonard, 51 W. Va. 624, 42 S. E. 625 (1902). See also Foley v. Jones, 52 Mo. 64 (1873).

[22] In the recent case of McNaughton v. Rockford State Bank, (Mich. 1933) 246 N. W. 84, the court expressly drew a distinction between actions based on "fraud or breach of trust . . . and those where such misconduct does not taint the cause of action," pointing out that in the second group of cases "mere silence on the part of the defendant is not fraudulent concealment." See also the dicta in American Nat. Bank v. Fidelity & Deposit Co., 131 Ga. 854, 63 S. E. 622 (1908). It was assumed in Hathaway v. Hudson, 256 Mich. 694, 239 N. W. 859 (1932), that the "fraudulent concealment" exception applied to a "concealed fraud," consisting of an honest misrepresentation by a vendor of land, not later repeated or concealed. Similar assumptions appear in the Arkansas cases: Dilley v. Simmons Nat. Bank, 108 Ark. 342, 158 S. W. 144 (1913); Meier v. Hart, 143 Ark. 539, 220 S. W. 819 (1920); Wright v. Lake, 178 Ark. 1184, 13 S. W. (2d) 826 (1929).

[23] Lundy v. Hazlett, 147 Miss. 808, 112 So. 591 (1927). *Cf.* Brackett v. Perry, 201 Mass. 502, 87 N. E. 903 (1909).

Even where fraudulent concealment is not recognized as a ground for suspension of the statute, subsequent misrepresentations may be an independent basis for an action of deceit, the damages being measured by the value of the cause of action lost through delay. This ingenious and rather artificial substitute has been worked out particularly in the Wisconsin cases. Thus, in Ott v. Hood, 152 Wis. 97, 139 N. W. 762 (1913), an attorney had collected a note for his client in 1892, but repeatedly represented that he had been unable to collect anything, so that plaintiff did not learn the contrary until 1910. The court said that defendant's plea of the statute of limitations was morally wrong, but must be allowed since the legislature "is the supreme and

a repetition of the original representations does not appear to be essential. Suspension of the statute has been allowed where a spiritualist medium procured a transfer of bonds from a client through "messages" from the client's deceased husband, and then transmitted confirmative messages during repeated séances over a period of years.[24] The subsequent misrepresentations may relate to independent transactions whose terms would otherwise have revealed the discrepancies in the original transaction.[25] Where the misrepresentation concerns the validity of a security for a money debt, continued payments of interest may be sufficient to allay suspicion and excuse delay.[26]

infallible judge of what shall be the test of right conduct in the relations between members of society." But it then went on to say that plaintiff should be allowed to amend and bring an action for deceit if he could show that he was induced by the subsequent misrepresentations not to sue for the amount collected. This reasoning was applied in Seideman v. Sheboygan Loan & Trust Co., 198 Wis. 97, 223 N. W. 430 (1929), and Danielson v. Bank of Scandinavia, 201 Wis. 392, 230 N. W. 83 (1930), to misrepresentations, subsequently repeated, as to the adequacy of the security behind mortgages purchased by plaintiffs. But apparently it is necessary under this theory that plaintiff's suspicions be awakened, so that the subsequent misrepresentations may be said to "induce" delay and thus cause the loss of the cause of action. Blake v. Miller, 178 Wis. 228, 189 N. W. 472 (1922).

Technically there is no difficulty with this analysis. It has been applied to cases where defendant's misrepresentations resulted in the loss of a cause of action against a third person. Bowen v. Carter, 124 Mass. 426 (1878); Ochs v. Woods, 221 N. Y. 335, 117 N. E. 305 (1917); Gerry v. Dunham, 57 Me. 334 (1869). It has also been used outside Wisconsin in cases where the original cause of action was against the defendant, but for some independent reason was unavailable. Desmarais v. People's Gas Light Co., 79 N. H. 195, 107 Atl. 491 (1919), action under death act where the "right" was said to expire with limitation of the remedy; Cameron v. Cameron, (W. Va. 1931) 162 S. E. 173, petition to set aside marriage annulment defeated by subsequent marriage of defendant. For further discussion see 14 MINN. L. REV. 569 (1930). In Whitman v. Seaboard Air Line Ry., 107 S. C. 200, 92 S. E. 861 (1917), there were dicta describing as too "speculative" the value of the cause of action lost through defendant's fraud.

[24] Dean v. Ross, 178 Mass. 397, 60 N. E. 119 (1901).

[25] Boyd v. Boyd, 27 Ind. 429 (1867).

[26] State ex rel. Barringer v. Hawkins, 103 Mo. App. 251, 77 S. W. 98 (1903), where defendant, a notary public, undertook to invest plaintiff's money in a mortgage, the acknowledgment of which was forged and then certified as valid by defendant. Thereafter defendant paid interest regularly on the sum supposedly loaned, pretending that interest was deposited with him by the borrower for that purpose. Payments of interest were likewise held to assist in concealment of the fraud in Zinkeison v. Lewis, 63 Kan. 590, 66 Pac. 644 (1901), an action brought under the "fraud" exception. In Pullan v. Struthers, 201 Iowa 1179, 207 N. W. 235 (1926), continued payments of dividends by a corporation then operating at an actual loss, plus misleading statements as to earnings sent plaintiff in subsequent prospectuses, were held to conceal the original fraud which induced plaintiff's purchase of corporate stock.

A stricter view appears in Skordzki v. Sherman State Bank, 348 Ill. 403, 181 N. E. 325 (1932), where the cashier of defendant bank represented to plaintiff, a

There is no formula for determining how completely defendant's efforts must close all avenues to discovery. Where plaintiff's inquiries are repeatedly met with misstatement by all the parties from whom information could be derived, his credulity is of course excused.[27] Something less than this will satisfy the strictest tests. For example, if third persons cooperate in an elaborate scheme to disguise the truth and facilitate deception, most courts would be eager to find a fraudulent concealment and suspend the statute.[28] But results at this point do not depend merely on the methods used to prevent discovery. If from other sources the plaintiff acquired information through which suspicion might or

depositor, that the bonds of a certain corporation were secured by a first mortgage on real estate, thus inducing plaintiff to purchase them for the sum of $800. The bonds were in fact secured by a second mortgage which after foreclosure gave plaintiff a return of only $13 on his investment. Defendant bank continued to make payments of interest on the bonds for two years and a half, this conduct being made natural by the fact, known to plaintiff, that the president of defendant bank was also president of the issuing corporation. The court refused to suspend the statute of limitations during the period of interest payments, pointing to the public records from which plaintiff could have discovered the existence of the prior mortgage. See also Oklahoma Farm Mortgage Co. v. Jordan, 67 Okla. 69, 168 Pac. 1029 (1917).

[27] One of the most extraordinary examples of elaborate deception is International Bank v. Bartalott, 11 Ill. App. 620 (1882), where the plaintiff, a purchaser of land subject to a mortgage, alleged that he was induced to pay off the mortgage debt although the debt had already been satisfied by the mortgagor. Plaintiff inquired of the mortgagor whether the debt had been paid and was told that they had not paid it. The president of defendant bank, the mortgagee, made the same statement and when asked for a surrender of the original mortgage notes replied that they had been burned in the Chicago fire of 1871. When an expert was employed to examine defendant's records, its president gave misleading information; and when examined under oath in another action the same person asserted that the debt had been paid on the date when plaintiff's payment had been received.

[28] In Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155 (1885), plaintiff's assignee in bankruptcy was induced to sell stock owned by plaintiff in a construction company, by defendant's misrepresentation as to its value. Defendant at the time was trustee of the assets of the corporation under an agreement with the stockholders, knew that dividends of $10,000 had been declared on plaintiff's stock, and caused these dividends to be paid out secretly to an agent for defendant's own wife, arranging the records of the corporation so that no trace of this payment appeared on its books and vouchers. This was held to be a fraudulent concealment which suspended the special limitation on actions by or against assignees in bankruptcy concerning assets of the bankrupt.

In Fidelity-Philadelphia Trust Co. v. Simpson, 293 Pa. 577, 143 Atl. 202 (1928), an even more complicated scheme was resorted to, involving the use of code messages between defendant and his agent, to disguise the fact that defendant was securing control of a corporation by the purchase of stock through a dummy purchaser. But the early case of Smith v. Bishop, 9 Vt. 110 (1837), suggested that an arrangement with a third person not to disclose a fact directly misrepresented by defendant, would not be enough for fraudulent concealment.

should have been aroused, the statute will commence to operate.[29] Likewise, where the disclosures of the opposite party suggest the existence of some discrepancy between representation and fact, a "duty" to investigate appears and the sanction of this "duty" is the commencement of the statutory period.[30] In short, it is not possible to generalize as to what facts will suffice for suspension of the statute because in every application of the "fraudulent concealment" exception there is included a judgment as to how far the plaintiff conformed to an external standard of conduct imposed by courts, with the wisdom acquired after the event.

There is some temptation to assert that in the field of actual fraud the two exceptions for "fraud" and "fraudulent concealment" do not

[29] In Smith v. Blachley, 198 Pa. 173, 47 Atl. 985 (1901), defendant, a physician, treated plaintiffs' daughter for what defendant asserted to be the results of a criminal abortion. Defendant told plaintiffs that the Humane Society of Pittsburgh planned to prosecute for the abortion, but that if plaintiffs would give him $3000, he would pay it over to an agent of the Society and stop further inquiries. Defendant told plaintiffs frequently not to mention the facts to anyone, and not to employ counsel. After seven years plaintiffs sued for restitution of the money so paid, alleging the falsity of defendant's representations. The court made the emphatic remarks quoted supra, n. 14, and then went on to say, at p. 180: "The gradual leaking out of the circumstances and the gossip and suspicion of others started an investigation by plaintiffs, which the most ordinary prudence would have prompted at the beginning, and which would then have either foiled the scheme or led to its discovery. . . . "

In Dalzell v. Lewis, 252 Pa. 283, 97 Atl. 407 (1916), plaintiff was induced to contribute an excessive amount to a joint purchase of land, through the false representations of the defendants as to the amount that they were paying the vendors. The court refused to suspend the statute of limitations during the 10 years prior to plaintiff's discovery of the fraud, pointing out that the names of the vendors were disclosed, so that plaintiff could have discovered the true price by inquiring from them. See also Walker v. Soule, 138 Mass. 570 (1885), where the absence of a power of sale, pretended by an administrator, was held to be discoverable from the public records; Roether v. Nat. Union Fire Ins. Co., 51 N. D. 634, 200 N. W. 818 (1924), where the financial condition of an insurance company was held to be discoverable from other sources than the company's own representations; and Jackson v. Jackson, 149 Ind. 238, 47 N. E. 963 (1897), where defendant merely requested plaintiff not to inquire of other persons the value of bank stock purchased by plaintiff and "refused to answer" a letter written subsequently by plaintiff asking about the stock.

[30] Ramsey v. Child, Hulswit & Co., 198 Mich. 658, 165 N. W. 936 (1917), where misrepresentations as to the security behind an issue of irrigation bonds were held to be revealed by subsequent defaults in interest payments and recommendations of defendant that plaintiff join a bondholders' protective committee; Sankey v. McElevey, 104 Pa. 265 (1883), where a debtor represented to the administrator of the deceased creditor that the amount of the debt was less than it in fact was, and the court concluded that since the existence of the debt was disclosed plaintiff was bound to ascertain its amount; Conklin v. Towne, 204 Iowa 916, 216 N. W. 264 (1927), where the concealment consisted of a refusal of corporate officers to turn over the books of the corporation for examination by plaintiff, a stockholder who asserted that his purchase was induced by fraud. See also Cummings v. Bannon, (Md. 1887) 8 Atl. 357.

operate in an essentially different manner, and to explain the common requirement of active concealment in these cases as a mere form of words to express the plaintiff's want of diligence. There are in fact many cases that can be explained in this way.[31] But when these explanations have been made, there remain some cases where the requirement of active concealment has actually influenced decision, and prevented suspension of the statute that might otherwise have been allowed.[32] And in other cases it is difficult to measure the effect that this test has had in the delicate process of measuring plaintiff's conduct by a hypothetical standard to which it did not exactly conform and which at most reflects vague conceptions of policy.[33]

2. *Claims Founded on Breaches of Confidential or Fiduciary Obligation*

Even the strictest tests of fraudulent concealment dissolve in the shadowy fields of confidential and fiduciary obligation. It has already been pointed out that the existence of such relationships will tend very strongly to excuse delay in claims based on direct misrepresentation.[34] But all courts would go far beyond this. Even without actual fraud a claimant will ordinarily be justified in the expectation that the person on whom such obligations are imposed will conform to them strictly and in good faith. The absence of direct misrepresentation is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is "fraud." [35]

[31] All the cases cited in note 14, supra, as requiring "active" concealment for suspension of the statute, might have been disposed of on this ground. Some of them are described in note 27.

[32] The Illinois cases especially deserve criticism. See Wood v. Williams, 142 Ill. 269, 31 N. E. 681 (1892); Keithley v. Mutual Life Ins. Co., 271 Ill. 584, 111 N. E. 503 (1916); Skordzki v. Sherman State Bank, 348 Ill. 403, 181 N. E. 325 (1932). Also Brackett v. Perry, 201 Mass. 502, 87 N. E. 903 (1909).

[33] It is commonly agreed that it is a jury question whether plaintiff has availed himself of available sources of information and pursued inquiries with the requisite diligence. See, for example, Williams v. Beltz, 30 Del. 360, 107 Atl. 298 (1919); Lundy v. Hazlett, 147 Miss. 808, 112 So. 591 (1927); New England Mutual Life Ins. Co. v. Swain, 100 Md. 558, 60 Atl. 469 (1905); Wilson v. LeMoyne, (C. C. A. 4th, 1913) 204 Fed. 726; McDonald v. McDougall, 86 Wash. 334, 150 Pac. 628 (1915). But the question whether defendant's conduct has been sufficiently "affirmative" or "fraudulent" is in practice treated as one appropriate for court rather than jury. This is especially true where there was no fraud at the inception and where, as a result, courts feel greater difficulty in allowing suspension of the statute.

[34] Supra, n. 11.

[35] This "word-magic" is not offered as an adequate description of the reasons of policy for treating non-disclosure by fiduciaries as equivalent to misrepresentation of

The typical violation of confidential or fiduciary obligation is the secret misappropriation of property held in a fiduciary capacity, or the securing of secret profits which rules of law forbid. In States that employ the "fraud" exception, suspension of the statute of limitations in such cases is everywhere achieved by labelling such conduct "fraud." [36] Where the "fraudulent concealment" exception is used, courts are equally willing to describe mere non-disclosure as "concealment." Particularly is this true in long-term relationships, such as those involving trustees, executors, and guardians, where wide opportunities for misappropriation may exist and prompt discovery may be more difficult.[37] In these fiduciary relationships the expectations of the beneficiary are further protected by the independent rule that the statute will not run in equitable actions until notice of the fiduciary's misconduct is brought home to the beneficiary.[38] In other situations, where this equitable rule is not so readily invoked, the courts have employed the "fraudulent concealment" exception to accomplish similar results.[39]

This application of the "fraudulent concealment" exception is best exemplified in relationships that would usually be described as those of principal and agent, or employer and employee. Where the relationship is long protracted, and especially where it involves the detention and control of property by the agent or employee, it is quite clear that secret misappropriations come under the "fraudulent concealment" ex-

fact. Nor do the courts assume that by applying an epithet they express these reasons of policy. Nevertheless, the availability of the epithet "fraud," laden with gloomy and ominous implications, has immeasurably eased the burden of courts in extending the statutory period of limitation. One of the commonest explanations for this indulgence is that a defendant "should not be allowed to take advantage of his own fraud." Such sentiments as this can be counted on to bring a shudder from court and counsel, and to awaken general applause. Conversely, in fields where judicial usage has not accustomed lawyers to the use of this opprobrious epithet, a court is apt to proceed with greater caution.

[36] Dawson, "Undiscovered Fraud and Statutes of Limitation," 31 MICH. L. REV. 591 at 610-14 (1933).

[37] State v. Northrop, 93 Conn. 558, 106 Atl. 504 (1919) (testamentary trustee); Watts v. Mulliken's Estate, 95 Vt. 335, 115 Atl. 150 (1921) (trustee); Heap v. Heap, 258 Mich. 250, 242 N. W. 252 (1932) (administrators); Allen v. Conklin, 112 Mich. 74, 70 N. W. 339 (1897) (guardian); Morris v. Johnstone, 172 Ga. 598, 158 S. E. 308 (1931) (administrators); Hoyle v. Jones, 35 Ga. 40 (1866) (executor); Blakeney v. Wyland, 115 Iowa 607, 89 N. W. 16 (1902) (guardian). But *cf.* State v. Henderson, 54 Md. 332 (1880).

[38] 2 WOOD, LIMITATIONS, 4th ed., ch. 20 (1916).

[39] Kelley v. Nealley, 76 Me. 71 (1884), secret misappropriation of logs by pledgee; Perry v. Wade, 31 Kan. 428, 2 Pac. 787 (1884), secret removal of house by renting agent; Spalding v. Enid Cemetery Ass'n, 76 Okla. 180, 184 Pac. 579 (1919), secret profit by corporate officer.

ception, and the statute is suspended until "discovery."[40] But where the arrangement is for a short period and a limited purpose, as in an agency to collect a debt, there is somewhat more difficulty. On receipt by the collecting agent a "cause of action" will normally accrue at once in favor of the principal, unless some agreement exists for detention by the agent over a longer period. There is some authority postponing the accrual of the "cause of action" until demand for payment by the principal, on the notion that until demand and refusal to pay the agent's conduct is not wrongful and cannot be the basis of an action.[41] The ready objection to this method is that it enables the principal to delay demand for an indefinite period after the agent's breach of duty is disclosed.[42] This objection has induced many courts to fix the accrual of the "cause of action" at the date when payment was received by the agent, in spite of secrecy which seriously interfered with discovery by the principal and prosecution of an action.[43] Where the doctrine of "fraudulent concealment" is recognized an intermediate view is possi-

[40] Often there are misrepresentations, such as could be found in false bookkeeping entries, and these are usually seized upon as "fraudulent concealment." Township of Boomer v. French, 40 Iowa 601 (1875); Farmers' Co-operative Mercantile Co. v. Shultz, 113 Neb. 801, 205 N. W. 288 (1925); Lieberman v. First Nat. Bank. 2 Pen. (Del.) 416, 45 Atl. 901 (1900); Vance v. Mottley, 92 Tenn. 310, 21 S. W. 593 (1892); Caffee v. Berkley, 141 Iowa 344, 118 N. W. 267 (1909). But such misrepresentation is not necessary. Harrisburg Bank v. Foster, 8 Watts (Pa.) 12 (1839) (bank cashier); The Telegraph v. Loetscher, 127 Iowa 383, 101 N. W. 773 (1904) (secret profit by promoter of corporation); Board of Chosen Freeholders of Somerset v. Veghte, 44 N. J. L. 509 (1882), dicta to the effect that equity would enjoin a plea of the statute at law where there was "fraudulent concealment," apparently consisting of non-disclosure by an embezzling treasurer.

[41] Dodds v. Vannoy, 61 Ind. 89 (1878); Ewers v. White's Estate, 114 Mich. 266, 72 N. W. 184 (1897); Cole v. Baker, 16 S. D. 1, 91 N. W. 324 (1902); Hutchins v. Gilman, 9 N. H. 359 (1838). For a collection of cases see 17 L. R. A. (N. S.) 660, 667 (1909); also 3 WILLISTON, CONTRACTS, sec. 2036 (1920); 1 MECHEM, AGENCY, 2d ed., sec's 1346-1348 (1914).

[42] See discussion in 3 WILLISTON, CONTRACTS, sec. 2041 (1920).

[43] Townsend v. Eichelberger, 51 Ohio St. 213, 38 N. E. 207 (1894); Cocke & Jack v. McGinnis, 8 Tenn. 361 (1828); Cook v. Rives, 21 Miss. 328 (1850); Goodyear Metallic Rubber Shoe Co. v. Baker's Estate, 81 Vt. 39, 69 Atl. 160, 17 L. R. A. (N. S.) 667 (1908).

The extreme inconvenience and hardship of such a rule has led to special treatment of this situation in some States. In New York by statute it is provided that the statute shall operate from the time when "the right to make the demand" accrues, except where the claim arises out of "the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity," and then the statute will operate from the time when "actual knowledge" is acquired of the facts upon which the right depends. N. Y. Civ. Pr. Act, sec. 15 (1929). In Kansas it has been held that the statute does not run against the principal until knowledge of the agent's default. Rafter v. Hurd, (Kan. 1932) 12 Pac. (2d) 837.

ble. By treating mere non-disclosure as concealment the statute of limitations may be postponed until the agent's undue delay or other circumstances should awaken suspicion of wrongdoing. This can be explained in terms of the "fiduciary" nature of the agent's obligation, requiring affirmative disclosure and justifying exceptional credulity on the part of the principal.[44] The result is to protect expectations that clearly deserve legal protection, and for which other concepts from the agency field are not altogether adequate.[45]

But there are important restrictions on the usefulness of the "fraudulent concealment" exception in this field. Where the action is against a third person, suspension of the statute is achieved with greater difficulty, although the obstacles to discovery by the aggrieved party may be equally great.[46] If the third party so participating is innocent of con-

[44] The result is most easily achieved where after collection the agent or representative denies that any proceeds have been received. Bradford v. McCormick, 71 Iowa 129, 32 N. W. 93 (1887); Wickersham v. Lee, 83 Pa. 416 (1877); Earnhart v. Robertson, 10 Ind. 8 (1857); Boyer v. Barrows, 166 Cal. 757, 138 Pac. 354 (1914) (dicta); Voss v. Bachop, 5 Kan. 59 (1869); Aultman, Miller & Co. v. Adams, 35 Mo. App. 503 (1889); Clarke v. Gilmore, 149 App. Div. 445, 133 N. Y. S. 1047 (1912); Freeman v. Conover, 95 N. J. L. 89, 112 Atl. 324 (1920) (dicta that equity would enjoin a plea of the statute at law).

"Fraudulent concealment" has been found also in misleading statements made in advance of collection, where they had the effect of throwing the principal off his guard. Fisher v. Tuller, 122 Ind. 31, 23 N. E. 523 (1889); Morgan v. Tener, 83 Pa. 305 (1877); Vigus v. O'Bannon, 118 Ill. 334, 8 N. E. 778 (1886). Likewise where, after collection, the collector made arrangements with third persons to disguise the facts. Pate, Executor v. Tait, 72 Ind. 450 (1880). Also where the agent's misstatements to the creditor prevented the creditor from notifying the principal. Caldwell v. Ulsh, 184 Ind. 725, 112 N. E. 518 (1915).

But mere non-disclosure has been held to amount to fraudulent concealment. Kane v. Cook, 8 Cal. 449 (1857); Wilder v. Secor, 72 Iowa 161, 33 N. W. 448 (1887). With the latter case compare Brunson v. Ballou, 70 Iowa 34, 29 N. W. 794 (1886). A case which uses language pointing the other way is Boyd v. Beebe, 64 W. Va. 216, 61 S. E. 304 (1908), where an agent for the sale of stock was alleged to have accounted for only $11,500 out of the $15,000 received on the sale, but the court felt that the principal had not used reasonable diligence in ascertaining the amount of the proceeds, since the name of the purchaser was known to him.

[45] 1 MECHEM, AGENCY, 2d ed., sec. 1346 (1914), argues vigorously for the view that the statute should not run against the principal until his discovery of the agent's misconduct. But the cases cited there and in the two preceding sections do not support so sweeping a statement. In States that operate under the exception for "actions for relief on the ground of fraud," that exception is clearly applicable to undiscovered breach of an agent's "fiduciary" obligation. See 31 MICH. L. REV. 591 at 611 (1933). In at least one State the agency situation is given special treatment without the aid of the "fraud" exception. Rafter v. Hurd, (Kan. 1932) 12 Pac. (2d) 837.

A liberal use of the "fraudulent concealment" exception is equally effective, and finds abundant support in the decisions.

[46] The best illustration is the case where a trustee uses trust funds for the payment

scious wrong, the last remaining basis for suspension of the statute is swept away.[47] Furthermore, even where the defendant was subject to an obligation that for most purposes is treated as "fiduciary," the same

of his personal obligation. Suspension of the statute as against a third person with notice of the trust has been achieved in a few cases through the use of the "fraud" exception. Peck v. Bank of America, 16 R. I. 710, 19 Atl. 369 (1890), and cases cited in 31 MICH. L. REV. 591 at 613 (1933). In one recent case, Pennsylvania Company for Ins. on Lives v. Ninth Bank & Trust Co., 306 Pa. 148, 158 Atl. 251 (1932), the court relied on the "express trust" exception, which requires notice to the cestui of the trustee's misconduct before the statute begins to run; and also said that "in actions based on fraud, where the fraud has been actively concealed, or where a relationship of trust and confidence exists, it does not begin to run until the discovery of the fraud." In neither of these cases was there a showing that the defendant in any way misled the beneficiary, by words or conduct. Likewise, in American Nat. Bank v. Fidelity & Deposit Co., 131 Ga. 854, 63 S. E. 806 (1908), the court found that a bank, depositary of a receiver's checks, was under an affirmative obligation to disclose the receiver's improper issue of checks not countersigned as required by court order, the court emphasizing the fact that this breach of duty was peculiarly within the knowledge of the defendant, and that the creditors relied on the bank to assist in the preservation of the fund.

In American Bonding Co. v. Fourth Nat. Bank, 206 Ala. 639, 91 So. 480 (1921), the court found fraudulent concealment in the mere statement by defendant that the fiduciary had been its debtor, but that the account was now closed and that they knew nothing more about it. It appeared that the fiduciary had used trust funds for the settlement of his own debt.

In Holman v. Moore, 259 Mich. 63, 242 N. W. 839 (1932), defendant arranged with the cashier of a national bank to transfer to the bank a mortgage insufficiently secured, both defendant and the cashier taking a commission from the transferors. There was some evidence of doctoring of the bank's books by the cashier. The court held that this amounted to fraudulent concealment, both by the cashier and defendant, helped to this result no doubt by a federal statute which made this conduct a misdemeanor for both the bank's officer and any third person who participated in such a transaction.

But there are cases which refuse to suspend the statute as against a third person taking with notice of the fiduciary's breach of duty. Wilson v. Sibley, 54 Miss. 656 (1877); Daugherty v. Daugherty, 116 Iowa 245, 90 N. W. 65 (1902); Kerrigan v. O'Meara, 71 Mont. 1, 227 Pac. 819 (1924). In this last case plaintiff claimed that money was collected from him by one O'Meara through duress and paid over to defendant, O'Meara's wife, who had notice of these circumstances. The court said at p. 7:

> "Unless there is some relation of trust or confidence between the parties which imposes upon a defendant the duty of making a full disclosure of the facts, there must be some active affirmative concealment of the fraud, something said or done to continue the deception or to prevent inquiry and lull plaintiff into a sense of security, in order to postpone the running of the statute."

[47] Culpeper Nat. Bank v. Tidewater Improvement Co., 119 Va. 73, 89 S. E. 118 (1916); Moses v. St. Paul, 67 Ala. 168 (1880); Finnegan v. McGuffog, 203 N. Y. 342, 96 N. E. 1015 (1911); Model Building & Loan Ass'n v. Reeves, 236 N. Y. 331, 140 N. E. 715 (1923).

purity of motive may swing the scales in his favor.[48] And finally, there are clearly limits to the range of "fiduciary" and confidential obligations, limits that are difficult to formulate in general terms and that leave ample room for intuitive judgments in cases at the outer fringe.[49] But as we emerge from that penumbra, we find not only a wholly different point of view toward suspension of the statute of limitations, but new factors of policy rising nearer to the surface.

II

SUSPENSION OF THE STATUTE OUTSIDE THE FIELDS OF ACTUAL AND "CONSTRUCTIVE" FRAUD

When plaintiff's ignorance of his cause of action is proposed as a ground for suspension of limitation acts in cases which cannot be described as actual or "constructive" fraud, there must be a new and more rigorous scrutiny of the reasons for such ignorance. If elaborate devices

[48] This question was elaborately discussed in Lippitt v. Ashley, 89 Conn. 451, 94 Atl. 995 (1915), an action against the directors of a savings bank for negligence in failing to prevent the theft of its assets by its treasurer over a period of years. The majority of the court found negligence in not providing a more adequate system of bookkeeping, by means of which the thefts would have been discovered, but refused to suspend the statute of limitations in the bank's action for damages in the absence of a showing of knowledge by the directors that the thefts had occurred.

Other cases have shown the same reluctance to employ either the "fraud" or "fraudulent concealment" exceptions against bank directors for negligent breach of contractual or statutory obligations. Curtis v. Connly, 257 U. S. 260, 42 Sup. Ct. 100 (1921) (fraudulent concealment); 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) (fraud); Olesen v. Retzlaff, 184 Minn. 624, 238 N. W. 12 (1931) (fraud).

There is one group of cases, however, where the defendant's innocence will not entitle him to the protection of the statute, that is, where the defendant is surety for a person whose conduct amounts to fraudulent concealment. In such a case the object of the suretyship arrangement is usually to protect the plaintiff against the type of misconduct that actually occurred, such as misappropriation of funds by employees or fiduciaries, and the cases are unanimous in sticking the surety. Lieberman v. First Nat. Bank, 2 Pen. (Del.) 416, 45 Atl. 901 (1900); McMullen v. Winfield Building & Loan Ass'n, 64 Kan. 298, 67 Pac. 892 (1902); Eising v. Andrews, 66 Conn. 58, 33 Atl. 585 (1895); State ex rel. Barringer v. Hawkins, 103 Mo. App. 251, 77 S. W. 98 (1903); Bradford v. McCormick, 71 Iowa 129, 32 N. W. 93 (1887); State v. Gant, 201 N. C. 211, 159 S. E. 427 (1931); State v. Northrop, 93 Conn. 558, 106 Atl. 504 (1919).

[49] The agency cases discussed above are far out toward the border between "fiduciary" obligation and mere debtor-creditor relationship. The wide discretion that is left for appellate courts in the application of these elusive tests is illustrated by the two Iowa cases of Wilder v. Secor, 72 Iowa 161, 33 N. W. 448 (1887), and Brunson v. Ballou, 70 Iowa 34, 29 N. W. 794 (1886). See also Cloyd v. Reynolds, 44 Pa. Super. Ct. 81 (1910); Morgan v. Tener, 83 Pa. 305 (1877).

are actively used to prevent discovery, morality and policy alike may justify suspension to the same extent as in the field of "fraud." But if the plaintiff's injury is of a kind that naturally escapes discovery, will that fact alone make mere non-disclosure a breach of moral obligation and justify the plaintiff's delay? To admit such a result might appear to undermine the entire statutory system for the limitation of actions, and defeat the policies on which it is founded. This may be true even though plaintiff's conduct conforms to the highest standards of vigilance and energy.

The requirements for "fraudulent concealment" can certainly not be fixed in generalized language, equally applicable to all type-situations. The most extreme and deliberate schemes for concealment may be equally reprehensible in all fact settings, and may deprive defendants of statutory protection in all types of actions. But one must be less confident as elaborate conspiracy shades off into mere denial and from that into watchful silence. In every case the basic question must be — How far is a defendant bound to disclose the fact-elements of his own misconduct? Or, if the question is put conversely, to what extent is a defendant protected by limitation acts where he has refrained from disclosure for the statutory period, resting secure in the knowledge that avenues for discovery by the plaintiff are effectively closed?

1. *Fraud on Creditors*

The question is directly raised in transfers by debtors intended to delay or defeat creditors in realizing on their claims. It is fairly clear that solvent debtors normally owe no affirmative duty to assist their creditors to discover assets available for execution.[50] But where efforts are made to disguise their ownership of property, especially by debtors who are at the time insolvent, various rules of law, some of them statutory, have intervened for the protection of creditors. Express misrepresentation by the debtor as to ownership of specific property or as to the purposes for which it is transferred would make a strong case of fraudulent concealment.[51] But even without express misrepresentation a purely formal transfer intended to disguise continued ownership would

[50] See cases cited infra, n. 122.

[51] Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382 (1884); Smith v. Blair, 133 Ind. 367, 32 N. E. 1123 (1892); Bailey v. Glover, 21 Wall. (88 U. S.) 342 (1874). The requirement of diligence in the creditor applies here as in other cases of "fraud" and "fraudulent concealment." Avery v. Cleary, 132 U. S. 604, 10 Sup. Ct. 220 (1889); Wynne v. Cornelison, 52 Ind. 312 (1876). But compare Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 71 So. 598 (1916).

involve a violation of obligations imposed by law on debtors. A mechanical application of statutes of limitation, ignoring the very real obstacles to discovery in transactions shrouded with secrecy, would defeat the policy so elaborately developed in the field of creditors' remedies. The courts are unanimous in applying to this situation the exception for undiscovered "fraud." [52] There is also authority to the effect that mere non-disclosure of such transfers is "concealment" within the meaning of the "fraudulent concealment" exception.[53]

Greater difficulty appears where an intention to disguise ownership or to conceal the existence of assets cannot be proved, or inferred in a genuine way from something more than legal presumptions of "fraud." For example, it is wise to avoid a gift by an insolvent without regard to the actual intent, and courts do so. In order to bring the case within the terms of statutes regarding fraudulent conveyance, the court may talk of rebuttable or conclusive presumptions of fraudulent intent. With this practice there need be no quarrel. But in the application of limitation acts, especially where the "fraudulent concealment" exception is involved, something more than this may be required, some direct proof of bad motive, some affirmative interference with the creditor's activities.[54] The situation would probably be the same with those cases, endless in variety, which cluster around the doctrine of reputed ownership.[55] At these points tests for the limitation of the creditor's action may depart from the usual tests for "fraud on creditors." But on the whole it is fairly clear that in this field the exceptions to limitation acts involve the same complex and delicate adjustment of conflicting interests which have governed the evolution of the right of action itself.

2. *Trespass to Land*

Special considerations of policy are likewise involved in cases of trespass to land. Rules for the limitation of actions have been fused in

[52] Numerous cases are cited in 31 MICH. L. REV. 591 at 614 (1933).

[53] McAlpine v. Hedges, (C. C. Ind. 1884) 21 Fed. 689; Reynolds' Adm'rs v. Gawthrop's Heirs, 37 W. Va. 3, 16 S. E. 364 (1892); Edwards v. Gibbs, 39 Miss. 166 (1860).

[54] In Stivens v. Summers, 68 Ohio St. 421, 67 N. E. 884 (1903), the exception for undiscovered "fraud" was applied to a case of gratuitous transfer during actual insolvency, the court intimating that the result would have been different if it had been applying the "fraudulent concealment" exception. In Bickle v. Chrisman's Adm'x, 76 Va. 678 (1882), and Vashon v. Barrett, 99 Va. 344, 38 S. E. 200 (1901), the court in refusing to suspend the statute for fraudulent concealment was somewhat influenced by the special form of the Virginia statute allowing attack on gratuitous transfers, but it also emphasized the absence of moral fault on the part of the debtor.

[55] GLENN, LAW OF FRAUDULENT CONVEYANCES, sec's 341 *et seq.*, 375 *et seq.* (1931).

modern law into a complex body of doctrine, expressed in the phrase "adverse possession." [56] This is not the place to describe the painful and obscure processes by which common lawyers have evolved a theory of prescription comparable to continental notions in the property field and performing the same functions as a device for the acquisition of ownership.[57] For present purposes it is enough to select from that body of learning the requirement of notoriety in adverse possession, a requirement that crept rather early into American theories of prescription.[58] The purpose of requiring notoriety for the acquisition of title by adverse possession is obviously to protect the original owner and give him an opportunity to interpose.[59] The result might be described as the equiva-

[56] The influence of this phrase on American theories for the limitation of actions is admirably described by Percy Bordwell, "Disseisin and Adverse Possession," 33 YALE L. J. 1, 141 (1923).

[57] See the articles of Bordwell, cited in the previous note; H. W. Ballantine, "Title by Adverse Possession," 32 HARV. L. REV. 135 (1918); and Dean Ames, "The Nature of Ownership," LECTURES ON LEGAL HISTORY 192 (1913).

[58] The requirement of notoriety appears in English cases: Earl of Dartmouth v. Spittle, 24 L. T. 67 (1871); Ashton v. Stock, 6 Ch. Div. 719 (1877). But it has its fullest flowering in American decisions, some of which are collected in 28 Am. St. Rep. 158 (1893); TIFFANY, REAL PROPERTY, 2d ed., sec. 501 (1920); 2 REEVES, REAL PROPERTY, sec. 1029 (1909). It is also recognized in continental law, where the "acquisitive" nature of prescription is more sharply emphasized. PUGLIESE, LA PRESCRIZIONE ACQUISITIVA, 4th ed., sec. 183 ff. (1921); 28 BAUDRY-LACANTINERIE, TRAITÉ DE DROIT CIVIL, 3d ed., sec. 257 ff. (1905).

[59] In the early American cases in which this test is clearly stated, there is a very strong conviction that the owner should not be deprived of his property without a fair opportunity to interrupt the running of the statute. See for example, Proprietors of the Kennebeck Purchase v. Springer, 4 Mass. 416 (1808): " . . . the occupation must be of that nature and notoriety, that the owner may be presumed to know, that there is a possession of the land adverse to his title: otherwise a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seizin has been interrupted." See also the strong statement in Thompson v. Pioche, 44 Cal. 508 (1872); and Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230 (1807); Royall v. Lessee of Lisle, 15 Ga. 545 (1854); Bates v. Norcross, 31 Mass. 224 (1833); Whitley County Land Co. v. Powers' Heirs, 146 Ky. 801, 144 S. W. 2 (1912).

That fair notice to the owner of the adverse claim is the object of this requirement is indicated not only in the detailed tests as to what conduct is sufficiently notorious (fencing, harvesting crops, cutting timber, pasturing, etc.), but also by the common statement that publicity is not required if the owner has actual notice. See 2 TIFFANY, REAL PROPERTY, 2d ed., sec. 501 (1920).

The development of the "notoriety" test seems to have resulted from an increased emphasis in American cases on the function of prescription as a transfer of title. It is true that both the barring of stale claims and the quieting of title to land have a larger social purpose than punishment of the owner for his neglect. See Bordwell, "Disseisin and Adverse Possession," 33 YALE L. J. 1 at 11 (1923); HOLMES, COLLECTED LEGAL PAPERS 198-200 (1921). But the injustice of cutting off the owner's claim is more

lent of a "fraud" or "fraudulent concealment" exception in cases involving trespass to land. At least it is true that full disclosure, by overt and unmistakable conduct, is necessary if wrongful possession or use of land is to result in the transfer of either limited or fee simple interests therein.

Judicial reasoning takes a wholly different direction where the tortfeasor does not claim an interest in the realty through his continuous and hostile invasion of the owner's right. If only a single trespass is involved, or a series of trespasses not sufficiently continuous or notorious for adverse possession, the trespasser can ordinarily claim the protection of the statute of limitations in the owner's action for damages for the trespass. If the trespass occurred more than the statutory period before the owner's action was brought, his ignorance will not raise the bar of the statute.[60] The most important exception is made in the case of underground trespass. Even where the trespasser made no deliberate attempt to disguise or mislead, the natural obstacles to discovery by the owner have led several courts to suspend the statute by the application of the "undiscovered fraud" exception.[61] Where the "fraudulent con-

shocking where the denial of a remedy for a secret trespass will have the incidental effect of passing a partial or complete "title" to the secret trespasser.

[60] Arkansas Power & Light Co. v. Decker, 181 Ark. 1079, 28 S. W. (2d) 701 (1930); Nudd v. Hamblin, 90 Mass. 130 at 133 (1864)— " . . . a mere wilful trespass not committed by stealth is not legally a fraud, however wrong and unjust it may be"; Lee v. Gram, 105 Or. 58, 196 Pac. 373 (1921); Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co., 167 Pa. 136, 31 Atl. 484 (1895); Golden Eagle Mining Co. v. Imperator-Qulip Co., 93 Wash. 692, 161 Pac. 848 (1916); Williams v. Pomeroy Coal Co., 37 Ohio 583 (1882). In the case last cited the court distinguished cases where the trespass involved a continuing injury and might result in the acquisition of a prescriptive right.

[61] 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. In the Lightner case it appeared that defendants had instructed their workmen not to cross the boundary line in their underground workings, and had no actual knowledge at any time that the trespasses were being committed, but that their workmen had actual knowledge which by rules of agency could be imputed to the principals. In none of the other cases was there even such fault as this, the court in the Tom Reed Gold Mines Co. case expressly holding that even an unintentional trespass was a "constructive fraud."

In Kentucky suspension of the statute has been allowed through redefinition of the "cause of action," which accrues only in discovery in cases of underground trespass, even though the trespass was wholly unintentional. Falls Branch Coal Co. v. Proctor Coal Co., 203 Ky. 307, 262 S. W. 300 (1924).

Two States have refused to suspend the statute. Williams v. Pomeroy Coal Co., 37 Ohio St. 583 (1882); Golden Eagle Mining Co. v. Imperator-Qulip Co., 93 Wash. 692, 161 Pac. 848 (1916). In the latter case defendant's knowledge was alleged.

The English cases have made decisive the question whether the trespasser knew

cealment" exception is recognized it may be used for the same purpose.[62]

3. *Detention of Personal Property*

The convergence of several theories for the suspension of limitation acts has brought far more serious confusion in cases of detention or injury to personal property. The initial difficulty arises from the transfer to the chattel field of doctrines of adverse possession, originally developed in cases involving real property. With the positive result of adverse possession, in transferring title to the adverse possessor of chattels, there need be no quarrel and there is very little doubt in American decisions. If the possession is sufficiently hostile, continuous, and public, important social interests require not only that the owner's remedies be barred but that his "right" be extinguished.[63] This is

that a trespass was being committed. In Imperial Gas Light & Coke Co. v. London Gas Light Co., 10 Exch. 39, 156 Eng. Repr. 346 (1854), a demurrer was sustained in a common law action for damages for tapping gas pipes laid underground, although there were allegations of intentional trespass and also deliberate concealment. But in Bulli Coal Mining Co. v. Osborne, [1899] A. C. 351, the Privy Council held that the statute of limitations was suspended where defendant trespassed intentionally in mining coal underground. In the same year a lower court refused to toll the statute in a case where the trespasser did not know that boundaries had been passed, the court indicating that even knowledge by the trespasser would not be enough, unless there were affirmative concealment. In re Arbitration between Astley and Tyldesley Coal Co. and Tyldesley Coal Co., (Q. B. 1899) 80 L. T. R. 116, 15 T. L. R. 154. Whether the Bulli case will be followed is as yet uncertain. See Lynn v. Bamber, [1930] 2 K. B. 72. But earlier equity cases had gone at least as far. Dean v. Thwaite, 21 Beav. 621, 52 Eng. Repr. 1000 (1855); Ecclesiastical Commissioners v. Northeastern Ry., L. R. 4 Ch. Div. 845 (1877).

[62] Lightner Mining Co. v. Lane, mentioned in the previous note, relied also on fraudulent concealment as a ground for suspension. The only concealment was the disclosure by defendants that they had crossed the boundary on another level, with an offer to pay for the value of ore there taken. The court indicated that this conduct had the effect of relaxing the plaintiff's vigilance. In Petrelli v. West Virginia-Pittsburgh Coal Co., 86 W. Va. 607, 104 S. E. 103 (1920), it was found that defendant knew the trespass was occurring. The court apparently relied on the "fraudulent concealment" exception, which has been recognized in West Virginia.

In a few States there is special legislation suspending the statute until the owner's discovery, in actions for underground trespass: Ohio Gen. Code (Page 1926), sec. 11224; Utah C. L. (1917), sec. 6468(2); and in actions for injuries to "property": Iowa Code (1931), sec. 11010; N. Mex. Ann. Stat. (1929), c. 83, sec. 115.

[63] Cockfield v. Hudson, 2 Bay (S. C.) 425 (1802); Layne v. Norris' Adm'r, 57 Va. 236 (1861); Torrey v. Campbell, 73 Okla. 201, 175 Pac. 524 (1918); and other cases cited in following note. In the well-known case of Chapin v. Freeland, 142 Mass. 383 (1886), it was held that after the barring of remedies for the recaption of personal property the owner's retaking by self-help would be ineffective to revest "title."

HOLMES, COLLECTED LEGAL PAPERS 199 (1921), has suggested considerations that are peculiarly applicable to this situation:

" . . . I should suggest that the foundation of the acquisition of rights by lapse of

especially true in the case of movable goods, where possession may be more persuasive evidence of ownership and third persons may be more easily misled.[64] The real difficulty comes where actual possession, long continued, is still insufficient to satisfy the tests for the acquisition of title by adverse possession. And the test that has probably caused the greatest trouble is precisely the one of greatest interest here, that is, the requirement of "notoriety."

It is undoubtedly difficult to define the degree of secrecy which will deprive a wrongful holder of chattels of statutory protection. It is difficult enough to define the "notoriety" required for adverse possession of land.[65] But land is fairly solid. The surface may be removed

> time is to be looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and if necessary, stopped."

Such factors as these have undoubtedly influenced decision in the field of personal property. In view of their strength, and the extreme difficulty of defining the "notoriety" which will suffice to charge the original owner with notice of adverse claims, it is surprising that courts clung so desperately to this requirement in cases involving personalty. There remains a lingering feeling that unless the owner know the identity of the adverse claimant, or where he may be found, even the social interest in protection of long-term actual possession should not defeat his claim.

[64] Most of the cases in which the doctrines of adverse possession have been recognized are cases in which one or a succession of bona fide purchasers have detained the property in ignorance of any defect in their predecessor's title. Dee v. Hyland, 3 Utah 308 (1883); Gaillard v. Hudson, 81 Ga. 738, 8 S. E. 534 (1888); Yore v. Murphy, 18 Mont. 342, 45 Pac. 217 (1896); Wells v. Halpin, 59 Mo. 92 (1875); McGehee v. Alexander, 33 Okla. 699, 127 Pac. 480 (1912); Simons v. Executor of Geiger, 12 Rich. (S. C.) 392 (1859); Leavitt v. Shook, 47 Or. 239, 83 Pac. 391 (1905); Shelby v. Shaner, 28 Okla. 605, 115 Pac. 785, 34 L. R. A. (N. S.) 621 (1911).

[65] The difficulty varies, of course, with the conditions of land settlement. It is interesting that an Italian writer, having in mind a stable and settled community, raises a doubt whether there could ever be a continuous, adverse, and "legitimate" occupation without sufficient publicity to apprise the owner. 1 PUGLIESE, LA PRESCRIZIONE ACQUISITIVA, 4th ed., sec. 183 (1921). But in this country there has been abundant litigation over this question, and statutes have undertaken in many States to define the conduct which will satisfy this test. The great mass of litigation reflects a sparsely

but the owner's "title" will still attach, for legal purposes, to what remains. Even a house cannot be moved very fast or very far.[66] Many types of personal property, on the other hand, are not only extremely movable but also very hard to distinguish from other objects of similar type (horses, negotiable bonds). Accordingly, while we find that many cases say, [67] and many others assume,[68] that "secret" possession of personal property will not suffice for acquisition of title by adverse possession, we also find that the tests for "secrecy" are elusive, and look primarily to the wrongdoer's state of mind.[69]

The problem is equally serious when suspension of the statute is sought through the use of the "fraud" or "fraudulent concealment"

settled, primarily agricultural community, with a population still fluid and migratory. See cases cited in 2 TIFFANY, REAL PROPERTY, 2d ed., sec. 501 (1920); 28 Am. St. Rep. 158 (1893). But dispute and litigation can still arise. See CURRENT DIGEST, "Adverse Possession," key numbers 28-33.

[66] The writer has encountered only one limitations case involving the misappropriation of a house, and there the defendant had accomplished his purpose by persuading the owner that the house had never stood there at all, and that the land had always been vacant. Perry v. Wade, 31 Kan. 428 (1884).

[67] Chilton v. Carpenter, 78 Okla. 210, 189 Pac. 747 (1920); Vaut v. Gatlin, 31 Okla. 394, 120 Pac. 273 (1912); dicta in Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119 (1910).

[68] This is the assumption of most of the cases cited supra, notes 63 and 64.

[69] In most of the cases where the possessor has been protected by the statute of limitations there was a finding of a purchase in good faith. See cases cited supra, n. 64. If the court scrutinizes his conduct subsequent to the purchase it is usually to point out that the property was used in a manner that would be reasonable and normal for a person who honestly believed himself the owner. Gaillard v. Hudson, 81 Ga. 738, 8 S. E. 534 (1888): "It is manifest from the record in this case that the defendant . . . had been in the peaceable, quiet and honest possession of this property for more than four years. . . ."; Dee v. Hyland, 3 Utah 308 (1883): " . . . the defendants and their vendors purchased, held, and used the horse in good faith, making no effort to conceal it. . . ." See also Simons v. Fox, 12 Rich. L. (S. C.) 392 (1859). In Torrey v. Campbell, 73 Okla. 201, 175 Pac. 524 (1918), there was some evidence that defendant Campbell had paid an inadequate price for the stolen property, but the court emphasized the fact that "the cow was held in open and notorious possession by Campbell on his farm in the same county," without any effort to remove it to any greater distance for the purpose of preventing discovery.

It has been held that removal of personal property outside the jurisdiction will suspend the statute until its return. Vaut v. Gatlin, 31 Okla. 394, 120 Pac. 273 (1912). Also that secrecy by the thief aimed at preventing detection will have the same effect, at least until the property reaches the hands of a bona fide purchaser. Chilton v. Carpenter, 78 Okla. 210, 189 Pac. 747 (1920). In Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119 (1910), there were strong dicta to the effect that a thief of bonds would not acquire title by adverse possession where he hid the bonds in a private drawer and secretly collected them at maturity, having secured the serial numbers from the owner through a promise to assist him in preventing collection by the thief.

exceptions. Most courts have felt a profound reluctance to describe as "fraud" a secret detention of personal property, for which other names were more appropriate.[70] It is the "fraudulent concealment" exception, or its equivalent, that has usually been employed.[71] The application of that exception has been fairly easy where there was direct misrepresentation of fact or a course of conduct, face to face, deliberately aimed at misleading the original owner.[72] Here as elsewhere, a relation of mutual trust will induce courts to stretch concepts to protect justified expectations of fair dealing.[73] And a statutory system for the registration of lost and unclaimed property may by implication require disclosure from finders and provide a standard for the measurement of their conduct.[74] But where no such standard is imposed by legislation, and the owner's discovery is obstructed by more furtive and fugitive means, the

[70] Bennett v. Meeker, 61 Mont. 307, 202 Pac. 203 (1921); Howk v. Minnick, 19 Ohio St. 462 (1869); Havird v. Lung, 19 Idaho 790, 115 Pac. 930 (1911). But see Orr Shoe Co. v. Edwards, 111 Miss. 542, 71 So. 816 (1916).

[71] See cases cited infra, notes 72, 74, and 75. And see the dicta in Watts v. Mulliken's Estate, 95 Vt. 335 at 341, 115 Atl. 150 (1921), to the effect that a thief's "carefully laid plan" to avoid detection would be a fraudulent concealment.

[72] Free v. Jordan, 178 Ark. 168, 10 S. W. (2d) 19 (1928), denial by defendant that plaintiff's dog was in his possession; Estate of Claghorn, 181 Pa. 608, 37 Atl. 921 (1897), misappropriation by bailee disguised by regular payments of interest and false accounts; Hughes v. First Nat. Bank, 110 Pa. 428, 1 Atl. 417 (1885), similarly. See also Orr Shoe Co. v. Edwards, 111 Miss. 542, 71 So. 816 (1916), where the "fraud" exception was applied to a conversion of goods in which discovery was obstructed by misleading statements of defendant.

[73] In Auld v. Butcher, 22 Kan. 400 (1879), a bond was pledged with defendant by plaintiff in 1869, but no demand for its return was made until 1876. In postponing the accrual of the "cause of action" until actual demand the court emphasized the life-long friendship between plaintiff and defendant, the physical and mental debility of plaintiff, and the relative superiority of defendant.

[74] Conditt v. Holden, 92 Ark. 618, 123 S. W. 765 (1909), where a statute made it a misdemeanor to detain found live stock without reporting it to a local justice of the peace and publishing its brand. See also Alfred v. Esser, (Colo. 1932) 15 Pac. (2d) 714, where suspension of the statute was allowed in an action against a state live stock inspection board on account of its failure to notify the owner of found live stock that it had been seized and sold, the court drawing the implication from the statute that "some sort of notice" was required.

But compare Havrid v. Lung, 19 Idaho 790, 115 Pac. 930 (1911), where the original finder of an estray failed to comply with the estray statute, but later sold it to an innocent purchaser. It was held that the estray law had no effect on the operation of the statute of limitations as against a second innocent purchaser, the defendant.

In Utah a special clause suspends limitation acts until discovery in actions for the theft of "branded live stock." Utah C. L. (1917), sec. 6468 (3). In three States such clauses go further and apply to all trespasses to or conversions of "property." Iowa Code (1931), sec. 11010; N. Mex. Ann Stat. (1929), c. 83, sec. 115; Ohio Gen. Code (Page 1926), sec. 11224.

only question can be whether the means of obstruction reflected an exceptional anxiety to evade detection, inspired primarily by a consciousness of guilt.[75] Incongruities are further increased where a third person, a non-participant in the original conversion, is introduced. The wrongdoer may have disguised the taking or removed the property in such a way that the owner's avenues to discovery may remain completely closed. But the protection of innocent third persons will probably require that the statute operate in their favor from the date at which they intervene.[76]

4. Actions for Malpractice

Actions against physicians and surgeons for malpractice present a more vivid and specific trial for legal doctrine in the field of limitations. In such actions there appear abundantly those disparities in

[75] In Quimby v. Blackey, 63 N. H. 77 (1884), the finder of a lost pocketbook hid it in a haymow and later spent the money contained in it. Defendant knew these circumstances, and joined with the finder in spending the money. It was held that defendant's failure to notify the owner was a "fraud," and that a continued failure to notify was "fraudulent concealment." In Arnold v. Scott, 2 Mo. 14 (1828), the court held that the jury should be allowed to say whether a converter of bank notes and coins had used more than "a reasonable privacy in using or keeping it." The unwillingness of the court in Bennett v. Meeker, 61 Mont. 307, 202 Pac. 203 (1921), to describe as "fraud" the defendant's detention of plaintiff's wandering cow was probably due in part to the fact that defendant advertised its brand in local newspapers, so that the court was able to infer defendant's "honesty and good faith."

A mere detention of personal property which was rightfully received is probably not enough to suspend the statute, without some misleading conduct by defendant. Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795 (1895); Sparks v. First Nat. Bank, (Tenn. 1932) 46 S. W. (2d) 43. See also O'Brien v. McSherry, 222 Mass. 147, 109 N. E. 904 (1915).

[76] Wells v. Halpin, 59 Mo. 92 (1875); Munson v. Hallowell, 26 Tex. 475 (1863); Johnson Cotton Co. v. Sprunt & Co., 201 N. C. 419, 160 S. E. 457 (1931); dicta in Gatlin v. Vaut, 6 Ind. Terr. Rep. 254 (1906). See also Jones v. Rogers, 85 Miss. 802, 38 So. 742 (1904); and especially Havrid v. Lung, 19 Idaho 790, 115 Pac. 930 (1911), discussed in note 74, supra. The same protection to innocent third persons is called for where property is held subject to equitable obligations and the third persons deal with the fiduciary in ignorance of his breach of trust. See supra, n. 47.

There is more difficulty where the third person has actual notice of the legal or equitable owner's interest in the property. There is some authority in the field of adverse possession which treats such third persons in the same manner as the original wrongdoer. Rankin v. Bradford, 28 Va. 163 (1829); dicta in Gatlin v. Vaut, 6 Ind. Terr. Rep. 254 (1906). But in Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277 (1894), it was held, in applying the "fraudulent concealment" exception, that a pledgee of misappropriated securities was under no duty of disclosure, although he had actual notice of the misappropriation and although the pledgor owed such a duty as a result of confidential relations with the owner. *Cf.* Quimby v. Blackey, 63 N. H. 77 (1894), supra, n. 75.

knowledge and experience, coupled with reliance by the inferior party, that are used in other situations to justify suspension of the statute. The defendant's conduct does not usually involve direct misrepresentation or even consciousness of wrongdoing. But the plaintiff's ignorance can be explained by an absence of technical training, assumed on both sides as the basis of their relationship. A patient's expectations of skill, diligence, and good faith are protected in various ways, by "implying" a high standard of care as an element of their express contract, by legal protection to confidential statements made in the course of treatment, and so on. For some purposes that relationship is treated as "confidential," so that a physician faces an initial handicap in attempting to retain property of his client transferred by way of gift.[77] The obstacles to discovery are often enhanced by the fact that injuries due to negligence will be disguised for considerable periods, and the physical results may not develop to their full extent for some time after the injuries first appear. It is therefore surprising that courts have not resorted more readily to devices for suspension of limitation acts in these cases. The contrast with their treatment of injuries to property is striking. In malpractice cases the elements of the legal relationship have been coldly dissected, the obstacles to discovery very largely ignored, and the tort-feasor's obligation to disclose reduced to a minimum.

One almost feels justified in attributing the hostility of lawyers toward malpractice actions to the solidarity of two professional castes which are equally exposed to the criticism and dislike of laymen.[78] But whatever the reason, this hostility appears at several points. Although the elements of express contract can nearly always be found in physician-patient relationships, it is usual to ignore their contractual aspects and apply to malpractice actions the shorter limitation on tort actions.[79] Even more remarkable is the unanimity of courts in a rigid definition of

[77] Woodbury v. Woodbury, 141 Mass. 329, 5 N. E. 275 (1886); and cases cited in 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., sec. 249 (1929).

[78] Occasionally the reason for this point of view is stated to be the danger of manufactured or doctored evidence. See for example, Bodne v. Austin, 156 Tenn. 353, 2 S. W. (2d) 100 (1927). As to the merit of this suggestion one may do no more than express a doubt.

[79] Bodne v. Austin, 156 Tenn. 353, 2 S. W. (2d) 100, 62 A. L. R. 1410 (1928), and annotation. See also 1 A. L. R. 1313 (1919); 74 A. L. R. 1256 (1931). There is some dissent. In Bodne v. Austin itself this conclusion was made to appear not altogether inevitable by the earlier case of Kirkman v. Phillips' Heirs, 7 Heisk. (Tenn.) 223 (1872), in which the six-year "contract" period was applied to a quasi-contract action for the conversion of personal property.

the "cause of action." Where, for example, a surgical sponge is left in the plaintiff's interior, the injurious consequences may not appear for many years. By fixing the accrual of the "cause of action" at the date when the surgical operation is negligently performed courts can effectively deprive the plaintiff of any substantial recovery. Even if the injury be at once discovered, an unlikely event, the recovery will be limited to nominal damages without proof that more serious consequences will follow.[80] This difficulty is by no means restricted, of course, to malpractice actions, and results in other fields are open to criticism from a similar point of view.[81] There are at least adequate analogies by which the accrual of the "cause of action" might be postponed to the date at which the injurious consequences first appeared.[82]

[80] This is admitted in a number of cases: Weinstein v. Blanchard, 109 N. J. L. 332, 162 Atl. 601 (1932); Capucci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929). And see the prevailing opinion in Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865 (1902).

[81] In the nearest analogy to the malpractice case, that is, in actions against attorneys for negligence in the performance of their professional duties, it is likewise usual to fix the accrual of the "cause of action" at the date when the breach of duty occurred, and not when the "damage" was suffered. Wilcox v. Executors of Plummer, 4 Pet. (29 U. S.) 172 (1830); Moore v. Juvenal, 92 Pa. 484 (1880); Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545 (1892); Fortune v. English, 226 Ill. 262, 80 N. E. 781, 12 L. R. A. (N. S.) 1005 (1907). See also Provident Loan & Trust Co. v. Wolcott, 5 Kan. App. 473, 47 Pac. 8 (1896) (title-abstractor); Russell & Co. v. Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212 (1893) (title-abstractor); Schade v. Gehner, 133 Mo. 252, 34 S. W. 576 (1896) (title-abstractor); Lambert v. McKenzie, 135 Cal. 100, 67 Pac. 6 (1901), sheriff's failure to collect judgment. See collection of cases on this question in 126 Am. St. Rep. 944 (1909).

In actions based on actual fraud this question occasionally presents itself as a problem in the measurement of damages. Where property is purchased through misrepresentation by the vendor as to some "material" fact, the full effect of the discrepancy on the value of the property may not appear at once, or may be influenced by other independent but contributing factors, such as a general fall in commodity prices. Damages apparently must be assessed as of the date of the purchase. Ebacher v. First State Bank, (Minn. 1933) 246 N. W. 903.

[82] In actions for withdrawal of lateral support the "cause of action" is usually said to accrue when the subsidence of the plaintiff's land occurs. Backhouse v. Bonomi, 9 H. L. Cas. 503, 11 Eng. Repr. 825 (1861); West Pratt Coal Co. v. Dorman, 161 Ala. 389, 49 So. 849 (1909); Rector, Wardens, & 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. 474, 50 Atl. 255, 55 L. R. A. 410 (1901).

In the field of warranty, especially warranty of title, there is authority fixing the accruing of the cause of action at the date of the "injury" rather than at the date of the original agreement. See 126 Am. St. Rep. 944 (1909). The Louisiana cases, under the influence of French legal doctrine, apply this reasoning freely to both contract and tort cases. Woodward-Wight & Co. v. Engel Land & Lumber Co., 123 La. 1093, 49 So. 719 (1909); Jones v. Texas & Pacific Ry., 125 La. 542, 51 So. 582 (1910).

But these analogies have not been followed; instead the cases are almost unanimous in deciding that the "cause of action" accrues at the date when a technical breach of duty first occurred,[83] or at the latest when professional treatments ceased.[84]

Nor has the narrow circle of this strict reasoning been broken to any great degree by the use of the undiscovered "fraud" and "fraudulent concealment" exceptions. There is very little authority for the application of the "fraud" exception to negligent injuries by physicians.[85]

[83] See cases cited in 74 A. L. R. 1317 (1931), and also Johnson v. Nolan, 105 Cal. App. 293, 288 Pac. 78 (1930); Weinstein v. Blanchard, 109 N. J. L. 332, 162 Atl. 601 (1932); Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. S. 139 (1926); Lotten v. O'Brien, 146 Wis. 258, 131 N. W. 361 (1911).

An extremely embarrassing problem was presented to the New Jersey court in the malpractice case of Weinstein v. Blanchard, 109 N. J. L. 332, 162 Atl. 601 (1932). The New Jersey decisions fixed the accrual of the cause of action at the point where damage occurred in land cases of withdrawal of lateral support, partly on account of the difficulties in proving prospective damages in such cases. Rector, Wardens, etc. v. Paterson Ext. R. R., 66 N. J. L. 218, 49 Atl. 1030 (1901); *ibid.*, 68 N. J. L. 399, 53 Atl. 449, 1079 (1902). Furthermore, in Ochs v. Public Service Ry., 81 N. J. L. 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240 (1911), it was held that a cause of action could be "split" where defendant's negligence caused injury to both person and property, since "it is the injury alone and not alone the negligent act which gives rise to the right of action, for a negligent act is not in itself actionable, and only becomes the basis when it results in injury to another." In Weinstein v. Blanchard the court simply refused to apply this language to the problem of limitation, and disposed of the even more persuasive analogy of the lateral support cases by describing the defendant's tort in those cases as a "continuing and recurring injury."

[84] That extension of the statutory period to this later point will be permitted is indicated by Peteler v. Robison, (Utah 1932) 17 Pac. (2d) 244; Schmit v. Esser, 183 Minn. 354, 236 N. W. 622 (1931), and cases cited in annotation, 74 A. L. R. 1317 at 1322 (1931). The Ohio cases especially have developed along this line. In Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865 (1902), an evenly divided court affirmed a judgment for a plaintiff, the prevailing opinion arguing that failure to use due care in remedying injuries caused by negligence was an independent breach of duty so long as professional relations continued. In McArthur v. Bowers, 72 Ohio St. 656, 76 N. E. 1128 (1906), a memorandum opinion followed the opposing view of the other half of the court in Gillette v. Tucker. But in Bowers v. Santee, 99 Ohio St. 361, 124 N. E. 238 (1919), the court returned to the view that had prevailed in Gillette v. Tucker, making these significant remarks at pp. 366 and 368:

> "The patient relies almost wholly upon the judgment of the surgeon, and under the usual circumstances of each case is bound to do so, and if the injury is not reduced, and a normal condition restored, as fully or as speedily as expected, the patient is still at liberty to rely upon the professional skill, care and treatment to complete such recovery so long as the surgeon continues his employment with reference to the injury. . . . The doctrine announced here is conducive to that mutual confidence that is highly essential in the relation between surgeon and patient."

[85] Apparently the only case to this effect is Bryson v. Aven, 32 Ga. App. 721, 124 S. E. 553 (1924), which describes the relation of physician and patient as "confiden-

The "fraudulent concealment" exception may be used where there is a subsequent and intentional misrepresentation as to the seriousness of the injury.[86] But without knowledge by the defendant that an injury has occurred, no court has suspended the statute on the ground of

tial," so that a duty existed to inform plaintiff of a pessary inserted during an operation, and failure to disclose its presence was a "fraud" suspending the statute. But it was expressly held in Trimming v. Howard, (Idaho 1932) 16 Pac. (2d) 661, that negligence in breaking off a surgical needle and leaving a piece in plaintiff's spine was not "fraud" for limitation purposes. See to the same effect Peteler v. Robison, (Utah 1932) 17 Pac. (2d) 244.

In Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. S. 139 (1926), plaintiff alleged that defendant, a dentist, negligently permitted a tooth to go down her throat while plaintiff was under ether and fraudulently concealed the fact from her, the tooth being removed from her lung three years later. The court expressed a willingness to infer from this allegation that defendant knew the tooth had gone down plaintiff's throat, but refused to make the further inference that defendant knew it had gone into her lung. Counsel urged on the court the earlier case of Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (1910), where an action "in equity" to reach the proceeds of stolen bonds was held to be an action for relief on the ground of "fraud." (See 31 MICH. L. REV. 616-17, 630 (1933).) The court in Tulloch v. Haselo explained that Lightfoot v. Davis was based on "fraud," whereas this action was for personal injuries, and added that "It would be a dangerous precedent to establish to hold that equity should interpose against the statute of limitations in a malpractice case, especially where no intentional injury is shown or to be inferred."

[86] Schmucking v. Mayo, 183 Minn. 37, 235 N. W. 633 (1931), coming up on demurrer with character of misrepresentations not revealed; Hudson v. Shoulders, 164 Tenn. 70, 45 S. W. (2d) 1072 (1932), likewise coming up on demurrer, with allegation that when burns from X-ray treatment were pointed out by plaintiff to defendant he "falsely and fraudulently represented to him that no ill effects or other injurious results would follow from the apparent burn." In Groendal v. Westrate, 171 Mich. 92, 137 N. W. 87 (1912), an action was brought for malpractice in failing to treat plaintiff's dislocated arm in the proper manner, plaintiff testifying that defendant had been her family physician for 11 years, that they were both Hollanders, and that defendant represented the arm to be merely bruised and not dislocated, these representations continuing during the treatment over a period of a year and a half. Defendant testified that he discovered the dislocation almost immediately. It was held that there was a case that might go to the jury on the question of fraudulent concealment.

But in Ogg v. Robb, 181 Iowa 145, 162 N. W. 217 (1917), plaintiff alleged in his petition that when discoloration appeared after X-ray treatments, defendant "falsely and fraudulently" represented it to be merely temporary and "of no particular consequence." Cancer appeared 11 years later. It was held that a demurrer to the petition was properly sustained, the court suggesting that defendant's statement was merely a statement of "opinion."

In Peteler v. Robison, (Utah 1932) 17 Pac. (2d) 244, the plaintiff alleged negligence in the performance of a tonsilectomy and to excuse delay alleged further that defendant "with intent to deceive plaintiff and to induce her to refrain from bringing an action against him for his malpractice, of which he well knew he was guilty, fraudulently concealed from plaintiff the facts as to his negligence, and fraudulently lulled her into the belief that the evil results were the natural sequence of the operation, and defendant baited her along by treatment," asserting that such treatment would

"fraudulent concealment." [87] And it is uncertain whether mere knowledge on the defendant's part creates an obligation to disclose the existence or extent of the injury.[88] At least it is fairly clear that the loud lament of plaintiffs, describing their complete helplessness and ignorance throughout the statutory period, will awake no sympathetic response from appellate courts.[89]

cure the infection. In holding these allegations sufficient against demurrer the court said at p. 250:

> " . . . the case is not one of an alleged tort or breach where the parties stood on an equality and dealt with each other at arm's length, or each had equal means of knowledge. The relation of the parties being that of physician and patient, the case is one of trust and confidence imposed in the defendant, and, as to what was to be done and what was being done and as to the manner of treatment, the plaintiff had the right to rely and did rely upon the superior knowledge of the defendant. . . . While the alleged assurances of the defendant, that the continued treatments would eventually clear up and cure the throat conditions, were in the nature of an opinion, and for that reason not subject as a basis of an action for failure to accomplish such results, still the promises and assurances were pertinent and relevant as bearing on the confidence and reliance placed in the defendant, on the acts and conduct of the plaintiff in submitting to the continued treatment, and as to her delay in enforcing whatever right to a cause of action was possessed by her. . . . "

[87] Such knowledge was either found or alleged in all the cases cited in the previous note. Expressly holding that there can be no fraudulent concealment of merely negligent injuries without at least knowledge on the part of the defendant that such injuries occurred: Murray v. Allen, 103 Vt. 373, 154 Atl. 678 (1931); Bodne v. Austin, 156 Tenn. 366, 2 S. W. (2d) 104 (1927); Brown v. Grinstead, 212 Mo. App. 533, 252 S. W. 973 (1923).

[88] In Conklin v. Draper, 229 App. Div. 227, 241 N. Y. S. 529 (1930), aff'd 254 N. Y. 620, 173 N. E. 892 (1930), it was held that an allegation of defendant's knowledge did not help the plaintiff's claim. See also Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. S. 139 (1926), discussed supra, n. 85.

[89] In Murray v. Allen, 103 Vt. 373 at 378, 154 Atl. 678 (1931), the court said:

> "The plaintiff's brief concludes with the earnest request that we consider this case free from any technical application of the statute of limitations, to the end that she may not be deprived of a remedy for the injury which she claims to have suffered. It is unfortunate for her that her right of action is no longer available, but to make it so we cannot disregard the plain wording of the statutory provisions applicable to the case."

Likewise in Capucci v. Barone, 266 Mass. 578, 165 N. E. 653 (1929), this language is to be found:

> "The plaintiff makes no contention of fraudulent concealment of facts by the defendant, but contends that 'The facts bring the case . . . 'within the equity' of the fraudulent concealment statute, since the Legislature never intended that a defendant should take advantage directly or indirectly of his own wrongful act, the existence of which was withheld either by his moral fault or his innocent concealment, since in either case the injured person is damaged without the means of knowing the wrong.' It is settled that the law is otherwise. . . . "

One is reminded of Professor Arnold's suggestion that a similar answer from an ad-

5. *Other Tort Actions*

In other types of tort action similar ruthlessness has been shown toward suitors who remained completely ignorant of the existence of a cause of action until the statutory bar had fallen. The best examples are cases of libel, where defendant's conduct is often surrounded with secrecy, and may perhaps include requests to third persons intended to prevent disclosure.[90] In actions for damages for adultery or alienation of affections it would be perhaps too much to require publicity by the defendant or the open and notorious adverse possession of the property cases. Not only is there no such requirement, but apparently direct denial of wrongdoing will not operate to suspend the statute.[91] An

ministrative tribunal would be described as "red tape." T. W. Arnold, "The Role of Substantive Law and Procedure in the Legal Process," 45 HARV. L. REV. 617 (1932).

The only expression of leniency seems to be in the dictum of Byers v. Bacon, 250 Pa. 564, 95 Atl. 711 (1915), where defendant was charged with negligence in failing to remove a drainage tube after an operation. In sending the case back for a new trial to determine the time at which good surgical practice would have required the removal of the tube, the court threw off this suggestion at p. 567: "Then too, it should have been a question for careful consideration, as to whether the statute should properly have been regarded as running against plaintiff, until such time as he could reasonably be charged with knowledge of the fact that the tube had been overlooked and left in the wound."

[90] McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641 (1900), libellous statements as to plaintiff's financial condition mailed from Mississippi to Virginia; Gunton v. Hughes, 79 Ill. App. 661 (1898), similar statements sent to a prospective creditor of plaintiff; Irvin v. Bentley, 18 Ga. App. 662, 90 S. E. 359 (1916), similar statements sent "privately" by letter; Beckham v. Burrton State Bank, 68 Kan. 833, 75 Pac. 1133 (1904), libellous letter sent with request that information be treated as "strictly confidential." In the last case, however, the court put its decision chiefly on the ground that "fraudulent concealment" could not in any event suspend the statute.

An exception is Bernstein v. Commercial Nat. Bank, 161 La. 38, 108 So. 117 (1926), where a libellous statement concerning a director of a national bank was sent secretly to the Comptroller of the Currency, who did not refer to it in his subsequent conversations with plaintiff. Defendants twice requested that their statements concerning plaintiff be treated as confidential. It was held that the secrecy surrounding defendants' conduct suspended prescription.

[91] Jackson v. Buchanan, 59 Ind. 390 (1877), an action for criminal conversation, with allegations that defendant "concealed by acts of secretly, by night, going to plaintiff's house, and procuring the wife of said plaintiff to represent to said plaintiff that said facts were not true." The court said at pp. 391 and 392:

> "To deny a fact, or procure another to deny it, is not a positive or an affirmative act; it is a negation. That the guilty parties should deny the act averred in the complaint, is not calculated to conceal the fact, but rather to awaken the attention of the aggrieved party to its existence and put him upon enquiry as to its truth. . . . To hold that a denial of a fact is such a concealment of it as would prevent the statute of limitations from running, would require all persons to admit

exception should be noted for one type of secret tort, conspiracy in restraint of trade, where the secrecy of the defendant's conduct may satisfy the tests for fraudulent concealment, even though defendant's secrecy was not primarily aimed at preventing plaintiff's discovery.[92] But it may be predicted that in most torts divorced from contract and not involving tangible property (real or personal) a strictly individualist point of view will be adopted toward suspension of limitation acts. The plaintiff must protect himself at his peril. His ignorance that a tort has occurred will not prevent the falling of the axe at the time and in the place fixed by statutory language.[93]

6. Secret Breach of Contract

Where plaintiff's claim is analysed in terms of contract the application of the "fraudulent concealment" exception becomes uncertain. Here the element of direct misrepresentation is usually absent. But the contractual relationship might be thought to create an obligation on the defendant's side analogous to the requirement of affirmative disclosure by "fiduciaries." To assert the existence of any such obligation over the whole field of contractual obligation would neglect the enormous variety of fact-situations that are to be subsumed within that legal category. In a few situations such an obligation has emerged, but results more commonly depend on a delicate balance of the plaintiff's opportunities for discovery as against the means used by defendant to forestall it.

Where honest misrepresentation by defendant can be detected at the inception of the contract or during its performance, suspension of the statute might be allowed through the simple extension of the cate-

facts, or remain silent when confronted with them, or place themselves beyond the protection of the statute."

See also Sanborn v. Gale, 162 Mass. 412, 38 N. E. 710 (1894), where the plaintiff was convinced that adultery had occurred but was prevented by his wife's denials of guilt from collecting evidence to prove it.

[92] American Tobacco Co. v. People's Tobacco Co., (C. C. A. 5th, 1913) 204 Fed. 58, an action under the Sherman Act for treble damages for conspiracy to injure the plaintiff's business. Defendant contended that the concealment of its relation to the Craft Tobacco Co., plaintiff's competitor, was intended only to prevent a boycott by organized labor against the Craft Co., since defendant was on the "unfair" list of labor groups and to reveal the connection would have caused an extension of the boycott. The court disposed of this contention by emphasizing the plaintiff's ignorance as the chief ground for suspension of statute, so that defendant's purpose was relatively unimportant.

[93] There remain other types of concealment in tort cases, i.e. concealment of the identity of the tort-feasor, concealment of evidence necessary for proof by plaintiff, etc. These will be considered below, notes 107-113.

gory "fraud." Especially should that result be expected where the plaintiff was known to rely on defendant's claim to expert knowledge and skill. But there is relatively little authority for the use of the "undiscovered fraud" exception in such situations,[94] and almost none for the use of "fraudulent concealment." [95] The same might be said for breach of express warranty in sales of goods, and here too there is

[94] An equitable action to rescind a land contract for honest misrepresentation by the vendor was held to be based on "constructive fraud," whose non-disclosure was a concealment, in Hathaway v. Hudson, 256 Mich. 694, 239 N. W. 859 (1932). Actions against title-abstractors for negligence in preparing abstracts have been brought within the "fraud" exception on the theory that their certificates, though issued without knowledge of defects, were misrepresentations of fact for which they were liable in damages. Chicago, R. I. & G. Ry. v. Duncan, (Tex. Civ. App. 1925) 273 S. W. 908; Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 Pac. 612 (1912). See also Lou v. Bethany Lutheran Church, 168 Wash. 595, 13 Pac. (2d) 20 (1932). But suspension of the statute was not allowed in Oklahoma Farm Mortgage Co. v. Jordan, 67 Okla. 69, 168 Pac. 1029 (1917), an action for damages against a notary public for executing a false certificate of acknowledgment on a mortgage procured by the notary as plaintiff's agent for investment. And most of the claims against title-abstractors are said to be based on negligence, so that the "cause of action" accrues when the inaccurate report is presented or at the latest when the plaintiff is induced to act in reliance thereon. See cases cited supra, n. 81. In Kelly v. Shropshire, 199 Ala. 602, 75 So. 291 (1917), an action against surveyors for negligence in surveying plaintiff's land was held not to be based on "fraud."

[95] A case in which the statutory period probably should have been extended was Fortune v. English, 226 Ill. 262, 80 N. E. 781 (1907). Here the plaintiff sued his attorney for negligence in certifying his opinion that real estate which plaintiff was about to purchase was free from encumbrances. When it appeared that there were mortgage liens outstanding, plaintiff hired defendant to defend foreclosure suits brought by the mortgagees. During this litigation defendant reiterated "falsely and maliciously" that these mortgages were invalid, but the actions were decided adversely to plaintiff six years later. The court pointed out that defendant's knowledge of the incorrectness of his opinion was not sufficiently alleged, and that the relation of attorney and client does not require the attorney "to volunteer information to his client that his client has a cause of action against him."

To be compared are cases involving breach of statutory obligation by public officers. In Morrissey v. Carter, 103 Okla. 36, 229 Pac. 510 (1924), an action was brought against a sheriff for the misconduct of his deputy in making a false return to the effect that persons against whom plaintiff was foreclosing a mortgage had been personally served with process. As a result of the defective service plaintiff's foreclosure action was ultimately barred by limitation. The court held that the absence of an intent to mislead was immaterial, since the prosecution of plaintiff's action was just as effectively hindered where there was no such intent. Suspension of the statute of limitations was explained first on the ground that the action was based on "fraud," and secondly on the ground that the cause of action did not accrue till injury was suffered, "especially where there is fraud amounting to concealment which prevented the injured party from knowing when the wrongful act was done or the amount of the damages." In a similar action against a sheriff in Foley v. Jones, 52 Mo. 64 (1873), it was held that the false return was an "improper act" that prevented plaintiff's discovery of the cause of action (itself based on the false return), and therefore suspended the statute.

reluctance to extend either exception against a defendant innocent of conscious wrongdoing.[96]

Where there is no misrepresentation, intentional or innocent, results depend on the extent to which the whole legal setting justifies an expectation of performance by defendant. Negligence by a surveyor of land employed by plaintiff would not ordinarily be discovered for a considerable period, but courts have been slow to impose a high standard of professional conduct in such situations.[97] The same is true with examiners of title-abstracts,[98] and even in cases of negligent conduct by attorneys at law.[99] Where workmanship is defective in a construction or service contract, the statute will probably not be suspended if no attempt is made to disguise defects.[100] Mere non-payment of a money debt is not concealment, and the debtor may even deny his liability[101]

[96] Lynn v. Bamber, [1930] 2 K. B. 72, where defendant sold some plum trees to plaintiff in 1921, the trees being described and sold as "Purple Pershores." The trees were planted and tended for several years before it was discovered that they were of an inferior type. The court in elaborate dicta reviewed the English authorities as to suspension of the statute for fraud and fraudulent concealment, but on examining the evidence concluded that plaintiff's allegations of "fraud" were not proven, and denied relief, on the ground that the action was merely for "breach of warranty."

[97] In Kelly v. Shropshire, 199 Ala. 602, 75 So. 291 (1917), such a claim was held not to be based on "fraud." In Troup v. Executors of Smith, 20 Johns. (N. Y.) 33 (1822), relief was denied on the ground that fraudulent concealment cannot suspend the statute of limitations, no question being raised as to whether the action was based on "fraud." For further discussion of this case see 31 MICH. L. REV. 591 at 601 (1933).

[98] See cases cited supra, n. 81.

[99] Cornell v. Edsen, 78 Wash. 662, 139 Pac. 602 (1914), where action against attorney for dismissing his client's action without authority was held not to be based on "fraud" and the court refused to recognize "fraudulent concealment" as an independent ground; Armstrong v. Milburn, (Ct. of App. 1886) 54 L. T. R. 723, where the attorney's negligence in failing to prosecute was assumed not to amount to "fraud," and "fraudulent concealment" was not found because there was no evidence of defendant's intention to conceal. Compare Fortune v. English, 226 Ill. 262, 80 N. E. 781 (1907). For other actions against attorneys see supra, n. 81.

[100] Osgood v. Sunderland, (K. B. 1914) 30 T. L. R. 530, an action for damages for defective installation of electric wiring. The early case of First Massachusetts Turnpike Co. v. Field, 3 Mass. 201 (1807), involving the defective construction of a turnpike road by defendant contractor, would probably not be followed on its facts, though its language had an important effect in developing the two exceptions for "fraud" and "fraudulent concealment." See 31 MICH. L. REV. 591 at 599 (1933).

[101] Mereness v. First Nat. Bank, 112 Iowa 11, 83 N. W. 711 (1900), defendant's cashier alleged to have said "with an intent to mislead and deceive plaintiff" that bank owed nothing to plaintiff's intestate, a former depostior of the bank; Cole v. McGlathry, 9 Me. 131 (1932), non-payment by debtor; McNaughton v. Rockford State Bank, (Mich. 1933) 246 N. W. 84, bank's failure to pay over to customer proceeds received from sale of collateral. See also Shreves v. Leonard, 56 Iowa 74, 8 N. W. 749 (1881), where the court emphatically asserted that the debtor was not required to

though requirements are usually relaxed where special obstacles lie in the way of the creditor's discovery that such a debt exists.[102] Cases of rate discrimination by public utilities, before the advent of public regulation, caused especial difficulty, since the records which disclosed such discrimination were commonly within defendant's control. If there was an express agreement not to give rates lower than those allowed the plaintiff, subsequent reassurances that the agreement was being observed suspended the statute, but mere secret breach of such agreements is probably not enough.[103] There are a few cases where courts have penal-

"pursue the plaintiff and inform him that because of his neglect the plaintiff's cause of action had accrued against him"; and Parmelee v. Price, 208 Ill. 544, 70 N. E. 725 (1904).

Compare Glover v. Nat. Bank of Commerce, 156 App. Div. 247, 141 N. Y. S. 409 (1913), an action to compel the transfer to plaintiff of stock negligently made over on defendant's books to other persons, and also for an accounting for dividends paid over to the record owners. The action was held not to be based on "fraud," since defendant's conduct consisted of breach of contract. It was further held that for fraudulent concealment something more than mere silence by defendant must be alleged, "some affirmative act of misrepresentation or the like."

[102] More leniency has been shown where the creditor dies and his personal representative attempts to collect the debt. In Wolkins v. Knight, 134 Mich. 347, 96 N. W. 445 (1903), the debtor showed to agents of the administrator account books which falsely showed payment of the debt. It was held that this might amount to fraudulent concealment. And in Bricker v. Lightner's Executor, 40 Pa. 199 (1861), suspension of the statute was allowed where the debtor went to the residence of the testator the morning after his death, induced his housekeeper to extract the notes which evidenced defendant's liability, and procured them from her a few days later. The court said: "Against a man who snatches the evidence of his indebtedness from a deceased creditor, we would not hesitate to presume a new promise to pay, or an intention to administer assets, or anything else to arrest the statute." See also Powell v. Overton, 191 Iowa 574, 181 N. W. 24 (1921). But compare Mereness v. First Nat. Bank, 112 Iowa 11, 83 N. W. 711 (1900), in the preceding note.

[103] In Hall v. Penna. R. R., 257 Pa. 54, 100 Atl. 1035 (1917), defendant's agent in 1893 assured plaintiff, a shipper, that no rates were being allowed to plaintiff's competitors lower than the ones charged to plaintiff. The court said that this statement "was calculated to deceive by preventing inquiry as to rebates, both before and after the time of the interview." The court also said that defendant's intention to conceal the secret rebates could be inferred from a request made in 1907 to persons who had received rebates that they destroy their records which revealed them. But in Mitchell Coal & Coke Co. v. Penna. R. R., 241 Pa. 536, 88 Atl. 743 (1913), the Pennsylvania court had held that the giving of rebates to competitors after a promise not to give them was merely a breach of contract which did not suspend the statute.

The Iowa court in Carrier v. Chicago, R. I. & P. Ry., 79 Iowa 80, 44 N. W. 203 (1890), found fraudulent concealment where an agent of the defendant continued to assure the plaintiff that no rebates were being given, and where the favored shippers were required to promise not to reveal them. To the same effect is Cook & Wheeler v. Chicago, R. I. & P. Ry., 81 Iowa 551, 46 N. W. 1080 (1890).

In other cases suspension of the statute has been denied on the ground that fraudulent concealment will not in any event have that effect. Atchison, Topeka, &

ized deliberate efforts to elude discovery or to take advantage of credulity.[104] But the underlying assumption in all this group of cases is that vigilance should be required from contract obligees in detecting nonperformance or defective performance by obligors. The rules for the limitation of actions probably reflect at this point prevailing views as to the moral force of contract obligations.[105]

7. *Interposing Obstacles to the Prosecution of a Known Claim*

The complex factors of policy which operate on the limitation of actions appear in greater profusion where the existence of a "cause of action" is known to the suitor, but some obstacles are deliberately raised by the opposite party to prevent prosecution. In a legal system

Santa Fe R. R. v. Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051 (1904); Saks & Co. v. New York Edison Co., 178 App. Div. 634, 165 N. Y. S. 572 (1917).

[104] Gregory v. Spieker, 110 Cal. 150, 42 Pac. 576 (1895), where a vendor of a patent medicine agreed not to sell the product in a certain locality and then proceeded to sell it through a secret combination with another person, whose name was used on the bottle. The court used the "fraud" exception for suspension of the statute, saying that "fraud was so ingrained with the breach of contract by defendant that the action, as regards the bar of the statute, at least, must be treated as one for relief on the ground of fraud. The breach was accomplished underhandedly, by secret confederacy with another, and the use of his name to cloak the movements of the defendant; and by deceit inducing third persons to believe that defendant's product differed from, and was superior to, that of plaintiff."

See also Jacobs v. Snyder, 76 Iowa 522, 41 N. W. 207 (1889), where a mortgagee agreed to discontinue a foreclosure suit already begun, but in violation of his agreement proceeded to decree and foreclosure sale, the plaintiff in the meantime relying on defendant as her confidential adviser; and Brake v. Payne, 137 Ind. 479, 37 N. E. 140 (1894), where plaintiff induced defendant to default in an action brought against him, by a promise not to proceed to execution against defendant personally.

[105] Undoubtedly commercial morality has remained on a higher plane than the "bad man," whose attitude toward contract obligation has been dramatized by Justice Holmes. COLLECTED LEGAL PAPERS, 170-175 (1920). Llewellyn was right in insisting that the pressure toward performance of contract does not come chiefly, in most fields, from legal sanctions, but rather from a variety of extra-legal factors, back of which lies the threat of official action as a last-resort device. "What Price Contract?", 40 YALE L. J. 704, 718-22, 724-5 (1931). How much is contributed to these pressures by a sense of moral obligation, vividly felt and consciously assumed by the contract obligor, is a matter for speculation. Surely the force of any such conviction must vary with different types of contract relations and with prevailing economic conditions. The best evidence of this is the great laboratory test, on an international scale, of the 1930-'33 deflation, in which a falling price level destroyed the moral authority of specific provisions in most contracts. The credit structure as a whole has shown an astonishing stability, even after devices for the evasion of contract obligation have been multiplied by legislation. But over very wide fields the conviction has spread that it is morally justifiable and economically sound to scale down or wipe out obligations that general economic conditions have made burdensome.

so far committed as our own to free and vigorous litigation it would be anomalous to require, in the application of limitation acts, the cordial help of the defendant for his self-declared opponent. Hostility and obstruction are among the hazards faced by litigants, especially in a procedural system that depends so largely on individual initiative and relegates to the background the moderating influence of officials. Those hazards are very much aggravated by statutes of limitation, which add the new risk of complete extinction if the claim is withheld too long. It is true that many procedural obstacles to successful litigation have been modified in modern reforms by liberalizing rules for amendment of pleadings, by widening the powers of the court over the conduct of the trial, etc. But it is still true that there are few penalties and certainly no moral sanctions attached to vigorous resistance by defendants or to their withholding information which might assist in the enforcement of claims.[106]

The point at which legitimate tactics of obstruction become "fraudulent concealment" is of course very difficult to define. For example, where the existence of a cause of action is known to the plaintiff, but the identity of the person liable is deliberately concealed, it is possible to argue that the "*cause*" of action is not concealed within the meaning of that exception.[107] The assumptions behind this purely conceptual ap-

[106] See for example, Bickle v. Chrisman's Adm'x, 76 Va. 678 (1882), where an action was brought by creditors to set aside assignments by their debtor for the benefit of his wife, on the ground that the assignments were without consideration. The plaintiffs claimed that the debtor had "obstructed" the prosecution of their action, within the language of the Virginia statute, by interposing "unjust and urgent defences," so that the 5-year statute of limitations had run against plaintiffs before they were able to secure a judgment at law on their claims. In refusing to suspend the 5-year statute the court made the remark that would probably meet with approval in other States: "No authority can be found, I imagine, for the proposition that the honest though mistaken defence of a suit will prevent the operation of the statute of limitations."

But estoppel may be resorted to against unfair methods of obstruction which result in delay beyond the statutory period. Albert v. Patterson, 172 Mich. 635, 138 N. W. 220 (1912); Fitzgerald's Estate, 252 Pa. 568, 97 Atl. 935 (1912).

[107] This is emphatically asserted in Illinois cases. In Short v. Estate of Jacobus, 212 Ill. App. 77 (1918), Jacobus set fire to plaintiff's barn, after having threatened to do so before. When examined by a private detective he denied it, but the detective reported to plaintiff that all the evidence pointed to Jacobus as the responsible party. No action was begun for nearly 10 years, on account of plaintiff's lack of evidence. The court held the action barred, asserting incidentally that concealment of the identity of the tort-feasor is not concealment of the cause of action. This proposition was extracted from the earlier case of Proctor v. Wells Bros. Co., 262 Ill. 77, 104 N. E. 186 (1914), where plaintiff sued for personal injuries against an Illinois corporation and for that reason delayed too long in starting suit against defendant, a New York corporation with a similar name. Defendant had done nothing to contribute to plaintiff's con-

proach are by no means absurd. And when the question appears as a problem in the limitation of actions, it can certainly be said that discovery of the injury creates a "duty" to discover who inflicted the injury.[108] But fortunately only one court has yet decided that the identity of the wrongdoer is not an element of a cause of action for the purpose of the "fraudulent concealment" exception.[109] And there is abundant authority for the proposition that direct misrepresentation or other active steps to conceal the identity of the wrongdoer do justify delay and suspend the statute.[110]

fusion. That other States would have refused to suspend the statute on the facts of Proctor v. Wells Bros. Co. is indicated by Reuff-Griffin Decorating Co. v. Wilkes, 173 Ky. 566, 191 S. W. 443 (1917), a case which does not, however, indulge in such unnecessary generalization.

[108] This requirement of diligence in unearthing the essential elements of suspected wrongdoing might have been used to reach the same result in the Illinois cases discussed in the previous note. It appears in other cases, such as American Tobacco Co. v. People's Tobacco Co., (C. C. A. 5th, 1913) 204 Fed. 58. How imperative this requirement of diligence will be depends of course on how far the defendant has a correlative privilege to withhold or conceal useful information.

[109] See the Illinois cases cited in note 107. But even in Illinois suspension of the statute had been allowed where defendant concealed not only the identity of the tortfeasor but the fact that an incendiary fire had been caused by human agencies. Athey v. Hunter, 65 Ill. App. 453 (1895).

[110] Theft of personal property: Kalin v. Wehrle, 36 Pa. Super. Ct. 305 (1908); Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (1910).

Personal injuries causing death: Brookshire v. Burkhart, 141 Okla. 1, 283 Pac. 571 (1930), discussed in 43 HARV. L. REV. 471 (1930). In Desmarais v. People's Gas Light Co., 79 N. H. 195, 107 Atl. 491 (1919), it was held that the two-year limitation of the Death Act could not be extended even by fraudulent concealment, but that an action for damages could be allowed for deceit resulting in the loss of the cause of action. See also Whaley v. Catlett, 103 Tenn. 347, 53 S. W. 131 (1899).

In Dodds v. McColgan, 229 App. Div. 273, 241 N. Y. S. 584 (1930), it appeared that plaintiff had done plumbing work on a building owned by Mrs. McColgan, but which she represented to be owned by her husband's estate, of which she was executrix. The estate had already been distributed and she had been discharged as executrix. After repeated litigation, in which she continued to represent that her husband's estate was liable, plaintiff discovered that she owned the building and that the estate had no assets. Suspension of the statute was allowed. See also Leslie v. Jaquith, 201 Mass. 242, 87 N. E. 480 (1909); Bankers' Surety Co. v. Willow Springs Beverage Co., 104 Neb. 173, 176 N. W. 82 (1920), and Williams v. Pittsburgh Terminal Coal Corp., (C. C. A. 3d, 1933) 62 F. (2d) 924. In the last case the failure of a purchaser to record a deed from its purchasing agent was held to suspend the statute in an action by the vendor against the purchaser as undisclosed principal. In Weems v. Melton, 47 Okla. 706, 150 Pac. 720 (1915), a depositor of a bank was told by the officers that its assets had been turned over to liquidating trustees, so that the trustees were liable. The trustees denied their liability likewise. These denials were held to be a fraudulent concealment.

But compare Rouse v. Southard, 39 Me. 404 (1855), where a denial of part ownership in a vessel on which plaintiff had performed some work was held not to

Beyond this point the cases become increasingly difficult to classify and predictions more hazardous. What will happen where the existence of some injury, and the defendant's connection with it, are both known to the suitor, but the defendant conceals or misrepresents facts from which his legal liability can be inferred? In such a case it is possible to say that the "cause of action" is not concealed, when merely some fact-elements of liability are withheld.[111] But the hindrance to the plaintiff's prosecution of his claim may be just as effective as if the injury itself were completely unsuspected. There is one case that has found "fraudulent concealment" in such a situation.[112] That courts will go far in this direction is unlikely. The most that can be said is that the operation of limitation acts will depend on how directly the defendant interfered with the plaintiff's investigations, but some weight must be given to the defendant's nearness to or remoteness from the transactions out of which the plaintiff's claim arose.[113]

suspend the statute in an action against defendant who was in fact a part owner. And in Soule v. Atkinson, 18 Cal. 225 (1861), it was held that a dormant partner in a partnership owed no obligation to disclose his relationship to creditors who did not contract in reliance on his credit, so that arrangements to keep secret his membership in the firm did not amount to concealment.

[111] McBride v. Burlington, Cedar Rapids & Northern Ry., 97 Iowa 91, 66 N. W. 73 (1896). This was an action for damages for defendant's negligence, causing the death of plaintiff's intestate. Defendant was alleged to have represented that the death was due to an "accident," and to have made repairs on the defective hand car which caused the death in order to conceal its own negligence in allowing the hand car to be used. The court held that a demurrer to the petition was properly sustained, since the "cause of action" was not concealed, but at most some of the "evidence" by which liability might be established.

[112] Waugh v. Guthrie Gas, Light, Fuel & Improvement Co., 37 Okla. 239, 131 Pac. 174 (1913). Here an explosion was alleged to have been caused by the negligence of the defendant in failing to repair gas pipes, with the result that gas escaped and ignited. The petition further alleged that friends and representatives of the plaintiff, who received personal injuries in the explosion, were prevented from entering the building by defendant, who subsequently made "false, fictitious, and fraudulent reports" as to the cause of the explosion, and prevented its officers and employees from disclosing the true cause.

[113] In Patten v. Standard Oil Co., (Tenn. 1933) 55 S. W. (2d) 759, it was alleged that defendant supplied defective gasoline to an airplane company which used the gasoline in a plane on which the plaintiff's husband took passage; that as a result of the defective gasoline the plane crashed and plaintiff's husband was killed; that defendant took steps to conceal the defect in the gasoline by enjoining silence on its employees who were aware of it, "and gave them to understand that their jobs depended upon their keeping their mouths shut." The plaintiff then alleged that her only source of information as to the cause of the accident was thus closed to her until more than a year later when one of the defendant's employees disclosed the facts. In holding the action barred the court emphasized the fact that deceased had had no "contractual or confidential relations" with defendant, so that there was no affirmative duty of dis-

The same doubt exists where the defendant's conduct amounts primarily to the concealment or withholding of documentary evidence. There are numerous statements to the effect that the concealment of evidence is not concealment of the "cause of action" and cannot suspend the statute.[114] Certainly the underlying assumptions of common law procedure do not point to a requirement of full disclosure of such material for the benefit of an adversary. And yet where the evidence withheld is essential for the successful prosecution of a claim, special circumstances will occasionally make improper its destruction or nondisclosure.[115]

A more completely individualist point of view is adopted where the defendant merely tries to evade service of process by disguising his identity or withdrawing beyond the creditor's reach. The burden of securing service is ordinarily, and most emphatically, on the creditor. That burden has been somewhat lightened by legislation, which in most States suspends the statute of limitations during the debtor's withdrawal to another State.[116] In a few States the same indulgence is allowed where the absconding debtor is still within the State.[117] Still another

closure; but intimated that the result might be different if deceased had purchased the gasoline directly from defendant, and if defendant's employees, acting under instructions, had refused to disclose the facts in response to plaintiff's specific inquiries.

Compare Tedford v. Chicago, R. I. & P. Ry., 116 Ark. 198, 172 S. W. 1006 (1915), a case involving wrongful detention of personal property.

[114] City of Pella v. Fowler, (Iowa 1932) 244 N. W. 734; Conklin v. Towne, 204 Iowa 916, 216 N. W. 264 (1927); Fidelity & Casualty Co. v. Jasper Furniture Co., 186 Ind. 566, 117 N. E. 258 (1917). See also Sanborn v. Gale, 162 Mass. 412, 38 N. E. 710 (1894); Churchman v. City of Indianapolis, 110 Ind. 259, 11 N. E. 301 (1886); Tillison v. Ewing, 91 Ala. 467, 8 So. 404 (1890); Whaley v. Catlett, 103 Tenn. 341, 53 S. W. 131 (1899).

[115] Findley v. Stewart, 46 Iowa 655 (1877), destruction of deed to deceased ancestor of plaintiffs; Bricker v. Lightner's Executor, 40 Pa. 99 (1861), secret abstraction by debtor of promissory note from papers of recently deceased creditor; Clarke v. Goodrum, 61 Miss. 731 (1884), detention of will; Arrington v. McLemore, 33 Ark. 759 (1878), detention of will; Appeal of Deake, 80 Me. 50, 12 Atl. 790 (1888), detention of will. See also Walden v. Blassingame, 130 Ark. 448, 197 S. W. 1170 (1917); McKneely v. Terry, 61 Ark. 527, 33 S. W. 953 (1896).

[116] 2 WOOD, LIMITATION OF ACTIONS, 4th ed., ch. 22 (1916). This type of legislation is criticized in 46 HARV. L. REV. 706 (1933) on the ground that the interstate development of commercial relations and of judicial remedies has removed the justification for these privileges to the interstate creditor.

[117] Ark. Stat. (1921), sec. 6974: "If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented." Similarly, Ky. Stat. (Carroll 1930), sec. 2532; Mo. Rev. Stat. (1929), sec. 879; Va. Code (1930), sec. 5825; W. Va. Code (1931), c. 55, art. 2, sec. 17.

device for alleviating the creditor's burden is the common type of statutory provision allowing substituted service of process or service by publication in cases where diligent search has failed to disclose the debtor's whereabouts.[118] But where these explicit provisions do not apply, the suspension of the statute of limitations will not be allowed through the use of the "fraudulent concealment" exception. Apart from these provisions the debtor is privileged to move from State to State,[119] and to disguise his identity within the same State, by the use of an assumed name,[120] or through false whiskers or a wig.[121]

[118] For references see 50 C. J. 490, 500, 514-15 (1930).

[119] Miller v. Lesser, 71 Iowa 147, 32 N. W. 250 (1887); Myers v. Center, 47 Kan. 324, 27 Pac. 978 (1891); Rhoton v. Mendenhall, 17 Or. 199, 20 Pac. 49 (1888); Dowse v. Gaynor, 155 Mich. 38, 118 N. W. 615 (1908); Home Life Ins. Co. v. Elwell, 111 Mich. 689, 70 N. W. 334 (1897); Weaver v. Davis, 2 Ga. App. 455, 58 S. E. 786 (1907); Rock Island Plow Co. v. Masterson, 96 Ark. 446, 132 S. W. 216 (1910). See also Keith v. Hiner, 63 Ark. 244, 38 S. W. 13 (1896).

[120] Engel v. Fisher, 102 N. Y. 400, 7 N. E. 300 (1886); Chemical Nat. Bank v. Kissane, (C. C. N. D. Calif. 1887) 32 Fed. 429; St. Paul Title & Trust Co. v. Stensgaard, 162 Cal. 178, 121 Pac. 731 (1912).

[121] In Chemical Nat. Bank v. Kissane, (C. C. N. D. Calif. 1887) 32 Fed. 429, the plaintiff sought an injunction against a plea of the statute of limitations in an action on a money debt, on the ground that defendant had enlisted in an army in Nicaragua, that it was publicly rumored that he had died there, but that he had returned to California and lived there for years under another name. The court held that this obstacle to the plaintiff's action was no ground for suspending the statute, either at law or in equity, adding: "If, being bald-headed, he should put on a wig, or cultivate his beard in such a way, or wear false whiskers, or in some other way disguise himself, in addition to moving to another state, or while staying in some secluded spot in the state . . . that would be no legal obstacle to bringing suit. It would be simply throwing a difficulty in the way of finding, or recognizing, the man."

And compare the elaborate devices for evading service of process that were successful in Amy v. Watertown, 130 U. S. 320, 9 Sup. Ct. 537 (1889).

In the related case of Clark v. Augustine, 62 N. J. Eq. 689, 51 Atl. 68 (1902), the doctrine of estoppel was resorted to for suspension of the statute. Here the defendants, executors of the plaintiff's father, tried to take advantage of a three-month limitation on claims against their decedent's estate, after having induced plaintiff to send process to a town in New Jersey for service there, through the false statement that one of the executors resided there, when he in fact lived in New York State. The court said: "There does not seem to be any distinction between conduct of the defendant, which has misled the plaintiff as to the existence of a cause of action, and conduct of the defendant, which has misled the plaintiff as to the time, place, and manner in which the plaintiff's suit should be brought." And see the estoppel cases of Albert v. Patterson, 172 Mich. 635, 138 N. W. 220 (1912), and Fitzgerald's Estate, 252 Pa. 568, 97 Atl. 935 (1916). The usual estoppel situations are where defendant induces plaintiff to believe that the statute of limitations will not be pleaded and thus induces delay. The operation of estoppel on limitation acts, and its relation to the "fraud" and "fraudulent concealment" exceptions will be briefly discussed in a later issue of this Review.

The same result must be anticipated where the debtor does not conceal any fact-elements of the cause of action, but merely his ownership of property available in execution. The remedies of the creditor, who is faced with resistance at this point in the collection of his claim, lie in other fields — in proceedings for the examination of the debtor, in bills to set aside suspected transfers, or in more dangerous attempts to subject to execution property in which the debtor may have an interest. The "fraudulent concealment" exception will not be used, when such devices fail, to remove risks which the creditor's own diligence is expected to surmount.[122]

CONCLUSION

The "fraudulent concealment" exception has been used over a very wide field to relax statutory rules for the limitation of actions. At many points it achieves results that could not be reached by the use of the "undiscovered fraud" exception alone. Furthermore, if applied flexibly and imaginatively, it can be made to do the work of the "undiscovered fraud" exception, and to do it equally well. It is therefore unfortunate that statute and judicial usage have formulated separately the narrower exception for "undiscovered fraud"; and equally unfortunate that many courts have been influenced by purely verbal associations to restrict the usefulness of the "fraudulent concealment" exception, by undue emphasis on the requirement of independent and affirmative concealment. As a result of this double process, the distinctions between the two exceptions have been made to appear sharper than they need to be. Those distinctions have now penetrated so deeply into language and thought that their eradication will be exceedingly difficult.

Nevertheless, the "fraudulent concealment" exception has served admirably the purposes for which it was first created. The very diversity of human situations to which it must apply has helped to liberate courts from the influence of narrow and artificial tests. Such tests have been stated and have freely passed as currency in judicial opinions. But they flourish chiefly at the level of doctrine. When various type situations are more closely examined, it appears that on the whole the special factors of policy peculiar to each have controlled decision to a remarkable degree. If results at any points appear incongruous or

[122] Humphreys v. Mattoon, 43 Iowa 556 (1876); Burrus v. Cook, 215 Mo. 496, 114 S. W. 1065 (1908); Gilbert v. Hayward, 37 R. I. 303, 92 Atl. 625 (1914); Sparks v. First Nat. Bank, 164 Tenn. 64, 46 S. W. (2d) 43 (1932); Rice v. Burt, 58 Mass. 208 (1849); Wood v. Carpenter, 101 U. S. 135 (1879).

plainly wrong, the incongruity or error has probably not resulted from the form of limitation doctrine so much as from settled attitudes toward the type of fact situation involved. For example, the peculiarly strict decisions in the malpractice cases must be viewed in the light of the fact that many lawyers have been led by their experience to a deep-seated suspicion and hostility toward this type of claim.

In the end the concept of "fraudulent concealment" has remained a generality, whose content must shift in various fact settings. And it is probably wise that the concept itself, and the detailed rules that it may generate, should be left flexible, so that wide room should be left for judicial intuition in the application of limitation acts.