

## PLEADING THE STATUTE OF LIMITATIONS\*

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One approach to pleading problems is by a thorough examination of the methods of handling a single topic such as the statute of limitations, payment or contributory negligence. While conclusions as to one of these may not be conclusive, the results may be suggestive as to procedure generally. With reference to time limitations, as with most other matters, litigants may differ as to the facts, or as to the rules of law, or possibly both. One immediately thinks of two points of possible difference as to the facts, *viz.*, the time when the action accrued and the date of the commencement of suit. Obviously there is no chance for a dispute regarding the method of measuring time. In comparatively few cases will the parties differ as to the date when the physical acts, constituting a trespass, a promise or the like took place.<sup>1</sup> There is still less chance for serious disagreement as to the date of the facts constituting commencement of the action, for this is usually a matter of record.<sup>2</sup> Serious factual disputes

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<sup>1</sup> Considering the large number of appellate cases concerning the statute of limitations, it is remarkable how few involve disputes of facts as to the time of accrual. Occasionally there appear to be conflicts as to the date of a trespass. *Moore & McFerrin v. Luehrman Hardwood L. Co.*, 82 Ark. 485, 102 S. W. 385 (1907); *Dayton v. City of Asheville*, 185 N. C. 12, 115 S. E. 827 (1903); *Clark v. Norfolk Southern Ry.*, 168 N. C. 415, 84 S. E. 702 (1915); *Thompson Bros. Lumber Co. v. Longini*, 151 S. W. 888 (Tex. Civ. App. 1912); *Southern Ry. v. Watts*, 134 Va. 503, 114 S. E. 736 (1922). There are also many controversies as to when adverse possession began. In a few cases the date of a contract or breach thereof is controverted. *Jones v. Bank of Commerce*, 131 Ark. 362, 199 S. W. 103 (1917); *Wharton v. Fidelity Mutual Life Ins. Co.*, 156 S. W. 539 (Tex. Civ. App. 1913). This may be particularly so in breach of promise or alienation of affections cases. *Thrush v. Fullhart*, 230 Fed. 24 (C. C. A. 4th, 1915); *Disch v. Closset*, 244 Pac. 71 (Or. 1926). It is possible that the parties differ both as to the rules of law as to accrual and the date of the physical acts. See *Pacific Improvement Co. v. Maxwell*, 26 Calif. App. 265, 146 Pac. 900 (1915); *Merchants Loan and Trust Co. v. Boucher*, 115 Ill. App. 101 (1904); *Ahrens v. Guaranty Trust Co.*, 125 Misc. 443, 211 N. Y. Supp. 283 (1925); *Newman v. Roach*, 111 Okla. 269, 239 Pac. 640 (1925); *Smith v. Vermont Marble Co.*, 133 Atl. 355 (Vt. 1926).

<sup>2</sup> Here the question of failure of proof is probably more frequent than actual dispute, *e. g.*, *Murrell v. Goodwill*, 159 La. 1057, 106 So. 564 (1925); *cf. McNeil v. Garland & Nash*, 27 Ark. 343 (1871). There may be a jury question in the jurisdictions in which prompt delivery of the summons to the sheriff is necessary. *Godshalk v. Martin*, 200 S. W. 535 (Tex. Civ. App. 1918); *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 9 Sup. Ct. 690 (1889). Even if there is agreement as to the dates, the question of reasonable time has been held for the jury. *Gulf C. & S. F. Ry. v. Flatt*, 36 S. W. 1029 (Tex. Civ. App. 1896); *Panhandle Ry. v. Hubbard*, 190 S. W.

sometimes arise with reference to certain exceptions which prevent the statute from running, such as disability of the plaintiff or absence from the jurisdiction and concealment on the part of the defendant.<sup>3</sup>

It is much more likely that the parties will differ as to rules of law. Thus there are many legal questions with reference to the exceptions which prevent the statute from running.<sup>4</sup> Often the problem is, upon admitted facts, when is the action deemed to accrue in order to start the statute running,<sup>5</sup> or when is the suit deemed to be commenced for purposes of the statute.<sup>6</sup> Parties also differ concerning the proper period of limitations applicable, which generally involves the question of the legal nature of plaintiff's right of action.<sup>7</sup> There is sometimes the question of law as to whether there is any period of limitation applicable to a given situation.<sup>8</sup>

Frequently the problem is simply to ascertain which party

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793 (Tex. Civ. App. 1916). When a matter of notice determines the date of accrual there may be a sharp conflict as to the facts. *Nat'l Park Bank v. Concordia Land & Timber Co.*, 159 La. 86, 105 So. 234 (1925). The point may arise in case of failure to show the date instead of actual difference, *e. g.*, *American Law Book Co. v. Dykes*, 278 S. W. 247 (Tex. Civ. App. 1925). In such a situation, burden of proof becomes material. See *infra* note 10.

<sup>3</sup>This is particularly true in the question of fraudulent concealment. *Laster v. Cox*, 120 Kan. 452, 243 Pac. 1052 (1926). Or absence of the defendant from the jurisdiction. *Frett v. Holdorf*, 201 Iowa, 748, 206 N. W. 609 (1925); *Jayne v. Kane*, 140 Va. 27, 124 S. E. 247 (1924). See also *Bowman v. Lemon*, 154 N. E. 317 (Ohio, 1926).

<sup>4</sup>For examples of recent cases of this nature, see *Murphy v. Graves*, 170 Ark. 180, 279 S. W. 359 (1926); *Inland Steel Co. v. Jelenovic*, 150 N. E. 391 (Ind. App. 1926); *Pullan v. Struthers*, 207 N. W. 235 (Iowa, 1926); *Walker v. Bennett*, 209 Ky. 675, 273 S. W. 548 (1925); *Nat'l Park Bank v. Concordia Land & Timber Co.*, *supra* note 2; *Steffen v. Stahl*, 273 S. W. 118 (Mo. App. 1925); *Brunnert v. Boeckmann's Estate*, 276 S. W. 89 (Mo. App. 1925); *Watkins v. Adamson*, 113 Neb. 715, 204 N. W. 816 (1925); *Le Brun v. Boston & M. R. R.*, 131 Atl. 441 (N. H. 1925); *Larsen v. Duke*, 116 Or. 25, 240 Pac. 227 (1925); *Chicago R. I. & G. Ry. v. Duncan*, 273 S. W. 908 (Tex. Civ. App. 1925); *Advance Rumely Thresher Co. v. Higgins*, 279 S. W. 531 (Tex. Civ. App. 1926). *Cf.* *Linebaugh v. Portland Mortgage Co.*, 116 Or. 1, 239 Pac. 196 (1925).

<sup>5</sup>Many cases occur involving diverse situations, *e. g.*, *Reading Co. v. Koons*, 271 U. S. 58, 46 Sup. Ct. 405 (1926), noted in (1926) 35 YALE LAW JOURNAL, 1017; *Shapleigh Hardware Co. v. Spiro*, 106 So. 209 (Miss. 1925); *Holman v. Randolph Nat'l Bank*, 98 Vt. 66, 126 Atl. 500.

<sup>6</sup>There has been considerable diversity in holdings upon this point. For a note classifying the jurisdictions, see Gregory, *When Is an Action Commenced* (1903) 8 VA. L. REG. 624.

<sup>7</sup>See *Murray v. Low*, 8 Fed. (2d) 352 (C. C. A. 9th, 1925); *Cover v. Critcher*, 143 Va. 357, 130 S. E. 238 (1925); *White v. Turner-Hudnut Co.*, 332 Ill. 133, 152 N. E. 572 (1926); *Gilmour v. Johnson*, 150 N. E. 87 (Mass. 1926); *Empire Trust Co. v. Heinze*, 242 N. Y. 475, 152 N. E. 266 (1926).

<sup>8</sup>See *Clark v. Millsap*, 197 Calif. 765, 242 Pac. 918 (1926).

has the burden of proof.<sup>9</sup> In most cases this becomes important only in so far as the court is required to instruct the jury that the risk of non-persuasion is on one party or the other.<sup>10</sup> The verdict of the jury would generally be the same regardless of

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<sup>9</sup> At first sight, there seems to be nothing but utter confusion with reference to the burden of proof as to the bar of the statute of limitations. However, the recognition of several diverse situations will clarify the matter considerably, although even then there is some disagreement. When the problem is one of adverse possession, the burden is generally placed upon the party who attempts to make out title by this means. Thus, as to the character of the possession (whether adverse). *Brown v. King*, 5 Metc. 173 (Mass. 1842); *Johns v. Johns*, 244 Pa. 48, 90 Atl. 535 (1914); *Jansen v. Huerth*, 143 Wis. 363, 127 N. W. 945 (1910); *Brandt v. Ogden*, 1 Johns. 156 (N. Y. Sup. Ct. 1806). *Contra: Zebriska's Succession*, 119 La. 1076, 44 So. 893 (1907); *Ditmore v. Rexford*, 165 N. C. 620, 81 S. E. 994 (1914). Likewise as to the length of time of possession. *Gilbert v. Southern Land and Timber Co.*, 53 Fla. 319, 43 So. 754 (1907); *Archibald v. New York Cent. & H. R. R.*, 157 N. Y. 574, 52 N. E. 567 (1899); *Collins v. Riley*, 104 U. S. 322 (1881).

In case of special statutory actions, the burden is generally said to be on the plaintiff to show that his action was commenced within the time limited by the statute. See *infra* note 65. In case of the general statute of limitations, the prevailing rule is to place the risk of non-persuasion on the defendant. *Kelly v. Kansas City So. Ry.*, 92 Ark. 465, 123 S. W. 664 (1909); *Goodell's Ex'rs v. Gibbons*, 91 Va. 608, 22 S. E. 504 (1895); *Schell v. Weaver*, 225 Ill. 159, 80 N. E. 95 (1907); *In re Camp's Estate*, 188 Iowa, 734, 176 N. W. 795 (1920); *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925 (1888); *Clark v. Logan County*, 138 Ky. 676, 128 S. W. 1079 (1910); *Matteson v. Blaisdell*, 148 Minn. 352, 182 N. W. 442 (1921); *Gulfport Fertilizer Co. v. McMurphy*, 114 Miss. 250, 75 So. 113 (1917); *Johnston v. Ragan*, 265 Mo. 420, 178 S. W. 159 (1915); *Van Burg v. Van Engen*, 76 Neb. 816, 107 N. W. 1006 (1906); *Porter v. Magnetic Separator Co.*, 115 App. Div. 333, 100 N. Y. Supp. 888 (1st. Dept. 1906), *aff'd* 190 N. Y. 511, 83 N. E. 1130 (1907); *Torrey v. Campbell*, 73 Okla. 201, 175 Pac. 524 (1918); *Thomas v. Glendenning*, 13 Utah, 47, 44 Pac. 652 (1896); *Goodyear Metallic Rubber Shoe Co. v. Baker's Estate*, 81 Vt. 39, 69 Atl. 160 (1908); *Virginia Lumber & Extract Co. v. McHenry Lumber Co.*, 122 Va. 111, 94 S. E. 173 (1917); *Knight v. Chesapeake Coal Co.*, 99 W. Va. 261, 128 S. E. 318 (1925). *Contra: Leigh v. Evans*, 64 Ark. 26, 41 S. W. 427 (1897); *McCarty v. Simon*, 247 Mass. 514, 142 N. E. 806 (1924); *Ayres v. Hubbard*, 71 Mich. 594, 40 N. W. 10 (1888); *Jackson v. Int'l Harvester Co.*, 188 N. C. 275, 124 S. E. 334 (1924). When the statutory period has apparently run and the plaintiff relies on some exemption to take the case out of the statute, the burden is on the plaintiff to show such exception. *United States v. Bighorn Sheep Co.*, 9 Fed. (2d) 192 (D. C. Wyo. 1925); *Watkins v. Martin*, 69 Ark. 311, 65 S. W. 103, 425 (1902); *Manby v. Sweet Inv. Co.*, 78 Colo. 371, 242 Pac. 51 (1925); *Mason v. Henry*, 152 N. Y. 529, 46 N. E. 837 (1897); *Jones v. Coal Creek M. & M. Co.*, 133 Tenn. 159, 180 S. W. 179 (1915). See also *infra* note 38. For the English decisions on burden of proof, see *Atkinson, Some Procedural Aspects of the Statute of Limitations* (1927) 27 Col. L. Rev. 157, 166-167.

<sup>10</sup> If we could spread before us all the facts with reference to the litigation, there would be little, if any, need for the concept of burden of proof. Unfortunately, a law suit is not and probably cannot be conducted in this manner. Certain elements are regarded as necessary to be

what the court tells the jury as to the burden of proof. If the court passes on the entire matter, the necessity of instructions as to burden of proof would be avoided and a large number of technical but really non-material errors could be prevented. One of the most usual difficulties with reference to the statute of limitations seems to be merely whether the defendant has taken the proper procedural steps to entitle him to object on the ground of the statute.<sup>11</sup>

The reported cases may not be entirely conclusive as to the sort of questions which are ordinarily raised in trial courts, but it is evident that most disputes between the parties with reference to time limitations must be over rules of substantive law and procedure and are not differences of fact. Comparatively seldom is there anything for a jury to decide. In spite of this fact the orthodox plea of the statute of limitations was palpably designed to treat the matter as a proper one for the determination of the jury. All the subtleties of confession and avoidance were thrust upon the plea, with little or no attention to the kind of problems raised at the trial.

Of course, the purely formal and logical attitude cannot be overlooked entirely. In the interest of clarity, it seems desirable to state the facts constituting the cause of action in the declara-

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shown by the plaintiff and upon these he is said to have the burden of proof or risk of non-persuasion. Other elements are said to be matters of defense and upon these the defendant bears the risk of non-persuasion. Theoretically, the jury or other fact-finding body is supposed to decide a point upon which the evidence is equally balanced against the party who has the burden of proof. As a practical matter the inevitable element of prejudice will overshadow the theoretical rule. Jurors have initial and undisclosed prejudices and also acquire them from trivial incidents during the trial. And remembering that the Colonel's lady and Judy O'Grady are sisters under the skin, the same sort of process goes on in the court's mind. From this standpoint, the burden of proof seems an unimportant and purely theoretical sort of thing, with only a nuisance value. But many cases are reversed because of instructions that the burden of proof is on the wrong party. See cases *infra* note 11. Of course where there is an absence of proof on a given matter and where the data are difficult or impossible to obtain, the matter of burden of proof becomes very important and virtually decides the case. See *Nepean v. Doe d. Knight*, 2 M. & W. 894 (Ex. Ch. 1837); *Davie v. Briggs*, 97 U. S. 628 (1878). Again the matter of burden of proof may become important if the issue was entirely overlooked at the trial.

<sup>11</sup> Innumerable cases might be cited. The following are typical in holding that the defense of the statute of limitations must be asserted in some manner by the pleadings or is deemed waived. *Brownrigg v. De Frees*, 196 Calif. 534, 238 Pac. 714 (1925); *Brazell v. Hearn*, 33 Ga. App. 606, 127 S. E. 479 (1925); *Citizens-First Nat'l Bank v. Whiting*, 112 Okla. 221, 240 Pac. 641 (1925); *Selles v. Pagan*, 8 Fed. (2d) 39 (C. C. A. 1st, 1925); *cf. Wulfsohn v. Russo-Asiatic Bank*, 11 Fed. (2d) 715 (C. C. A. 9th, 1926). The court will err if it applies the statute of its own motion. *Murphy v. Murphy*, 71 Calif. App. 389, 235 Pac. 653 (1925). See *infra* notes 88, 89.

tion or complaint and to raise issue on these facts by denial or to plead specially additional facts which are consistent with those stated by the plaintiff. But too much reliance has been placed upon this so-called logical feature of our pleading. Progress and efficiency are more apt to result from greater emphasis upon framing our procedural rules so that: (1) whenever possible, the disputed points may be settled in advance of trial; (2) ample notice<sup>12</sup> may be given to opponents; (3) the burden of pleading certain sorts of facts may be governed by ideas as to whether those elements should be disfavored.

#### RAISING THE STATUTE OF LIMITATIONS BY DEMURRER

When we desire the disposal of a case on an issue of law before trial, we naturally think of the demurrer. It is the one procedural device which the common law had for the accomplishment of this end. Should a declaration, complaint or petition show on its face that the cause of action is not barred by the statute of limitations in order to be demurrer-proof? As the writer has elsewhere endeavored to show, the plaintiff is not obliged to state expressly in his declaration that the cause of action accrued within the period allotted by the statute of limitations of 21 James I.<sup>13</sup> Nevertheless the pleader at common law<sup>14</sup> and also usually under the codes<sup>15</sup> is obliged to al-

<sup>12</sup> The writer has already indicated above that he does not favor abandonment of ultimate fact pleading. Some advocates of pleading reform favor a system of notice pleading which departs radically from present American practices. See Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501. Among other difficulties, the extreme notice-pleading system would result in the loss of the benefits of enforced preparation for trial, through the drafting of proper ultimate fact pleadings. Undoubtedly the notice-giving function of pleading is receiving increased emphasis by courts and writers, with a corresponding decrease of attention to the issue-raising function. Yet there is often a failure to comprehend that pleading to a specific issue will give notice, while adequate notice will substantially, though not gramatically, isolate the issue. In general, pleadings should give notice in such a way as to avoid surprise of the opponents at the trial. But it is not necessary or desirable to go to the extreme of stating what the testimony is expected to be. See *infra* note 120. Often the disclosure of the legal theory upon which the pleader proceeds is sufficient to avoid surprise. See text *infra*, circa notes 117-123.

<sup>13</sup> Atkinson, *op. cit. supra* note 9, at 165-168. Because the statute of 21 James I relating to personal actions is the basis of American legislation regarding limitations, the English decisions under it may be regarded virtually as the "common law" upon the subject.

<sup>14</sup> STEPHEN, PLEADING (Tyler's ed. 1895) 278. This is the traditional statement of the rule. But there is a naturalness in the allegation of dates which would scarcely necessitate a strict rule on the subject. See (1926) 35 YALE LAW JOURNAL, 487, 488. A few common law jurisdictions have followed the cue of Stephen who announces the rule to be a formal one and have declared that unless time is "material" the dates need not be al-

lege the dates upon which the material facts transpired. It would seem that if these dates were truly alleged, it would appear from the plaintiff's pleading whether or not the statute had run. Of course it would be possible for a plaintiff to allege, regardless of truth, a recent date clearly within the period of limitation, but such a practice is dangerous because of the possibility of a continuance<sup>16</sup> at the trial or even a fatal variance between pleadings and proof.<sup>17</sup> Normally we find the correct date stated by the plaintiff. In such a situation it would be reasonable to regard a pleading which showed that the action accrued beyond the statutory period, as demurrable on that account. But the English and most American decisions in common law cases and in absence of statutory provisions hold that a demurrer to the declaration does not raise the point of the bar of general statutes of limitations.<sup>18</sup>

Three reasons have been asserted for this position. First, as the date of commencement of the action is not shown upon the face of the pleadings, it is said that the bar does not appear for the purpose of the demurrer.<sup>19</sup> While it is a common statement that "a demurrer searches the record,"<sup>20</sup> this does not seem to mean "record" in the sense of the entire judgment roll, but only the pleadings.<sup>21</sup> A way out of this difficulty has been suggested,

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leged. Fla. Rev. Gen. Stat. (1920) § 2625; Md. Ann. Code (Bagby, 1924) art. 75, § 6.

<sup>15</sup> See (1926) 35 YALE LAW JOURNAL, 487-8, notes 2, 3. In Iowa a statute provides that time need not be stated. Iowa Code (1924) § 11194. But this statute does not prevent the bar of the statute of limitations from being raised by demurrer. *Cooley v. Maine*, 163 Iowa, 117, 143 N. W. 431 (1913).

<sup>16</sup> See (1926) 35 YALE LAW JOURNAL, 487, 494.

<sup>17</sup> Ordinarily time is regarded as immaterial in the sense that one time may be alleged and another proved. *Ibid.* 491. However, it has occasionally been said that one cannot allege a time within the statutory period and prove an earlier date beyond the statutory period. See *Hill v. New Haven*, 37 Vt. 501 (1865). But see *Brand v. Longstreet*, 4 N. J. L. 325 (1816).

<sup>18</sup> See cases cited *infra* notes 19, 27, 35. An excellent collection of citations of earlier American cases is found in AMES, CASES ON COMMON LAW PLEADING (1905) 129-132. The note makes no distinction, however, between authorities arising under common law rules and those arising under the codes and statutory actions.

<sup>19</sup> *Thursby v. Warren*, Cro. Car. 159 (K. B. 1630); *Hawkings v. Billhead*, Cro. Car. 404 (K. B. 1636); *Gould v. Johnson*, 2 Ld. Raym. 838 (K. B. 1702); *Bulkley v. Norwich & W. Ry.*, 81 Conn. 284, 70 Atl. 1021 (1908); *Vencill v. Flynn Lumber Co.*, 94 W. Va. 396, 119 S. E. 164 (1923). See an excellent comment by Professor Leo Carlin, discussing the matter from the standpoint of West Virginia cases and to some extent generally. (1924) 30 W. VA. L. Q. 110. For the Illinois decisions upon the question see (1925) 20 ILL. L. REV. 391.

<sup>20</sup> STEPHEN, *op. cit. supra* note 14, at 160. As everyone will recognize, the term "record" has many meanings.

<sup>21</sup> *Bulkley v. Norwich & W. Ry.*, *supra* note 19. But see *Brown v. Hancock*, Cro. Car. 115 (C. P. 1629).

*viz.*, by craving oyer of the writ, in which case the writ may be considered for purposes of the demurrer,<sup>22</sup> evidently much the same as in the case of profert and oyer of a sealed instrument.<sup>23</sup> On the whole, most cases have not considered this objection — and the courts are apparently satisfied to learn the date of the commencement of the action from any authentic court documents, whether pleadings or not.<sup>24</sup> The point is a technical one. This appears especially in those jurisdictions where the suit is deemed commenced at the date of the filing of the declaration or complaint. The file-marks on the cover of the pleadings will generally show the date of commencement of suit.<sup>25</sup> It is, indeed, a fine distinction to say that a demurrer will look to the face of the pleadings and not to the official stamping on the back! There is plenty of authority to the effect that a court should take judicial notice of the date of commencement of the instant cause.<sup>26</sup>

Another objection which has troubled the courts<sup>27</sup> is the general rule that allegations of time are "immaterial." As the plaintiff is not usually obliged to prove the dates as alleged,<sup>28</sup> the time is not deemed sufficiently established or admitted by the allegation to dispose of the matter upon demurrer. The statement of Stephen<sup>29</sup> to the effect that the pleader may allege any date he pleases is no doubt a contributing factor to this position. The writer believes that Stephen's attitude is an extremely unfortunate one, is not in accord with present notions and is indeed a dangerous one for the pleader himself.<sup>30</sup> The

<sup>22</sup> Lambert v. Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431 (1896).

<sup>23</sup> See Cooke v. Graham's Adm'r, 3 Cranch, 229 (U. S. 1805).

<sup>24</sup> Cooley v. Main, *supra* note 15; Fleischman Const. Co. v. United States, 270 U. S. 349, 46 Sup. Ct. 284 (1926); Creswell v. Spokane County, 30 Wash. 620, 71 Pac. 195 (1903). See also cases *infra* notes 26, 39, 51, 56 57, 60, 62, 69.

<sup>25</sup> See Smith v. Day, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055 (1901); Patterson v. Thompson, 90 Fed. 647 (C. C. Or. 1898) where this sort of data has been considered on demurrer.

<sup>26</sup> N. D. Comp. Laws Ann. (1913) § 7937 (13) (19); Hollenbach v. Schnabel, 101 Calif. 312, 35 Pac. 872 (1894); Altoona Q. M. Co. v. Integral Q. M. Co., 114 Calif. 100, 45 Pac. 1047 (1896); State v. Stevens, 56 Kan. 720, 44 Pac. 992 (1896); Linehan v. Morton, 221 Ill. App. 70 (1921); Chapman v. Currie, 51 Mo. App. 40 (1892); Withers v. Gillespy, 7 S. & R. 10 (Pa. 1821); Searls v. Knapp, 5 S. D. 325, 58 N. W. 807 (1894); 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2579. This point is assumed and taken as obvious in the many cases *infra* where the statute of limitations is held properly raised on demurrer.

<sup>27</sup> Bulkley v. Norwick & W. Ry., *supra* note 19; Gebhart v. Adams, 23 Ill. 397 (1860); see Lee v. Rogers, 1 Lev. 110 (K. B. 1664) and Central Trust Co. v. Chicago, R. I. & P. Ry., 156 Iowa, 104, 135 N. W. 721 (1912).

<sup>28</sup> (1926) 35 YALE LAW JOURNAL, 491, and authorities there cited.

<sup>29</sup> *Op. cit. supra* note 14, at 279.

<sup>30</sup> See text *supra*, at notes 16, 17.

true date should be, and indeed generally is, alleged as far as possible. It is perfectly true that the allegation of time is "immaterial" in the sense that proof of a different date than alleged is not usually regarded as a fatal variance. Yet there is no reason why the allegation cannot be regarded as "material"<sup>31</sup> for purposes of demurrer. If a plaintiff alleges a date of accrual of his cause of action beyond the statutory period, it is fair to take him at his word. Many courts so consider the matter.<sup>32</sup> Amendments are now permitted after demurrer is filed<sup>33</sup> and this may prevent any injustice because of a clerical error of the plaintiff's counsel as to the dates. Such amendments might well be limited to meritorious cases where the plaintiff can make a showing to the effect that his right is not barred.<sup>34</sup>

A third objection is that if a demurrer is permitted to raise the question of the bar of the statute, the plaintiff may be robbed of an opportunity to show some exception which prevents the bar from operating.<sup>35</sup> If the matter is raised by a plea in confession and avoidance, the plaintiff may bring himself within the exception by replication and, of course, prove the necessary facts at the trial. Even in the cases where the defense is raised by merely pleading the general issue or general denial, the plaintiff could be given a chance to prove himself within the exception at the trial. But in earlier times at least, there would be no opportunity for the court to consider the matter of exceptions if the defendant could have advantage of the defense of the statute of limitations on demurrer to the declaration. Some courts have solved the difficulty by requiring the plaintiff to bring himself within his exception in his declaration

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<sup>31</sup> The Supreme Court of the United States recently took this position in a criminal case in which the trial court quashed the indictment because of the federal statute of limitations. *United States v. Noveck*, 271 U. S. 201, 46 Sup. Ct. 476 (1926). The court presumes that the date charged in the indictment is the true one, although of course the prosecution might have proved another date without fatal variance. But see *Amory v. McGregor*, 12 Johns. 287 (N. Y. Sup. Ct. 1815).

<sup>32</sup> See references cited *supra* note 24.

<sup>33</sup> Conn. Prac. Book (1922) § 189.

<sup>34</sup> See *Thornton v. Jackson*, 129 Ga. 700, 59 S. E. 905 (1907); *Danzig v. Baroody*, 140 App. Div. 542, 125 N. Y. Supp. 797 (1st Dept. 1910).

<sup>35</sup> *Trankersley v. Robinson*, Cro. Car. 163 (K. B. 1631); *Stile v. Finch*, Cro. Car. 381 (K. B. 1635); *Hawkings v. Billhead*, *supra* note 19; *Gunton v. Hughes*, 181 Ill. 132, 54 N. E. 895 (1899); *Leshner v. U. S. Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N. E. 208 (1909); *Charters v. Citizens Nat'l Bank*, 84 Ind. App. 15, 145 N. E. 517 (1925); *Callan v. Bodine*, 81 N. J. L. 240, 79 Atl. 1057 (1911); *Oldham v. Rieger*, 145 N. C. 254, 53 S. E. 1091 (1907) (for statute see *infra* note 61); *Murdock v. Herndon's Ex'r*, 4 Hen. & M. 200 (Va. 1809); *Shreck v. Va. Hot Springs Co.*, 140 Va. 429, 125 S. E. 316 (1924); *Vencill v. Flynn Lumber Co.*, *supra* note 19. *Contra*: *Kirkpatrick v. Monroe*, 234 Ill. App. 213 (1924), criticized in (1925) 20 ILL. L. REV. 391.



or complaint if the latter shows the action would otherwise be barred.<sup>36</sup> Under modern practice, the facts necessary to show the exception could be added to the declaration or complaint by amendment either before or after the decision on the demurrer. But the practice of anticipating the defense of the statute in the plaintiff's original or amended pleading would seem strange to a common law pleader. We have come to regard the statute as a defense<sup>37</sup> in both the pleading and proof stages. Although there is no inherent reason why we should not regard the matter of a timely suit as one of the elements of the plaintiff's affirmative case,<sup>38</sup> we seem committed in the main to the opposite policy. While the cases in which exceptions are applicable are not extremely numerous, yet they are frequent enough to be of importance in framing procedural rules. The possibility of the existence of exceptions constitutes the only serious reason for the common law position that the bar of the statute could not be asserted by demurrer.

In early cases, the English Court of Chancery allowed the defense of the statute of limitations to be raised by demurrer to the bill.<sup>39</sup> There may be several factors which contribute to this holding. Demurrers were borrowed from the common law prac-

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<sup>36</sup> *Ferrier v. McCabe*, 129 Minn. 342, 152 N. W. 734 (1915); *Douglas v. Corry*, 46 Ohio St. 349, 21 N. E. 440 (1889). But most cases at law do not require this anticipation. *Charters v. Citizens Nat'l Bank*, *supra* note 35; *Graziani v. Ernst*, 169 Ky. 751, 185 S. W. 99 (1916); *Willis v. Wileman*, 53 Misc. 462, 102 N. Y. Supp. 1004 (Sup. Ct. 1907). See also cases *supra* note 35. In equity, most courts would probably require a plaintiff to anticipate the defense of the exceptions. See *infra* notes 47, 51. Upon anticipation of defenses in general, see Clark, *The Complaint in Code Pleading* (1926) 35 YALE LAW JOURNAL, 259.

<sup>37</sup> 4 WIGMORE, *op. cit. supra* note 26, § 2538.

<sup>38</sup> No one has yet written quite satisfactorily upon the subject of why burden of proof on particular issues is placed on one party or the other. Thayer regarded the subject as one of particular difficulty. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 369-375, 388, 389. Some writers have said that a party is obliged to bear the onus upon affirmative facts but not upon negative facts. ODGERS, PLEADING AND PRACTICE (8th ed. 1918) 308-310; *cf.* LANGDELL, SUMMARY OF EQUITY PLEADING (1883) § 108. Wigmore believes that the matter is determined by considerations of fairness and convenience and is also dependent upon the pleadings, *viz.*, one has the burden of proof upon matters which he must allege according to the ordinary rules of pleading. 4 WIGMORE, *op. cit. supra* note 26, § 2486. To determine burden of proof by the rules of pleading or by the affirmative or negative nature of facts seems inadequate; manner of pleading should depend on burden of proof rather than vice versa. Atkinson, *op. cit. supra* note 9, n. 60; Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920) 68 U. PA. L. REV. 307, 309, n.

<sup>39</sup> *Saunders v. Hord*, 1 Chan. Rep. 184 (1660); see *Pearson v. Pulley*, 1 Chan. Cas. 102 (1668). For later cases, see *infra* notes 44-49. As to the applicability of the statute of limitations to equity suits see (1926) 26 COL. L. REV. 362.

tice<sup>40</sup> and were not at first distinguished from pleas.<sup>41</sup> Perhaps the seventeenth century chancellors saw in the demurrer a means of disposing of the suit at an early stage and cared little about the common law technicalities of looking only to the face of the pleadings and of regarding allegations of time as formal or immaterial matters. In addition, the chancery bill, being much more verbose and less standardized<sup>42</sup> than the common law declaration, might be expected to show the facts constituting any exception which prevented the statute from running, if any existed and were necessary to show a timely suit. The complaint would naturally suggest any element which would negative laches.<sup>43</sup> This fact would probably compel the complainant to state facts which would bring him within the limitation period or within the shorter or further time allowed in the exceptional cases. However, at one time the common law rule against the use of the demurrer to raise the point threatened to prevail in equity. Lord Hardwicke<sup>44</sup> and Lord Thurlow<sup>45</sup> declared that a demurrer would not be permitted to raise the point as the complainant would be prevented from replying or amending his bill to show that the case came within an exception to the statute. In a slightly later case<sup>46</sup> Sir Thomas Plumer, Vice-Chancellor, seemed to be of the opinion that only in the rare case will the bill affirmatively show that the statutory period has elapsed and that none of the exceptions applied so as to decide the point upon demurrer. But in most of the later cases, *in absence* of the complainant's showing that the case was within one of the exceptions, the bill was demurrable if the statute had apparently run.<sup>47</sup> Lord Kenyon has been credited with the first decision<sup>48</sup> to this effect. Through the great influence of

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<sup>40</sup> LANGDELL, *op. cit. supra* note 38, §§ 53, 92, 93.

<sup>41</sup> *Ibid.* § 93.

<sup>42</sup> *Ibid.* § 55.

<sup>43</sup> See *Prince v. Heylin*, 1 Atk. 493 (Ch. 1737).

<sup>44</sup> *Aggas v. Pickerell*, 3 Atk. 225 (Ch. 1745); *Gregor v. Molesworth*, 2 Ves. Sr. 109 (Ch. 1750); see *Prince v. Heylin*, *supra* note 43.

<sup>45</sup> *Deloraine v. Browne*, 3 Bro. C. C. 633 (Ch. 1792). See discussion of this case, generally disapproving it, in *Hovenden v. Annesley*, 2 Sch. & Lef. 607, 637 (Ch. 1806).

<sup>46</sup> *Hodle v. Healey*, 1 Ves. & Bea. 536 (Ch. 1813).

<sup>47</sup> *Mutloe v. Smith*, 3 Anst. 709 (Ex. Ch. 1796); *Foster v. Hodgson*, 19 Ves. Jr. 180 (Ch. 1812); *Hoare v. Peck*, 6 Sim. 51 (Ch. 1833); *Smith v. Fox*, 6 Hare, 386 (Ch. 1848). See *Hovenden v. Annesley*, *supra* note 45; *Hardy v. Reeves*, 4 Ves. Jr. 466, 479 (Ch. 1799).

<sup>48</sup> *Beckford v. Close*, decided at the Cockpit in 1784 and evidently unreported. The case was apparently well known to the chancellors and the bar for it is referred to in *Foster v. Hodgson*, *supra* note 47, *Deloraine v. Browne*, *supra* note 45, *Hardy v. Reeves*, *supra* note 47 and *Hovenden v. Annesley*, *supra* note 45. *Saunders v. Hord*, *supra* note 39, decided more than a century before *Beckford v. Close*, seems to have held that the statute of limitations could be asserted by demurrer.

Lord Redesdale,<sup>49</sup> the rule became firmly established in the chancery practice of England. It is a common statement of textwriters that in equity, the defense of the statute of limitations can be raised by demurrer.<sup>50</sup> In this country it is probably the general rule,<sup>51</sup> although there is some dissent.<sup>52</sup> Another feature of the equity practice is worth noticing. If the complaint did not show the bar of the statute, the point might be raised by plea.<sup>53</sup> This is important because the bill might be dismissed without discovery from the defendant as would result if he were compelled to answer.<sup>54</sup> The defendant's contention, if well taken, would dispose of the case at a preliminary stage, which is a factor usually very desirable to both court and parties.

A fair generalization of the position taken by courts in absence of statute is that a demurrer might raise the point in an equity suit but not in a common law action. In the code jurisdictions there is marked diversity. Some states<sup>55</sup> follow the common law rule and refuse to permit the point to be raised

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<sup>49</sup> As John Mitford, before his elevation to the bench, he was the losing counsel in *Deloraine v. Browne*, *supra* note 45. He faithfully enunciated the doctrine of that case in his text, MITFORD, EQUITY PLEADING, \* 213. But as Lord Redesdale, he firmly announced the doctrine for which he had contended in *Deloraine v. Browne*. *Hovenden v. Annesley*, *supra* note 45.

<sup>50</sup> STORY, EQUITY PLEADING (8th ed. 1870) §§ 484, 503, 760; MITFORD & TYLER, PLEADING AND PRACTICE IN EQUITY (1890) 306, n., 347; HEARD, EQUITY PLEADING (1889) 65; SHIPMAN, EQUITY PLEADING (1897) 398.

<sup>51</sup> *Wisner v. Ogden*, Fed. Cas. No. 17,914 (C. C. D. C. 1827); *Henry County v. Winnebago Drainage Co.*, 52 Ill. 456 (1869); *City of Fulton v. Northern Ill. College*, 158 Ill. 333, 42 N. E. 138 (1895); *McLean v. Barton*, Harr. Ch. 279 (Mich. 1841); *Campau v. Chene*, 1 Mich. 400 (1850); *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741 (1888); *Crawford's Adm'rs. v. Turner Adm'rs.*, 67 W. Va. 564, 68 S. E. 179 (1910); *Humbert v. Trinity Church*, 7 Paige, 195 (N. Y. Ch. 1838); *Gephart v. Sprigg*, 124 Md. 111, 91 Atl. 772 (1914); *Erickson v. Insurance Co.*, 66 Fla. 154, 63 So. 716 (1913).

<sup>52</sup> *Hubble v. Poff*, 98 Va. 646, 37 S. E. 277 (1900); see *Vyse v. Richards*, 208 Mich. 383, 175 N. W. 392 (1919); LANGDELL, *op. cit. supra* note 38, § 109.

<sup>53</sup> MITFORD & TYLER, *op. cit. supra* note 50, at 356; STORY, *op. cit. supra* note 50, §§ 751-756; LANGDELL, *op. cit. supra* note 38, § 110; HEARD, *op. cit. supra* note 50, at 88, 89; SHIPMAN, *op. cit. supra* note 50, at 465. Indeed, even if the bill did show that the statute had run, it seems that the point could be raised by plea or answer as well as demurrer. See *infra* note 134.

<sup>54</sup> Langdell, *op. cit. supra* note 38, § 98.

<sup>55</sup> The Indiana, Kentucky and Oklahoma cases are inclined to allow demurrers if no exceptions can be applicable. *Leard v. Leard*, 30 Ind. 171 (1868); *Hanna v. Jeffersonville Ry.*, 32 Ind. 113 (1869); *Low v. Ramsey*, 135 Ky. 333, 122 S. W. 167 (1909); *Missouri, K. & T. Ry. v. Wilcox*, 32 Okla. 51, 121 Pac. 656 (1912). But these courts will not permit the point to be asserted by demurrer if an exception might possibly be applicable. *Falley v. Gribbling*, 128 Ind. 110, 26 N. E. 794 (1891); *Brashears' Heirs v. Brashears*, 144 Ky. 451, 139 S. W. 738 (1911); *Graziani v. Ernst*,

by demurrer. The Minnesota court<sup>56</sup> has declared that it is impelled by the code to follow the equity rule, which of course permitted the point to be raised by demurrer. Other jurisdictions<sup>57</sup> sustain demurrers on the ground that a complaint which shows that the ordinary limitation period has run and does not bring the case within some exception, does not state facts sufficient to constitute a cause of action.

The matter is further complicated by special statutory provisions. In several code jurisdictions, the statutes<sup>58</sup> relating to demurrers expressly mention the bar of the statute of limitations as a ground of demurrer if it appears on the face of the complaint. The effect of such a provision could be whittled away to practically nothing by taking the position that it is only applicable when the complaint shows that none of the exceptions to the statute can possibly apply.<sup>59</sup> But the courts in these jurisdictions have assumed for purposes of the demurrer that no exception is applicable unless the complaint shows that one exists.<sup>60</sup> In a few states there is a statutory provision<sup>61</sup> that

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*supra* note 36; *Klineline v. Head*, 205 Ky. 644, 266 S. W. 370 (1924); *Polson v. Revard*, 104 Okla. 279, 232 Pac. 435 (1924). See *supra* note 35.

<sup>56</sup> *Ferrier v. McCabe*, *supra* note 36. This has been applied also to time limitations imposed by act of the parties themselves. *Fitger Brewing Co. v. American Bonding Co.*, 115 Minn. 78, 131 N. W. 1067 (1911); *cf. Ausplund v. Aetna Indemnity Co.*, *infra* note 135; *Ideal Brick Co. v. Gentry*, 191 N. C. 636, 132 S. E. 800 (1926).

<sup>57</sup> *Mueller v. Light*, 92 Ark. 522, 123 S. W. 646 (1909); *Douglas v. Corry*, *supra* note 36 (before passage of the statutory provision given *infra* note 58); *Kansas State Bank v. Shaible*, 118 Kan. 73, 234 Pac. 40 (1925); *Garth v. Motter*, 248 Mo. 477, 154 S. W. 733 (1913); *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 689 (1894); BRYANT, CODE PLEADING (2d ed. 1899) 193; *cf. POMEROY, CODE REMEDIES* (4th ed. 1904) § 589. See *Upton v. McLaughlin*, 105 U. S. 640 (1881). Some jurisdictions insist that the demurrer, while it comes under the general class of "facts insufficient to constitute a cause of action" must specially point out that the statute of limitations is relied upon. *California Safe Deposit & Trust Co. v. Sierra Valleys Ry.*, 158 Calif. 690, 112 Pac. 274 (1910); *Yost v. Irwin*, 53 Colo. 269, 125 Pac. 526 (1912); *Rogers v. Oregon-Washington R. & N. Co.*, 28 Idaho, 609, 156 Pac. 98 (1916); *State v. Spencer*, 79 Mo. 314 (1883); *Standard Oil Co. v. Nat'l Surety Co.*, 107 So. 559 (Miss. 1926); see *Cooley v. Maine*, *supra* note 15; *Lamm v. Gohlman, Lester & Co.*, 279 S. W. 552 (Tex. Civ. App. 1925). *Contra: Merriam v. Miller*, 22 Neb. 218, 34 N. W. 625 (1887); *Seymour v. Railway*, 44 Ohio St. 12, 4 N. E. 236 (1886).

<sup>58</sup> Alaska Comp. Laws (1913) § 890; Ariz. Rev. Stat. (1913) § 468; Ia. Code (1924) § 11141; Ohio Gen. Code (Page, 1920) § 11309; Or. Laws (Olsen, 1920) § 68; Wash. Comp. Stat. (Remington, 1922) § 259; Wis. Stat. (1921) § 2649.

<sup>59</sup> See *supra* note 55.

<sup>60</sup> *District Township of Carroll v. District Township of Arcadia*, 79 Iowa, 96, 44 N. W. 236 (1890); *Murray v. Low*, *supra* note 7 (under Oregon practice).

<sup>61</sup> Mont. Rev. Codes (Choate, 1921) § 9065; N. C. Cons. Stat. (1919) § 405; N. D. Comp. Laws Ann. (1913) § 7358; 1 S. C. Code (1922) § 313;

the defense of limitations can be raised only by answer. This might be interpreted as merely insisting that the point could not be raised by general denial and not as excluding the possibility of a demurrer when otherwise applicable.<sup>62</sup> But the courts of these states generally consider the enactment as a prohibition against the use of the demurrer to raise the defense.<sup>63</sup>

A distinction has been drawn between the general statutes of limitation and time limitations applicable to special statutory actions. Among the latter, civil actions for death are most common. In these, the commencement of the action within the time specified is generally considered to be a fact which the plaintiff must plead<sup>64</sup> and prove.<sup>65</sup> The traditional justification of such

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S. D. Rev. Code (1919) § 2263. In New York, C. P. A., § 30, formerly provided, following the older code provision, that the point could be asserted only by answer but was amended to agree with Rule 107. N. Y. Ann. Cons. Laws (1921) c. 372, § 1. See *infra* notes 78-79. Or. Laws (Olsen, 1920) § 3; Wash. Comp. Stat. (Remington, 1922) § 155; Wis. Stat. (1921) § 4206 provide that the statute of limitations must be raised by either answer or demurrer. Ariz. Rev. Stat. (1913) § 727 provides that the point can be raised only by answer but § 468 provides that the statute of limitations is ground for demurrer. Tex. App. Civ. & Crim. Stat. (Vernon, 1920) § 5706 is to the effect that the statute must be specially pleaded.

<sup>62</sup> See *Motes v. Gila Val. G. & N. Ry.*, 8 Ariz. 50, 68 Pac. 532 (1902), where the court was impelled to adopt this construction in order to reconcile then existing statutes. Probably the same result would be reached under the present statutes—see *supra* note 61. The Texas statute is differently worded from most of the other statutes cited in note 61 and is open to the interpretation that a special demurrer asserting the statute of limitations may raise the point. See *Lamm v. Gohlman, Lester & Co.*, *supra* note 57; *Ogg v. Ogg*, 165 S. W. 912 (Tex. Civ. App. 1914); *Oswald v. Giles*, 178 S. W. 677 (Tex. Civ. App. 1915).

<sup>63</sup> *Moody v. Wike*, 170 N. C. 541, 87 S. E. 350 (1915); *Shane v. Peoples*, 25 N. D. 188, 141 N. W. 737 (1913); *Guerard v. Jenkins*, 80 S. C. 223, 61 S. E. 258 (1908); *Fulmore v. Fulmore*, 115 S. C. 213, 105 S. E. 285 (1920); *cf.* *Northwestern Mortgage Trust Co. v. Schatz*, 35 S. D. 379, 152 N. W. 509 (1915); see *Grogan v. Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211 (1904); *Willis v. Willeman*, 53 Misc. 462, 102 N. Y. Supp. 1004 (Sup. Ct. 1907). *Contra*: *Howell v. Howell*, 15 Wis. 60 (1862); *Chemung Canal Bank v. Lowery*, 93 U. S. 72 (1876). The Wisconsin statute has been altered since so as expressly to permit the point to be raised by demurrer. See *supra* notes 58, 61.

<sup>64</sup> There is some doubt as to how specifically the plaintiff must allege commencement of the action within the period. It has been held that he must allege the matter in so many words and that it is not sufficient merely to state the date of the accrual of the action under a *videlicet*. *Seitter v. West Jersey and S. R.*, 79 N. J. L. 277, 75 Atl. 435 (1910); *Annuziati v. Eisner*, 2 N. J. Misc. 513, 124 Atl. 774 (1924); *Carey v. Deems*, 129 Atl. 191 (N. J. Sup. Ct. 1925). While it may be wiser to plead expressly that the action was commenced within the time allowed by statute, most courts do not hold this necessary. It is sufficient if a date of accrual is pleaded which is within the period. *Devine v. Chicago*, 213 Ill. App. 299 (1919); *Linehan v. Morton*, 221 Ill. App. 70 (1921); *Bishop v. Dignan*, 223 Ill. App. 178 (1921); *Burnham v. Peoria Ry.*, 223 Ill. App.

a distinction is that in the statutory actions the right as well as the remedy is barred.<sup>66</sup> The explanation is also offered that these actions are created by the very legislation which contains the limitation while the general statute of limitations applies to the sorts of rights which were recognized at common law.<sup>67</sup> But so far as time limitations are concerned, the operative facts of each transaction, and not the period of time during which similar rights have been recognized, would seem to be the important factors. A more plausible reason might be that the special statutory rights of action are disfavored to the extent of burdening the plaintiff with the additional operative fact of a timely suit. This may be sound in the case of some statutory actions, such as possibly those against municipalities. But there seems to be no reason of present social policy which would regard actions for battery, false imprisonment, malicious prosecution or slander with greater favor than actions for wrongful death. About the only really adequate ground for permitting the demurrer to raise the point in the statutory actions while denying it in the common law actions is that in the statutory actions there are usually no exceptions by which a plaintiff might possibly excuse the delay in bringing suit and the exceptions of the general statutes do not ordinarily apply.<sup>68</sup> As the only real difficulty in sus-

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573 (1921); *Luka v. Behn*, 225 Ill. App. 105 (1922); *Ramsey v. Mansell*, 233 Ill. App. 373 (1924); *Bright v. Thatcher*, 202 Mo. App. 301, 215 S. W. 788 (1919); *Mayberry v. Iron Mt. Co.*, 211 Mo. App. 610, 249 S. W. 161 (1923); *Brothers v. Rutland Ry.*, 71 Vt. 48, 42 Atl. 980 (1898).

<sup>65</sup> *Gulf States Steel Co. v. Jones*, 204 Ala. 48, 85 So. 264 (1920); *Poff v. New England Telephone Co.*, 72 N. H. 164, 55 Atl. 891 (1903); *Gulledge v. Seaboard Air Line Ry.*, 147 N. C. 234, 60 S. E. 1134 (1908); *Hatch v. Alamance Ry.*, 183 N. C. 617, 112 S. E. 529 (1923); see *Lapsley v. Public Service Corp.*, 75 N. J. L. 266, 68 Atl. 113 (1908).

<sup>66</sup> *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140 (1886); *Korb v. Bridgeport Gas Light Co.*, 91 Conn. 395, 99 Atl. 1048 (1917); *Rodman v. Missouri Pac. Ry.*, 65 Kan. 645, 70 Pac. 642 (1902); *Harwood v. Chicago, R. I. & P. Ry.*, 101 Kan. 215, 171 Pac. 354 (1917); *Bement v. Grand Rapids Ry.*, 194 Mich. 64, 160 N. W. 424 (1916); *Poff v. New England Telephone Co.*, *supra* note 65; *Hill v. New Haven*, *supra* note 17.

<sup>67</sup> *United States v. Rundle*, 27 Wash. 7, 67 Pac. 395 (1901); *The Harrisburg*, *supra* note 66. See also *Chandler v. Chicago & A. Ry.*, 251 Mo. 592, 158 S. W. 35 (1913). It is possible that the courts which use such language, have in mind the distinction between an exception and a proviso, but the analogy is not pursued and probably cannot be justified by the language of the statutory provisions.

<sup>68</sup> *Partee v. St. Louis Ry.*, 204 Fed. 970 (C. C. A. 8th, 1913); *Lewis v. Pawnee Bill's Wild West Co.*, 6 Pen. 316, 66 Atl. 471 (Del. 1907); *Rodman v. Missouri Pac. Ry.*, *supra* note 66; *Foster v. Yazoo & M. V. Ry.*, 72 Miss. 886, 18 So. 380 (1895); *Gulf & S. I. Ry. v. Bradley*, 110 Miss. 152, 69 So. 666 (1915); *Gengo v. Mardis*, 103 Neb. 164, 170 N. W. 841 (1919); see *Hill v. New Haven*, *supra* note 17, at 511. But see *Nelson v. Galveston Ry.*, 78 Tex. 621, 14 S. W. 1021 (1890) (posthumous child) and *Sharrow v. Inland Lines, Ltd.*, 214 N. Y. 101, 108 N. E. 217 (1915).

taining a demurrer in the common law actions is absent, most courts sustain demurrers in the statutory actions although they will not do so in ordinary common law or even in equity cases.<sup>69</sup> But some courts have recognized exceptions to the limitations in the statutory actions and on this account have refused to permit the question to be raised by demurrer.<sup>70</sup>

It is not always clearly recognized that the demurrer serves two distinct functions. The first might be called its disposing function because it is a means of finally determining the controversy.<sup>71</sup> The parties may state the facts so fairly and truthfully that both will agree upon the facts and disagree only as to whether the facts are sufficient in law to constitute a cause of action or a defense. Under such circumstances the decision of the demurrer will finally adjudicate the whole dispute, with-

<sup>69</sup> Of course all jurisdictions which allow the point to be raised by demurrer in ordinary common law actions would permit it here; in addition, the following jurisdictions allow the point to be raised by demurrer in the special statutory actions. *DeMartino v. Siemon*, 90 Conn. 527, 97 Atl. 765 (1916); *State v. Parks*, 148 Md. 477, 129 Atl. 793 (1925); *Dolenty v. Broadwater County*, 45 Mont. 261, 122 Pac. 919 (1912); *King v. Mayor of Butte*, 71 Mont. 309, 230 Pac. 62 (1924); *Lapsley v. Public Service Corp.*, *supra* note 65; *Savings Bank of Richmond v. Powhatan Clay Mfg. Co.*, 102 Va. 274, 46 S. E. 294 (1904); *Lambert v. Ensign Mfg. Co.*, *supra* note 22; see *Phillips v. Grand Trunk W. Ry.*, 236 U. S. 662, 35 Sup. Ct. 444 (1915); *Kansas City So. Ry. v. Wolf*, 261 U. S. 133, 43 Sup. Ct. 259 (1923).

<sup>70</sup> *Sharrow v. Inland Lines, Ltd.*, *supra* note 68. But see *Merz v. Brooklyn*, 57 Hun, 518, 11 N. Y. Supp. 778 (1890), *aff'd* 128 N. Y. 617, 23 N. E. 253 (1891); and *cf. Schwertfeger v. Scandinavian-American Line*, 186 App. Div. 89, 174 N. Y. Supp. 147 (1st Dept. 1919), *aff'd* 226 N. Y. 696, 123 N. E. 888 (1919) (action brought under New Jersey statute). In *Casey v. American Bridge Co.*, 116 Minn. 461, 134 N. W. 111 (1912), the exceptions of the ordinary statute of limitations are held applicable in case of the time limitation for commencement of death actions. The modern tendency of decision and legislation is said to be in this direction. (1920) 5 CORN. L. Q. 345. The Minnesota courts would undoubtedly permit the point to be raised by demurrer although an exception were applicable. See *supra* note 56. Illinois formerly refused to consider the time limitation in the death action as "conditions precedent" and consequently refused to allow the point to be raised by demurrer. *Wall v. Chesapeake & Ohio Ry.*, 200 Ill. 66, 65 N. E. 632 (1920); see *Heinberger v. Elliott Switch Co.*, 245 Ill. 448, 92 N. E. 297 (1910). But the court now regards the bringing of the suit within the period allowed as a condition of liability. *Carlin v. Peerless Gas Light Co.*, 283 Ill. 142, 119 N. E. 66 (1918); *Hartray v. Chicago Rys.*, 290 Ill. 85, 124 N. E. 849 (1919); *Joseph Schlitz Brewing Co. v. Chicago Rys.*, 307 Ill. 322, 138 N. E. 658 (1923). Unless the declaration shows a timely action, it is bad even on motion in arrest. *Hartray v. Chicago Rys.*, *supra*, noted in (1920) 20 COL. L. REV. 225 and (1920) 29 YALE LAW JOURNAL, 572. See also *North Side Sash & Door Co. v. Hecht*, 295 Ill. 515, 129 N. E. 273 (1920) (foreclosure of mechanic's lien).

<sup>71</sup> If the traditional history of the demurrer be true, it would seem that originally all demurrers finally disposed of the controversy. The demurrant was given no opportunity to withdraw his demurrer and the opponent was not permitted to amend; consequently, final judgment resulted from

out the necessity of the parties entering into the expense, delay and bitterness of the trial. Indeed, even if the demurrant does not fully agree that the facts alleged by the opponent are true, if the demurrer is sustained and the opponent feels that he cannot consistently with truth state a better case, the demurrer finally disposes of the controversy.

On the other hand, there are many instances in which the demurrer does not and cannot dispose of the entire matter. In the cases in which the pleader omits some items which he should have alleged, or makes his statements in a manner condemned by the law, or states a case which is legally sufficient but which he cannot prove, the demurrer does not determine the merits of the controversy but only the sufficiency or insufficiency of the pleading itself. Most lawyers and judges will recognize that the demurrer performs the latter function much more frequently than it does the disposing function.<sup>72</sup> Amendments are freely permitted to-day and a party may remedy his insufficient pleading without substantial penalty.<sup>73</sup> The pleader is not precluded from setting up, either in the first instance or by amendment, a formally perfect but false set of facts. The demurrer of course cannot usually<sup>74</sup> determine the truth or falsity of the facts and for this reason it usually performs the function of merely securing legally sufficient pleadings. While there must be some procedural devices to secure the observation of rules of pleading,<sup>75</sup> the demurrer is losing favor and the more flexible motion<sup>76</sup> is taking its place.

In New York the demurrer is abolished and is supplanted by the motion to dismiss.<sup>77</sup> The motion may be based on objections

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every decision of the demurrer. If this ever was the law there can be no doubt that comparatively early withdrawals and amendments were sometimes permitted *ex gratia*; later this came to be the general practice; and now statutes almost universally provide that the parties are absolutely entitled thereto.

<sup>72</sup> See *Report of Special Committee to Suggest Remedies* (1910) 35 A. B. A. REP. 638, 639.

<sup>73</sup> See Rothschild, *The Simplification of Civil Practice in New York* (1923) 23 COL. L. REV. 732, 747.

<sup>74</sup> Occasionally a court will take judicial notice that an allegation in a pleading is not true. *Masline v. New York, N. H. & H. R. R.*, 95 Conn. 702, 112 Atl. 639 (1921); *Taylor v. Barclay*, 2 Sim. 213 (Ch. 1828).

<sup>75</sup> Cf. 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1923) 251: "One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable."

<sup>76</sup> This is true in England, New Jersey, Michigan, New York and under the Federal Equity Rules. Even in the many code jurisdictions the motion to some extent supplants the special demurrer at common law. See, *c.g.*, Kan. Rev. Stat. Ann. (1923) § 60-741.

<sup>77</sup> C. P. A. § 277.



appearing on the face of the complaint<sup>78</sup> and in this respect is the approximate substitute of the demurrer. However, the motion is given a much broader effect than the demurrer. Rule 107 provides for motions based upon certain objections not appearing on the face of the complaint.<sup>79</sup> Such motions are supported by affidavits to sustain one or more of the nine grounds of the motion. The sixth ground is "that the cause of action did not accrue within the time limited by law for the commencement of an action thereon." The affidavits in support of the motion can fix the time of the accrual of the cause of action either by a positive reiteration of the allegation in the complaint or by showing that some other date is the true one. The time of commencement of the action can also be shown by affidavit or by reference to some court document, which perhaps could not technically be considered upon demurrer. If there is question concerning whether the time is extended by virtue of some exception, this can be brought forth in the affidavits of the respective parties.

Rule 108 provides that, in the discretion of the court, the matter may be disposed of (1) by the court upon the complaint and affidavits filed by the parties, (2) by submitting the issue to a jury or referee, or (3) by overruling the motion and permitting

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<sup>78</sup> Rule 106.

<sup>79</sup> As to the proper nomenclature applicable to the various sorts of motions under the present New York practice, see Rothschild, *op. cit. supra* note 73, at 641. Dicta in some of the cases are to the effect that the allegations of the complaint must be considered true for the purpose of disposal of motions under Rule 107. *Sly v. Van Lengen*, 120 Misc. 420, 422, 198 N. Y. Supp. 608, 610 (Sup. Ct. 1923); *Barnes v. Andrews*, 208 App. Div. 856, 204 N. Y. Supp. 326, 327 (2d Dept. 1924); *Keys v. Leopold*, 213 App. Div. 760, 761, 210 N. Y. Supp. 406, 408 (1st Dept. 1925), *rev'd*, 241 N. Y. 189, 149 N. E. 828 (1925). These statements would seem to be somewhat misleading. *Cf. Camp v. Reeves*, 209 App. Div. 488, 494, 205 N. Y. Supp. 259, 264 (1st Dept. 1924). There can be no doubt but that a court may base its decision on data supplied by affidavit when the complaint is silent upon the point. In addition it would be reasonable to adopt the version of an affidavit which positively contradicts allegations of a complaint and is not itself contradicted by counter-affidavit. The defense of the statute of limitations can, it seems, be raised in a similar preliminary manner under section 20 of the Pennsylvania Practice Act of 1915. *Koons v. Philadelphia & R. Ry.*, 281 Pa. 270, 126 Atl. 381 (1924); but see *Prettyman v. Irwin*, 273 Pa. 522, 117 Atl. 195 (1922). In Michigan the point cannot be raised by motion because the new devise is said to be no broader than the demurrer under the former practice. *Vyse v. Richards*, *supra* note 52; *Sandusky Grain Co. v. Borden's Milk Co.*, 214 Mich 306, 183 N. W. 218 (1921). It is interesting to note that these are equity cases. Formerly, Michigan held that the statute of limitations could in equity be raised by demurrer. *Campau v. Chene*, *supra* note 51; see *Highstone v. Franks*, 93 Mich. 52, 57, 52 N. W. 1015, 1016, 1017 (1892). In this respect the new motion has been given even a narrower effect than the demurrer in the earlier practice in Michigan.

the objection to be incorporated in the answer and determined at the trial. For the purpose of expedition of the action and the saving of expense, the first alternative is preferred to the others and probably the second to the third. Which alternative will be chosen by a court will depend largely upon the clearness of the showing or the extent to which the parties agree concerning the facts. If there is serious controversy over them, a court should not dispose of this important matter upon affidavits.<sup>80</sup> However, if the reported cases are representative, it would seem that most of the cases can be disposed of by the court. More often than not there is no real disagreement between the parties as to the pertinent facts with reference to the period of limitation.<sup>81</sup> Often the plaintiff files no counter-affidavits, evidently because he is unable to dispute the defendant's claim. If differences exist as to points of law, these can be determined more advantageously at the motion stage than at the trial as under the former practice. The present New York procedure does not require the plaintiff to follow the practice of anticipating the defense of the statute of limitations by showing his case to be within one of the exceptions.<sup>82</sup> The whole manner of treatment seems to be a great economy for, if the motion is granted, it or-

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<sup>80</sup> *Sly v. Van Lengen*, *supra* note 79; *United States v. Scudder*, 2 Fed. (2d) 632 (E. D. N. Y. 1924); *United States v. Connors*, 295 Fed. 521 (E. D. N. Y. 1923). See also *Rizzuto v. United States Shipping Board E. F. Corp.*, 213 App. Div. 326, 210 N. Y. Supp. 482 (2d Dept. 1925); *Herzog v. Brown*, 217 App. Div. 402, 216 N. Y. Supp. 134 (1st Dept. 1926).

<sup>81</sup> *Stern v. Auerbach*, 203 App. Div. 681, 197 N. Y. Supp. 295 (1st Dept. 1922); *Koerner v. Apple*, 120 Misc. 266, 199 N. Y. Supp. 171 (Sup. Ct. 1923); *Johnson v. Guernsey*, 208 App. Div. 548, 203 N. Y. Supp. 781 (4th Dept. 1924); *Bykowsky v. Public Nat'l Bank*, 209 App. Div. 61, 204 N. Y. Supp. 385 (1st Dept. 1924), *aff'd* 240 N. Y. 555, 148 N. E. 702 (1925); *Camp v. Reeves*, 209 App. Div. 488, 205 N. Y. Supp. 259 (1st Dept. 1924); *Peters v. Wells Fargo & Co.*, 211 App. Div. 772, 207 N. Y. Supp. 657 (1st Dept. 1925); *Keys v. Leopold*, *supra* note 79; *Dumbadze v. Lignante*, 216 App. Div. 554, 215 N. Y. Supp. 442 (1st Dept. 1926). See, generally, *supra* notes 2-12. The proceeding by motion is not mandatory and may be taken by answer. *Gentilala v. Fay Taxicabs, Inc.*, 214 App. Div. 255, 212 N. Y. Supp. 101 (1st Dept. 1925), *aff'd* on this point in 243 N. Y. 397, 153 N. E. 848 (1926). In several instances, counsel for the defendant has chosen to raise the point by answer, though it appears that the motion might possibly have been a more expeditious means. *Stuart v. Grattan*, 217 App. Div. 336, 216 N. Y. Supp. 727 (3d Dept. 1926); *Schochet v. Public Nat'l Bank*, 127 Misc. 447, 216 N. Y. Supp. 362 (Sup. Ct. 1926); *Backus v. Severn*, 127 Misc. 776, 216 N. Y. Supp. 381 (Sup. Ct. 1926); *Laurencelle v. Laurencelle*, 217 App. Div. 159, 216 N. Y. Supp. 384 (2d Dept. 1926). Often defendants desire to answer and raise the defense of the statute by a motion for judgment on the pleadings. *Harmon v. Alfred Peats Co.*, 243 N. Y. 473, 154 N. E. 314 (1926); *Guerin v. Guerin*, 127 Misc. 745, 217 N. Y. Supp. 1 (Sup. Ct. 1926).

<sup>82</sup> It will be noted that in the jurisdictions which permit the statute of limitations to be raised on demurrer, the plaintiff will be required to plead his exceptions in his first pleading in order to have it demurrer-proof. See

dinarily disposes of the entire controversy. The result is reached sooner and with far less strain on the participants than if raised by answer and determined at trial.

In many types of contractual actions, certain jurisdictions<sup>83</sup> permit summary judgment to be entered for the plaintiff upon the defendant's failure, due opportunity having been given him, to show that there are matters to be litigated. This gives to the plaintiff a remedy for the procrastinating practices of debtors. Defendants should have a similar protection against the nuisance of a pending unwarranted lawsuit. Often defendants, as well as plaintiffs, wish to have the matter disposed of as soon as possible. The constitutionality of Rules 107 and 108 does not seem to have been questioned directly in New York. They surely do not deprive a plaintiff of the constitutional right to trial by jury any more than summary judgment proceedings.<sup>84</sup> In cases of real conflict of evidence the court should not decide the case upon affidavit, and by doing so may in a given case violate the Constitution. But a useful procedural device should not be scrapped merely because conceivably it might result in abuses. These two rules seem to be among the most admirable features of the present New York procedure. Under them not only the statute of limitations but the defenses of the statute of frauds, *res adjudicata*, another action pending, release, incapacity and lack of jurisdiction can be raised and disposed of at an early stage of the case without the necessity of a trial. Indeed many other defenses could well be raised in this way if the rules permitted.<sup>85</sup> The practice is not without ancient precedent, for it is quite similar to the Roman *exceptio* and to the plea in

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*supra* notes 36, 47, 57. At common law such anticipation was not only unnecessary but improper. *Gunton v. Hughes*, *supra* note 35.

<sup>83</sup> Rothschild, *op. cit. supra* note 73, at 646, (1924) 24 COL. L. REV., at 863, 870; Finch, *Summary Judgments Under the Civil Practice Act in New York* (1924) 49 A. B. A. REP. 588; McCall, *Summary Judgment Under New York Rules* (1924) 10 A. B. A. J. 22; Rothschild, *New York Civil Practice Simplified* (1926) 26 COL. L. REV. 30, 53. See also (1922) 22 COL. L. REV. 483; (1923) 23 COL. L. REV. 496; (1925) 25 COL. L. REV. 678. In addition to England and New York, the summary judgment is in use in Arkansas, Michigan, New Jersey, Illinois and the District of Columbia.

<sup>84</sup> See articles and notes *supra* note 83 for a discussion of the constitutionality of the summary judgment proceeding and constitutional limitations on its use. The constitutionality of Rule 107 has been generally assumed. See authorities *supra* note 81. Constitutional dangers of refusing trial by jury when serious questions of fact exist are mentioned in *Herzog v. Brown*, *supra* note 80, at 136. See also Rothschild, *New York Civil Practice Simplified* (1926) 26 COL. L. REV. 30, 52.

<sup>85</sup> Possibly payment, validity of contract and the constitutionality of the law upon which the plaintiff bases his right of action could be raised by motion. Probably the question of contributory negligence could not, due to differences between the parties as to the facts in such cases and the closely intermingled question of the defendant's negligence.

equity, which was designed to obviate the necessity of an answer with its accompanying discovery.<sup>86</sup>

The great advantage of the New York motion is that it permits undisputed facts to be used by the court at an early stage of the case, in order to dispose of the case finally because of the bar of the statute of limitations. To a lesser degree this is true of the demurrer but the court can consider only such facts as are pleaded. Under the New York practice, the plaintiff has ample notice of the defense and of the facts upon which the defendant relies to sustain it. If the point is raised by demurrer, theoretically the plaintiff needs no notice, as only the factual data contained in his own pleading and other documents in the court files will be considered. But it is reasonable to insist that notice of the defendant's legal theory of the demurrer be given because: (1) the plaintiff may be able to amend consistently with truth and prevent a useless argument and decision upon the demurrer; (2) the plaintiff may be willing to confess judgment without argument as soon as he comprehends the defendant's theory; (3) the plaintiff's counsel should be given an opportunity to investigate the questions of law involved and prepare his argument thereon for the trial court. For these reasons a general demurrer should not be permitted to raise the point. Most jurisdictions which recognize the demurrer as a proper procedural device to raise the statute of limitations insist that it be a special demurrer.<sup>87</sup>

#### RAISING THE STATUTE OF LIMITATIONS BY ANSWER

1. *Under a Denial.* Even under the present procedure in New York it will not always be possible to dispose of the defense of the statute of limitations before the trial stage of the litigation. Furthermore, in the states which more or less generally permit the point to be asserted by demurrer, there will be frequent occasions when a demurrer is not applicable. For example, there will be cases in which the date of accrual of the cause of action is not mentioned at all<sup>88</sup> or in which the plain-

<sup>86</sup> 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (1911) 611.

<sup>87</sup> See text *supra* at notes 53, 54; LANGDELL, *op. cit. supra* note 38, §§ 93, 98; Herzog v. Brown, *supra* note 80, at 135.

<sup>88</sup> See Holdorf v. Holdorf, 185 Iowa, 838, 169 N. W. 737 (1918). In jurisdictions which ordinarily allow a demurrer to raise the question (*supra* notes 57, 60) when no date of accrual is alleged in the complaint, the point must be raised by answer. Pleasant v. Samuels, 114 Calif. 34, 45 Pac. 998 (1896); Pike v. Zadig, 171 Calif. 273, 152 Pac. 923 (1915); Osborn v. Portsmouth Nat'l Bank, 61 Ohio St. 427, 56 N. E. 197 (1900); Hawkins v. Donnerberg, 40 Or. 97, 66 Pac. 691, 908 (1901). But if the timely commencement of a statutory action is deemed a condition precedent, the omission to allege the time of accrual may be ground for demurrer. Hartray v. Chicago Rys., *supra* note 70. See also *supra* note 64.

tiff alleges a time within the statutory period, which fact the defendant wishes to contest. In these situations, and generally in the jurisdictions which do not permit a demurrer to raise the question,<sup>89</sup> the bar of the statute should be asserted by plea or answer.

There are some situations in which a defendant has been permitted to raise the point at the trial under the general issue or general denial. For example, Lord Holt<sup>90</sup> believed that the wording of the general issue in debt, "he does not owe," was so broad that it would permit the defense of the statute of limitations to be raised by merely pleading the general issue, but the prevailing view seems to be to the contrary.<sup>91</sup> In penal actions, most courts<sup>92</sup> have permitted the bar to be asserted at the trial after a mere denial of the indebtedness. This position was originally due to an express statutory provision<sup>93</sup> in England and has been followed in this country regardless of the absence of such a statute. There are a number of miscellaneous situations<sup>94</sup> in which the statute of limitations has been held to be properly raised at the trial without expressly pleading it.

<sup>89</sup> *Stair v. Gilbert*, 209 Ky. 243, 272 S. W. 732 (1925); *Hodgdon v. Haverhill*, 193 Mass. 327, 79 N. E. 818 (1907); *Sawyer v. Boston*, 144 Mass. 470, 11 N. E. 711 (1887); *First Nat'l Bank v. Steel*, 136 Mich. 588, 99 N. W. 786 (1904); *Township of Forest v. American Bonding Co.*, 180 Mich. 90, 146 N. W. 416 (1914); *Sullivan v. Portland Ry.*, 94 U. S. 806 (1877). Thus, when one defendant pleads the statute of limitations, benefit of the statute should not be given to other defendants. *Emory v. Keighan*, 94 Ill. 543 (1880); *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367 (1895); *West v. Williams & Sons*, 202 Ky. 382, 259 S. W. 1015 (1924); *Moran v. Midland Farms Co.*, 282 S. W. 612 (Tex. Civ. App. 1926). See also cases cited *supra* notes 19, 27, 35, 36, 55, 60, 63. It is not necessary, however, to plead presumption of payment after twenty years. *Chesapeake & Delaware Canal Co. v. United States*, 223 Fed. 926 (C. C. A. 3d, 1915).

<sup>90</sup> *Anonymous*, 1 Salk. 278 (N. P. 1690); *Draper v. Glassop*, 1 Ld. Raym. 153 (K. B. 1697). *Acc.*: *Hogan v. Sims*, 1 Brev. 76 (S. C. 1802).

<sup>91</sup> *Chapple v. Durston*, 1 Cr. & J. 1 (Ex. 1830); *Gardner v. Lindo*, Fed. Cas. No. 5231 (C. C. D. C. 1802); *McIver v. Moore*, Fed. Cas. No. 8831 (C. C. D. C. 1802); see *Smart v. Baugh*, 3 J. J. Marsh, 363 (Ky. 1830); *Butcher v. Hixton*, 4 Leigh, 519, 527 (Va. 1833).

<sup>92</sup> *Watson v. Anderson*, Hardin, 458 (Ky. 1808); *Moore v. Smith*, 5 Greenl. 490 (Me. 1829); *Pike v. Jenkins*, 12 N. H. 255 (1841); *Gebhart v. Adams*, *supra* note 27. But see *Western Union Telegraph Co. v. State*, 82 Ark. 309, 101 S. W. 748 (1907).

<sup>93</sup> (1623) 21 Jac. I, c. 4, § 4 specifically provided that when a person is sued in a penal action he may plead the general issue and give special matter in evidence. Rhode Island has a similar statute. R. I. Gen. Laws (1923) § 6420. Even aside from such provisions, it is possible to reconcile the decisions on the traditional line of reasoning that as the same statute "created," both the right and the limitation, the bringing of the suit within the limitation is a condition precedent to recovery. See *supra* notes 64-69 and *infra* note 105, and *Petrie v. White*, 3 T. R. 5, 11 (K. B. 1789).

<sup>94</sup> It has been held that when the declaration or complaint shows that

In the great majority of jurisdictions, a plaintiff who relies upon adverse possession for the statutory period, need not assert the bar of the statute as the source of his "title" but may merely plead generically that he is the owner.<sup>95</sup> Consequently if the

the action is barred, the statute of limitations can be insisted upon although not asserted by either answer or demurrer. *Robinson v. Lewis*, 45 N. C. 58 (1853); *Atwood Mercantile Co. v. Rooney*, 114 Kan. 840, 220 Pac. 1048 (1923). There are frequent dicta to this general effect. *Eayrs v. Mason*, 54 Neb. 143, 74 N. W. 408 (1898); *Easton Nat'l Bank v. American Brick Co.*, 70 N. J. Eq. 732, 64 Atl. 917 (1906); see also *Holland v. Tjosevig*, 109 Wash. 142, 186 Pac. 317 (1919). But this position is generally rejected. *Thompson v. Parker*, 68 Ala. 337 (1880); *Jennings v. Rickard*, 10 Colo. 395, 15 Pac. 677 (1887); *Brickett v. Davis*, 21 Pick. 404 (Mass. 1838); *Schmitt v. Hager*, 88 Minn. 413, 93 N. W. 110 (1903); *State v. Spence*, *supra* note 57; *Wilkinson v. Flowers*, 37 Miss. 579 (1859); *Vore v. Woodford*, 29 Ohio St. 245 (1876); see *Trebby v. Simmons*, 33 Minn. 508, 38 N. W. 693 (1888). There are a number of situations in which the statute of limitations can be insisted upon without pleading it because there was no opportunity to plead it, *viz.*, generally, *Emory v. Keighan*, *supra* note 89; *Purell v. Wilson*, 4 Gratt. 16 (Va. 1847); *Martin v. Cochran*, 94 W. Va. 432, 119 S. E. 174 (1923); *Dreutzer v. Baker*, 60 Wis. 179, 18 N. W. 776 (1884) (no special replication allowed to a set-off); *Kincade v. Peck*, 193 Mich. 207, 159 N. W. 480 (1916); *Woodland Oil Co. v. Byers*, 223 Pa. 241, 72 Atl. 518 (1909); *Williams v. Perry*, 2 Strob. 170 (S. C. 1847); *Sexton & Co. v. Aultman & Co.*, 92 Va. 20, 22 S. E. 838 (1895); see *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 843, 35 S. E. 986, 988 (1900) (no formal pleadings as in probate proceedings etc.); *Pendley v. Powers*, 129 Ga. 69, 58 S. E. 653 (1907); *Bromwell v. Bromwell*, 139 Ill. 424, 28 N. E. 1057 (1891); *Reynolds v. Lansford*, 16 Tex. 286 (1856); *Bartlett v. Tufts*, 241 Mass. 96, 134 N. E. 630 (1922). But see (generally) *Sloanaker v. Howerton*, 182 Iowa, 487, 166 N. W. 78 (1918). Where the interests of third persons (beneficiaries and creditors) are involved, personal representatives should not be permitted to waive the defense. Hence it seems sound for the court to notice the defense of limitations, although it is not pleaded, for the vitally interested parties have not an opportunity to do so. *Martin v. Estate of Martin*, 103 Wis. 284, 84 N. W. 439 (1900); *Murtha v. Donohoo*, 149 Wis. 481, 134 N. W. 406 (1912); *Mann v. Redmon*, 23 N. D. 508, 137 N. W. 473 (1912); *Branch v. Lambert*, 103 Or. 423, 205 Pac. 995 (1922); see *Stebbins v. Scott*, 172 Mass. 356, 52 N. E. 535 (1899). The same reasoning could be applied to suits against the United States. *Finn v. United States*, 123 U. S. 227, 8 Sup. Ct. 82 (1887). If the defendant is misled as to the nature of the plaintiff's cause of action he has been permitted to have the advantage of the statute without pleading it. *Gottschall v. Melsing*, 2 Nev. 185 (1866); *Tazewell v. Whittle*, 13 Gratt. 329 (Va. 1856). In special cases, statutes sometimes permit any matter to be raised under the general issue. *Miss. Ann. Code (Hemingway, 1917) § 1765*; *Pa. Stat. (1920) §§ 17179-17192*. When the effect of the statute of limitations is only to mitigate the damages, it may be shown under the general issue or denial. *Thompson v. Holbert*, 109 N. Y. 329, 16 N. E. 675 (1883); *Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174 (1887). This position is no doubt a heritage of the common law insistence upon a single issue. It is doubtful whether the New York court should so hold under the Civil Practice Act. See *infra* note 110.

<sup>95</sup> *Gillespie v. Jones*, 47 Calif. 259 (1874); *Montecito Valley Water Co. v.*

defendant, who was the initial owner, denies the plaintiff's title by a general or special denial, he can show that the statute of limitations has not run and that the plaintiff has not "title" by adverse possession.<sup>96</sup> This position is firmly established and there can be little hope of change. These holdings result from the traditional ideas (1) that "title" is an ultimate fact in pleading,<sup>97</sup> and (2) that the adverse possessor for the statutory period has "title."<sup>98</sup> For many purposes, this manner of thinking and speaking is convenient but it must be remembered that the regarding of title as something real and *a priori* instead of a mere shorthand expression to denote a more or less definite number of legal relationships may lead to serious inaccuracies or even absurdities.<sup>99</sup> There is also the more frequent situation in which a defendant claims title by adverse possession against the plaintiff, the original owner. Under the prevailing rule the defendant may raise the statute of limitations by any form of denial which puts the "title" in issue,<sup>100</sup> but some jurisdictions

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Santa Barbara, 144 Calif. 578, 77 Pac. 1113 (1904); Nash v. Northwest Land Co., 15 N. D. 566, 108 N. W. 792 (1906); Laclede Land & Imp. Co. v. Epright, 265 Mo. 210, 177 S. W. 386 (1915); Mascall v. Murray, 76 Or. 637, 149 Pac. 517 (1915); Donahue v. Thompson, 60 Wis. 500, 19 N. W. 520 (1884); Metropolitan Bldg. Co. v. Fitzgerald, 122 Wash. 514, 210 Pac. 770 (1922). See also Sullivan v. Dunphy, 4 Mont. 499, 2 Pac. 284 (1882); Frierson v. Irwin, 5 La. Ann. 531 (1850). *Contra*: Erp v. Tillman, 103 Tex. 574, 131 S. W. 1057 (1910) (under a peculiar statute); Hunnicut v. Brydson, 274 S. W. 1015 (Tex. Civ. App. 1925).

<sup>96</sup> See Donahue v. Thompson, *supra* note 95.

<sup>97</sup> STEPHEN, *op. cit. supra* note 14, at 290, 291. But it is not improper to specify the manner of acquiring title by adverse possession. Patchett v. Webber, 198 Calif. 440, 245 Pac. 422 (1926); Duckworth v. Duckworth, 144 N. C. 620, 57 S. E. 396 (1907); Rasmussen v. Winters, 82 Or. 674, 162 Pac. 849 (1917).

<sup>98</sup> Atkinson, *op. cit. supra* note 9, at 173.

<sup>99</sup> Cf. Chafee, *Rights in Overdue Paper* (1918) 31 HARV. L. REV. 1104.

<sup>100</sup> Smith v. Bachus, 195 Ala. 8, 70 So. 261 (1915); Stevens v. Smoker, 84 Conn. 569, 80 Atl. 788 (1911); Osceola Fertilizer Co. v. Beville, 86 Fla. 479, 98 So. 354 (1923); Coward v. Coward, 148 Ill. 268, 35 N. E. 759 (1893); Brown v. Fodder, 81 Ind. 491 (1882) (statute); Wiggins v. Powell, 96 Kan. 478, 152 Pac. 765 (1915); Asher v. Howard, 122 Ky. 175, 91 S. W. 270 (1906); Miller v. Beck, 68 Mich. 76, 35 N. W. 899 (1888); Dean v. Tucker, 58 Miss. 487 (1880) (statute permits no special plea); Hedges v. Pollard, 149 Mo. 216, 50 S. W. 889 (1899); Murray v. Romine, 60 Neb. 94, 82 N. W. 318 (1900); Fleming v. Sexton, 172 N. C. 250, 90 S. E. 247 (1916); Rhodes v. Gunn, 35 Ohio St. 387 (1880); Smith v. Algona Lumber Co., 73 Or. 1, 136 Pac. 7, 143 Pac. 921 (1914); Way v. Hooton, 156 Pa. 8, 26 Atl. 784 (1893); Lloyd v. Rawl, 63 S. C. 219, 41 S. E. 312 (1902); Southern Iron Co. v. Schwoon, 124 Tenn. 176, 135 S. W. 785 (1911); Pillow v. Roberts, 13 How. 472 (U. S. 1851); Hogan v. Kurtz, 94 U. S. 773 (1876); see McArthur v. Clark, 86 Minn. 165, 90 N. W. 369 (1902). For a review of the English cases, the origin of the rule and the reasoning supporting it, see Atkinson *op. cit. supra* note 9, at 171, *et seq.* The foregoing cases have to do with land. The same rule seems

require the defendant to plead the statute specially.<sup>101</sup>

There is still another group of cases in which the courts generally permit the question of limitation of time to be raised under a general denial. This is the class already noticed<sup>102</sup> in which the limitation is fixed by the same statutes which "created" the right, sometimes summarized as ones in which the limitation is said to bar the right as well as the remedy.<sup>103</sup> From the substantive law standpoint or, in other words, considering the operative facts as properly pleaded and shown, there seems to be no difference between the effect of the required lapse of time under the general statute of limitations and the special limitation provision of the statutory actions. In both cases the effect is to prevent the plaintiff's recovery. The principal differences are the procedural ones here in question, *viz.*, as to the assertion of the point by demurrer or by general denial, and the matter of burden of proof.<sup>104</sup> To say that the limitations of the special statutory actions bar the right as well as the remedy is not a reason for the different procedural treatment but an awkward announcement of the position that a difference will be made. As has already been indicated, the writer has searched for a satisfactory reason for this distinction and has failed to find one. Yet for the most part the courts have not required the defense to be specially pleaded in these cases,<sup>105</sup> while they ordinarily require it with respect to the general statute of limitations.

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to apply with reference to chattels. *Traun v. Keiffer*, 31 Ala. 136 (1857); *Anderson v. Dunn*, 19 Ark. 650 (1858); *Smart v. Baugh*, *supra* note 91; *Elam v. Bass*, 4 Munf. 301 (Va. 1814). A different rule is said to be unfair as the plaintiff who claims by adverse possession may plead his title generally. *Asher v. Howard*, *supra*.

<sup>101</sup> *McCreery v. Duane*, 52 Calif. 262 (1877); *Empire Ranch & Cattle Co. v. Howell*, 23 Colo. App. 265, 129 Pac. 245 (1912); *Luen v. Wilson*, 85 Ky. 503, 3 S. W. 911 (1887); *Hanse v. Mead*, 27 Hun, 162 (N. Y. Sup. Ct. 1882); *Northwestern Mortgage Trust Co. v. Schatz*, *supra* note 63; *Burk v. Turner*, 79 Tex. 276, 15 S. W. 256 (1891); *Brown v. Haley*, 56 Wash. 218, 105 Pac. 478 (1909); *Orton v. Noonan*, 25 Wis. 672 (1870); see *McKewen v. Allen*, 80 Ark. 181, 96 S. W. 392 (1906); *State v. Quantic*, 37 Mont. 32, 94 Pac. 491 (1908). Some of these are evidently overruled by later cases. See *supra* notes 95, 100. The statutes *supra* note 61 providing that the statute of limitations can be raised only by answer are largely responsible for these decisions. But these statutes do not seem to compel all courts to require special pleading of the defense of title by adverse possession. See North Carolina, Oregon and South Carolina cases, *supra* note 100.

<sup>102</sup> See *supra* notes 64 to 70.

<sup>103</sup> See *supra* note 65.

<sup>104</sup> As to demurrer, see *supra* notes 69, 70. Of course there is the difference of the presence of exceptions. See *supra* notes 68-70. See also *infra* note 112.

<sup>105</sup> *Louisville Ry. v. Echols*, 203 Ala. 627, 84 So. 827 (1919); *McRae v. New York Ry.*, 199 Mass. 418, 85 N. E. 425 (1908); *Cole v. Coon*, 70 Miss. 634, 12 So. 849 (1893); *Shattuck v. Guardian Trust Co.*, 204 N. Y.



2. *By Confession and Avoidance.* On the whole there is a tendency of recent legislation and case law to prevent the assertion of the defense of limitation of time at the trial under a general denial. There has been no pronounced rush in this direction, nor any sudden abandonment of former practices. But the current tends this way, largely because of our present emphasis upon the notice function of pleading.<sup>106</sup> The English rules of court were among the earliest influences in this regard. Rule 15 of Order XIX provides that matters which are likely to take the opposite party by surprise should be specially pleaded, and this general statement is followed by the enumeration of particular matters which should be alleged. Among these is the defense of the statute of limitations. The English provision is followed substantially in Connecticut,<sup>107</sup> Michigan,<sup>108</sup> New Jersey,<sup>109</sup> and New York.<sup>110</sup> In addition, a number of code jurisdictions have statutes<sup>111</sup> to the effect that the defense must be asserted by answer. Such legislative declarations have not caused the courts to depart entirely and suddenly from the "title by adverse possession" and the "right as well as remedy barred" grooves, in which a denial has traditionally raised the point.<sup>112</sup> Worshippers of the concept of title and of issue pleading will continue to tread the old paths. Those who insist that notice is the primary object of pleading will require special notice of the defense to be given. Decisions continue to follow the course of the old grooves but the foregoing provisions have already made some impression<sup>113</sup> and their future effect may be much greater.

The approved plea of the statute of limitations at common law was that "the cause of action did not accrue within *x* years before the commencement of this suit."<sup>114</sup> There might be said to

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200, 97 N. E. 517 (1912); *King v. Mayor of Butte*, *supra* note 69; *Atlantic Coast Line Ry. v. Burnette*, 239 U. S. 199, 36 Sup. Ct. 75 (1915); see *Tutsch v. Director General of Railroads*, 52 Calif. App. 650, 199 Pac. 861 (1921).

<sup>106</sup> Clark, *History Systems and Functions of Pleading* (1925) 11 VA. L. REV. 517, 544.

<sup>107</sup> Conn. Prac. Book (1922) § 200.

<sup>108</sup> Circuit Court Rule 23, § 2.

<sup>109</sup> Court Rule 40.

<sup>110</sup> C. P. A. § 242.

<sup>111</sup> See *supra* note 61.

<sup>112</sup> See *supra* notes 95-105. These so-called "grooves" are not confined to the field of pleading and procedure but are well established in other fields, e.g., conflict of laws, *Davis v. Mills*, 194 U. S. 451, 24 Sup. Ct. 692 (1904); constitutional law (1926) 35 YALE LAW JOURNAL, 478. There has probably been an interaction and mutual supporting process between the decisions in the different fields. See *Atkinson, op. cit. supra* note 9, at 174, 175.

<sup>113</sup> See *supra* note 101.

<sup>114</sup> CHITTY, PLEADING \*941; *Wallace v. Schaub*, 81 Md. 594, 32 Atl. 324

be three elements in this plea, *viz.*, (1) the date of the accrual of the action; (2) the date of the commencement of the action; (3) the time intervening between (1) and (2). This allegation was deemed to be in the approved form of "ultimate fact," avoiding the taint of being too specific matter of "evidence" on the one hand and too general "conclusion of law" on the other.<sup>115</sup> It had all the currency and orthodoxy, which constant usage and the form books could give. There was no need for the defendant to allege the dates upon which he claimed that the cause of action accrued or the suit was commenced. Such allegations would be bad at common law because they might lead to taking issue upon a particular time which would be immaterial.

Substantially the common law form of plea is approved under the code and other modern practice.<sup>116</sup> The more generic form that "the cause of action is barred by the statute of limitations" has been usually held bad,<sup>117</sup> although it has sometimes been sustained.<sup>118</sup> This manner of pleading is given express statutory sanction in several jurisdictions when coupled with a specification of the section of the statute which fixes the limitation upon which the pleader relies.<sup>119</sup> By reference, this points out the

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(1895); *Atkinson v. Winters*, 47 W. Va. 226, 34 S. E. 834 (1899). See the excellent comment by Professor Millar in (1916) 11 ILL. L. REV. 56. See, however, the doctrine that this form of plea is insufficient unless the declaration or complaint shows that the limitation pleaded is applicable. *Lyon v. Bertram*, 20 How. 149 (U. S. 1857); *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. 107 (1884) and cases *infra* note 131. In equity, any answer which shows an intention to rely on the statute of limitations is sufficient to raise the defense. *Rohrabacher v. Walsh*, 170 Mich. 59, 135 N. W. 907 (1912); *Tazewell v. Whittle*, *supra* note 94; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580 (1900).

<sup>115</sup> See Cook, *Statements of Fact in Pleading Under the Code* (1921) 21 COL. L. REV. 416.

<sup>116</sup> *Sweet v. Barnard*, 66 Colo. 526, 132 Pac. 22 (1919); *Bell v. Yates*, 33 Barb. 627 (N. Y. Sup. Ct. 1861); *Searls v. Knapp*, 5 S. D. 325, 58 N. W. 807 (1894); see *Franklin v. Southern Pacific Co.*, 40 Calif. App. 31, 180 Pac. 76 (1919); *Walker v. Laney*, 27 S. C. 150, 3 S. E. 63 (1887). In particular situations more specific allegations are required. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526 (1893); *Neill v. Burke*, 81 Neb. 125, 115 N. W. 321 (1908); *Lyon v. Bertram and Alexander v. Bryan*, *supra* note 114; New York cases cited *infra* note 131.

<sup>117</sup> *Southern Pac. Co. v. Santa Cruz*, 26 Calif. App. 26, 145 Pac. 736 (1914); *Scroggin v. Nat'l Lumber Co.* 41 Neb. 195, 59 N. W. 548 (1894); *Pope v. Andrews*, 90 N. C. 401 (1884); *Walker v. Laney*, *supra* note 116; *Spanish Fork City v. Hopper*, 7 Utah, 235, 26 Pac. 293 (1891).

<sup>118</sup> *Louis Werner Sawmill Co. v. Dyer*, 132 Ark. 78, 200 S. W. 281 (1917); *Ministerial & School Fund v. Rowell*, 49 Me. 330 (1860). Other jurisdictions hold this form of answer sufficient if the complaint shows that the action was barred. *Lilly v. Farmers Nat'l Bank*, 22 Ky. L. R. 148, 56 S. W. 722 (1900); *Litch v. Bryant*, 46 Colo. 160, 103 Pac. 289 (1909). See also equity cases *supra* note 114.

<sup>119</sup> Calif. Code Civ. Proc. (1915) § 458; Idaho Comp. Stat. (1919) § 6713; Mont. Rev. Codes (Choate, 1921) § 9173; Utah Comp. Laws (1917) § 6602;

period which is claimed to be a bar. The only respect in which it is less specific than the common law is that the word "barred" assumes that the measurement of time is between the date of the accrual of the cause of action and the date of the commencement of suit. This is such an elementary point that the statutory form seems unobjectionable and, to the lawyer at least, gives as much notice as the common law precedent. Too minute statements of fact are not desirable because they tend either to tie the pleader down to inconsequential matters<sup>120</sup> or to mislead the opponent as to what the real issue will be. For this reason, as at common law, the defendant should not be required to allege the particular dates of the accrual of the cause of action and of the commencement of suit.

It is generally held unnecessary for the defendant to point out in his answer the section of the statute of limitations upon which he relies.<sup>121</sup> It seems quite proper to do so and, as already stated, there are sometimes express statutes<sup>122</sup> permitting this form of answer. Such answers seem capable of serving the notice-giving function satisfactorily. While the rule of law relied upon is generally an unpleaded major premise, still the opponent's knowledge of one's legal theory is of substantial aid in avoiding surprises, misconceptions and absence of testimony at the trial. On the other hand, there is some danger in this practice, for the tendency may be to prevent the defendant from having the advantage of any other section than the one he has pleaded. This matter can be treated reasonably. The problem is one which arises very often in pleading, *viz.*, to require allegations sufficiently specific to be useful from the standpoint of notice and at the same time general enough to allow a pleader sufficient leeway to avoid the consequences of slight initial misconceptions of fact or law. If the defendant has pleaded one limitation provision, he should not be precluded from relying upon a shorter limitation which is applicable.<sup>123</sup> Even in the reverse

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Porto Rico Rev. Stat. Codes (Comp. 1911) § 5112. But the statutory method is not exclusive and the matter can evidently be pleaded according to the common law form. *Franklin v. Southern Pac. Co.*, 40 Calif. App. 31, 180 Pac. 76 (1919). But it is not sufficient to merely allege that the action is barred by the statute of limitations. See California and Utah cases, *supra* note 117.

<sup>120</sup> See comment by Professor Clark in (1923) 32 YALE LAW JOURNAL, 483, *passim*.

<sup>121</sup> *Bogardus v. Trinity Church*, 4 Paige, 178, 197 (N. Y. Ch. 1833); *Van Hook v. Whitlock*, 7 Paige, 373 (N. Y. Ch. 1839); *Meade v. Gilfoyle*, 64 Wis. 18, 24 N. W. 413 (1885); *Harpending v. Reformed Church*, 16 Pet. 455 (U. S. 1842); *Waller v. Texas & P. Ry.*, 229 Fed. 87 (C. C. A. 2d, 1915). See also *supra* notes 114, 116 and *Franklin v. Southern Pac. Co.*, *supra* note 119.

<sup>122</sup> *Supra* note 119.

<sup>123</sup> Two problems must be carefully distinguished: (1) is a plea, which

situation, where the limitation insisted upon at the trial is longer than the one pleaded,<sup>124</sup> the test of prejudice to the opponents should be applied before precluding the pleader. Even if the opponent has been misled, an amendment should be permitted with a continuance at the pleader's cost.<sup>125</sup> Fear of the inconvenience and expense of a continuance will ordinarily cause care in pleading a proper statutory provision, while disinclination to postpone a trial already commenced will tend to prevent a feigned claim of surprise.

The plea of the statute of limitations is usually regarded as one of confession and avoidance or of new matter.<sup>126</sup> Thus all

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sets up a longer period of limitation than is applicable, good against demurrer? This is generally answered in the negative. *Smith v. Joyce*, 10 Ark. 460 (1850); *Murphy v. Park Ridge*, 208 Ill. 66, 131 N. E. 256 (1921); *Axton v. Carter*, 141 Ind. 672, 39 N. E. 546 (1895); *Boyd v. Barrenger*, 23 Miss. 269 (1852); *Riggs v. Quick*, 16 N. J. L. 160 (1837); *Blackmore v. Tidderly*, 2 Salk. 423 (K. B. 1704). Indications to the contrary can be found, however. *Boyd v. Blankman*, 29 Calif. 19 (1865); *McCray v. Humes*, 116 Ind. 103, 18 N. E. 500 (1888); *Sergeant v. Johnson*, *McCord*, 336 (S. C. 1821); *Macfadzen v. Olivant*, 6 East, 387 (K. B. 1805); *McCormick v. Higgins*, 190 Ill. App. 241 (1914). (2) If no demurrer is filed, should a plea of a longer limitation than is applicable permit proof of a shorter one? Most courts answer this in the affirmative. *Boyd v. Blankman*, *supra*; *McCormick v. Higgins*, *supra*; *Van Hook v. Whitlock*, *supra* note 121; *Reilly v. Sabater*, 26 Civ. Proc. R. 34, 43 N. Y. Supp. 383 (1896); *Camp v. Smith*, 136 N. Y. 187, 32 N. E. 640 (1892); *Schneider v. Schneider*, 118 S. W. 789 (Tex. Civ. App. 1909); *Martin v. Burr*, 111 Tex. 57, 228 S. W. 543 (1921); *Davidson v. Wright*, 233 S. W. 108, 236 S. W. 776 (Tex. Civ. App. 1921); *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263 (1884); *Roberts v. Decker*, 120 Wis. 102, 97 N. W. 519 (1903); *Phelps v. Elliott*, 35 Fed. 455 (C. C. N. Y. 1888); *Ramsden v. Gately*, 142 Fed. 912 (C. C. N. Y. 1906). But see *Blakely v. Ft. Lyon Canal Co.*, 31 Colo. 224, 73 Pac. 249 (1903). When a defendant gives notice that he will show that the action was not commenced within ten years, there is ordinarily no surprise in the showing that the action was not commenced within six years. But it is conceivable that an opponent may be misled as to the legal theory and on that account entitled to a continuance.

<sup>124</sup> Here the courts quite uniformly hold that the defendant does not raise the longer limitation by pleading the shorter one. *Downey v. Atchison, T. & S. F. R. R.*, 60 Kan. 499, 57 Pac. 101 (1899); *Grigsby v. Morris*, 89 Kan. 758, 132 Pac. 1001 (1913); *Bridgforth v. Payne*, 62 Miss. 777 (1885); *Hunter v. Hunter*, 50 Mo. 445 (1872); *Bruce v. Baxter*, 75 Tenn. 477 (1881); *Puckle v. Moor*, 1 Vent. 191 (K. B. 1684). Of course, in such case, a demurrer would be properly sustained to the plea or answer. *Cornwell v. Broom*, 34 Ill. App. 391 (1889); *Ashbey v. Ashbey*, 38 La. Ann. 902 (1886); *Conowingo Land Co. v. McGaw*, 124 Md. 643, 93 Atl. 222 (1915); see *Burstein v. Levy*, 49 Misc. 469, 98 N. Y. Supp. 853 (Sup. Ct. 1906).

<sup>125</sup> See *Bruce v. Baxter*, *supra* note 124. See Pound, *The Canons of Procedural Reform* (1926) 12 A. B. A. J. 541, 544.

<sup>126</sup> *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783 (1895); *Central Trust Co. v. Chicago, R. I. & P. Ry.*, *supra* note 27; *Emmons v. Hay-*

the plaintiff's allegations are admitted except those which are immaterial, such as specification of dates, and the additional "fact" of failure to commence suit within  $x$  years is set up in avoidance. That allegations of time are sometimes regarded as "material" does not seem to have given particular difficulty in the theory of the nature of the answer. The distinction between a traverse or a denial on the one hand and confession and avoidance or new matter on the other seems, at times at least, more largely a matter of rhetoric than a difference in kind and substance.<sup>127</sup> If the plaintiff pleads expressly that his action was commenced within the period allowed, as he sometimes does in the statutory actions, and this allegation is specifically denied, the issue seems as aptly raised as if the answer were by way of new matter in the approved form. Although issue should not be taken upon a particular date which might be utterly immaterial,<sup>128</sup> a specific denial of a plaintiff's allegation of timely suit may be quite as satisfactory from both issue-raising and notice-giving standpoints as allegations by way of new matter.<sup>129</sup> Of course the denial form may encounter additional difficulty if the plaintiff wishes to reply avoiding the effect of the limitation by showing himself to be within some exception.<sup>130</sup> For this reason,

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ward, 11 Cush. 48 (Mass. 1853); *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500 (1890); *Walker v. Laney*, *supra* note 116; SHIPMAN, COMMON LAW PLEADING (Ballantine's ed. 1923) 348, 350. But see *Krause v. Hardin*, 222 S. W. 310 (Tex. Civ. App. 1920); *Webber v. Ingersoll*, 74 Neb. 393, 104 N. W. 600 (1905). Under the codes it is sometimes spoken of as an answer by way of new matter. BRYANT, *op. cit. supra* note 57, at 247; *Bell v. Yates*, *supra* note 116; *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339 (2d Dept. 1909).

<sup>127</sup> *Atkinson*, *op. cit. supra* note 9, at 169-171.

<sup>128</sup> One is seldom required to prove a date exactly as alleged. (1926) 35 YALE LAW JOURNAL, 487.

<sup>129</sup> Would not a specific denial of the plaintiff's allegation that the action had been commenced within the time allowed by law be as satisfactory as an answer which claimed the benefit of half a dozen different limitation provisions? Of course it would seldom be possible to permit a denial to raise the point as there is not ordinarily any allegation of timely suit in the declaration or complaint. See *Central Trust Co. v. Chicago, R. I. & P. Ry.*, *supra* note 27; *Herold v. Fisk*, 16 Ky. L. R. 63 (Super. Ct. 1894).

<sup>130</sup> *Viz.*, because of the technical rule that the parties are at issue upon a denial, there being no opportunity for further pleading thereafter. Ordinarily at common law a plaintiff would bring himself within exceptions in his replication, this being by way of confession and avoidance. Failure to allege an exception in the reply has been held to prevent the plaintiff from urging the exception. *Reed v. Barnes*, 113 Neb. 414, 203 N. W. 567 (1925); *Smith v. Cox's Committee*, 156 Ky. 118, 160 S. W. 786 (1913); *Amsler v. Cavitt*, 271 S. W. 139 (Tex. Civ. App. 1925). The plaintiff may (and indeed should in jurisdictions permitting the statute of limitations to be raised by demurrer) anticipate the defense by alleging his case to be within some exception. In such case it should not be necessary for the plaintiff to file a reply. *Larsen v. Duke*, *supra* note 4.

the answer might be subject to a motion or even a demurrer but if allowed to stand should certainly permit the defendant to insist upon the point at the trial. The defendant has clearly given sufficient notice of his intention to rely upon the time limitation.

When the dates alleged in the declaration or complaint show a timely action, there has been some difficulty as to how the defense should be pleaded. In this situation, some cases hold that the defendant cannot plead the statute of limitations without denying the dates set up in the complaint.<sup>131</sup> These decisions seem to go upon the ground that the orthodox form of the plea of the statute of limitations, being one of confession and avoidance, admitted every part of the plaintiff's declaration or complaint including the dates of accrual of the cause of action. The strict common law view would consider the time allegations to be "immaterial" and hence not confessed. This quibble results from an attempt to force the plea or answer to fit the mechanics of confession and avoidance since it could not be considered to be a traverse or denial. The venerable master, Logic, must be kept alive — by artificial respiration, if necessary. The orthodox form of the plea of the statute of limitations seems as sensible here as elsewhere and entirely sufficient from the notice-giving standpoint. An early New Jersey case<sup>132</sup> permitted a plaintiff who had declared upon a slander uttered one year previous to prove an act of defamation fifteen years before and denied the defendant the benefit of the statute of limitations because it had not been pleaded. Is the only safe practice to plead the statute in every case? The solution of such a situation would seem to be to permit the defendant, who has been misled by the dates in the declaration, to set up the defense by amendment at the trial.<sup>133</sup> It is quite unnecessary to prevent the plaintiff from proving a barred action after he has alleged dates showing that it is not barred, and defendant has not pleaded the statute.<sup>134</sup> Possibly the latter may wish to waive the benefit of the statute of limitations and he should not be prevented from so doing.

It has been held that when the bar of the statute of limitations

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<sup>131</sup> *Gray Lithograph Co. v. American Watchman's Time Detector Co.*, 44 Misc. 206, 88 N. Y. Supp. 857 (Sup. Ct. 1904); *Devoe v. Lutz*, *supra* note 126; *Union Ferry Co. v. Fairchild*, 106 Misc. 324, 176 N. Y. Supp. 251 (Sup. Ct. 1919); see *Lyon v. Bertram*, *supra* note 114; *Alexander v. Bryan*, *supra* note 114. *Contra*: *Elk Garden Big Vein Coal Co. v. Gerstell*, 95 W. Va. 471, 121 S. E. 569 (1924); see, generally, *supra* notes 114, 116. All this difficulty comes about from an attempt to force the plea or answer to fit the mechanics of confession and avoidance. The common law view seems more sensible in result and entirely sufficient from the notice standpoint.

<sup>132</sup> *Brand v. Longstreet*, *supra* note 17.

<sup>133</sup> *Brickett v. Davis*, *supra* note 94.

<sup>134</sup> But see *Hill v. New Haven*, *supra* note 17.

appears on the face of the complaint, it should be raised by demurrer or is deemed waived and cannot be asserted by answer.<sup>135</sup> But in states which permit the demurrer to raise the point, an answer will usually be a sufficient means of making the objection, although the complaint is demurrable on that account.<sup>136</sup> It might be plausible to hold that the defense should be disfavored to the extent that it must be asserted at the earliest opportunity or is deemed waived. At common law, certain defenses — pleas to the jurisdiction and in abatement — were disapproved to the extent that they must be pleaded before matters in bar.<sup>137</sup> However, the plea of limitations was considered to be in bar and in this respect was in as good favor as any defense which went to the merits. Under the present New York procedure, the defendant may raise the defense by answer, though he could have asserted it upon preliminary motion.<sup>138</sup> As a whole, we seem to be unwilling to require that the defendant assert the defense at the first possible point and in the most expeditious manner; we deem it sufficient if the defenses be raised in any approved manner at the pleading stage.

While the courts often declare<sup>139</sup> that they do not disfavor the defense of the statute of limitations, they clearly do so to some extent. This is probably due in some measure to the prejudice against those who tacitly admit a once existing duty and defend on the ground that the duty has been extinguished by lapse of time. This feeling cannot be overridden entirely by the felt and declared necessity of quieting stale claims. While the courts are bound by legislative provisions and have even imposed time limitation devices of their own manufacture,<sup>140</sup> they have the opportunity to give vent to their prejudice in decisions on procedural and other matters. Prejudice may well account for the prevailing view upon the matter of burden of proof<sup>141</sup> and for certain holdings<sup>142</sup> of procedural character. It is extremely dif-

<sup>135</sup> *Spaur v. McBee*, 19 Or. 76, 23 Pac. 818 (1890); see *Ausplund v. Ætna Indemnity Co.*, 47 Or. 10, 81 Pac. 577 (1905).

<sup>136</sup> *Highstone v. Franks*, *supra* note 79; *California Safe Deposit Co. v. Sierra Valleys Ry.*, *supra* note 57; see *Yost v. Irwin*, *supra* note 57.

<sup>137</sup> STEPHEN, *op. cit. supra* note 14, at 373.

<sup>138</sup> See cases cited *supra* at the end of note 82.

<sup>139</sup> *E.g.*, *Cullen v. Western Mortgage & Title Co.*, 47 Mont. 513, 134 Pac. 302 (1913); *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381 (1902); *Whereatt v. Worth*, 108 Wis. 291, 84 N. W. 441 (1900).

<sup>140</sup> The doctrine of laches, the presumption of payment, the presumption of grant, and the ancient limitations in the real actions and possessory assizes are examples of this.

<sup>141</sup> See *supra* notes 9, 10.

<sup>142</sup> There are several ways by which the courts might indicate their feeling of disapprobation of the defense of limitations in their procedural decisions.

(1) By insisting upon a particular time and device by which the mat-

ficult if not impossible to present specific data as to the extent which this feeling has played in the decisions, but it is possible and indeed probable that the influence has been considerable.

In addition to this factor, there are certain traits of the defense of the statute of limitations which may account for its apparent disfavor. While it would be possible to take the position that the bar is of such vital interest to society that the court will apply it of its own motion, this view has not prevailed.<sup>143</sup> A defendant may believe that his case is not harmed by passage of time and rely on some other defense, waiving the matter of time limitation. Once this position of non-assertion of the statute has been taken, there is much reason in refusing the defendant the advantage of the defense after he has consumed the time of the opponent and the court by the litigation of other matters.<sup>144</sup> Moreover, the defense is one which almost always<sup>145</sup> acts as an absolute bar to any recovery and not merely in mitigation of damages.

In addition, a defendant seldom fails to plead the statute of limitations because of ignorance or mistake concerning the facts in the case—usually, it is an avoidable oversight on his part. For these reasons it seems undesirable to permit the defense to be raised by amendment at a late stage.<sup>146</sup> The courts have been somewhat more strict with reference to amendments setting up the statute of limitations than in case of most other

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ter might be raised. See text *supra* at notes 135–138. (2) By requiring a particular form of words by which the matter might be raised. See *supra* notes 114–119. This method of disfavoring the defenses is purely formal and should not appeal to us today. (3) By holdings in which the defense when not pleaded is not considered for the purpose of granting motions for nonsuit, directed verdict, demurrer to evidence and in instructing the jury. See *infra* notes 155–158. (4) By the policy toward amendments. See *infra* notes 147–154; also *Wise v. Outtrim*, 139 Iowa, 192, 117 N. W. 264 (1908); *Dudley v. Stiles*, 32 Wis. 371 (1873).

<sup>143</sup> See particularly *Murphy v. Murphy*, *supra* note 11. There are matters such as the defense of illegality of contract which the court will notice, though not pleaded. *Keown v. Verlin*, 253 Mass. 374, 149 N. E. 115 (1925); *Oscanyan v. Arms Co.*, 103 U. S. 261 (1880).

<sup>144</sup> See *Forrest v. Philadelphia Rapid Transit Co.*, 261 Pa. 383, 389, 104 Atl. 663, 664 (1918) for similar reasoning with regard to laches in the prosecution of an action.

<sup>145</sup> See *Thompson v. Halbert* and *Slocum v. Riley*, *supra* note 94 for cases where the statute was involved in such a way as to mitigate damages only. Such situations are not common.

<sup>146</sup> Sometimes the courts have tried to balance the unfairness to the plaintiff by imposing costs in permitting the amendment. *Stokes v. Murray*, 99 S. C. 221, 83 S. E. 33 (1914); *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317 (1886); see *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263 (1884). But this gives only the slight pittance of taxable costs, which are entirely inadequate to compensate the opponent. The matter could be determined satisfactorily by the imposition of costs under the English practice where substantial and even actual costs are readily granted.



defenses.<sup>147</sup> While they have been fairly liberal if the amendment is prayed for considerably before trial,<sup>148</sup> there is a different attitude shortly before,<sup>149</sup> at or after<sup>150</sup> trial. Of course if the defendant has been misled by the plaintiff's allegation of dates,<sup>151</sup> or if both parties have tried the case as if the statute were pleaded,<sup>152</sup> or if the statute is defectively set forth,<sup>153</sup> and possibly under other circumstances,<sup>154</sup> the amendment should be allowed even at a late stage.

The defense of the statute of limitations is somewhat peculiar in that the factual data necessary for its determination are almost inevitably injected into the case, although the statute is not pleaded or consciously raised at the trial. The dates of the transactions are almost certain to be specified by the witnesses and the date of commencement of the action regularly appears in the court records. No further facts are ordinarily necessary to decide the matter—provided of course it is open without being asserted in the pleadings. With regard to most other matters of defense such as payment, self-defense, failure of consideration, etc., the data do not so inevitably and unconsciously creep into the case. Objections to the proof of these matters on the ground of failure to plead them can be easily made and sus-

<sup>147</sup> See *Cullen v. Western Mortgage & Title Co.*, *Supra* note 139; also *supra* note 146, and *infra* notes 148–150.

<sup>148</sup> See *People v. Honey Lake Valley Irrigation District*, 246 Pac. 819 (Calif. App. 1926); *Roche v. Spokane County*, 22 Wash. 121, 60 Pac. 59 (1900); *Hardin v. Greene*, 164 N. C. 99, 80 S. E. 413 (1913). See also *Maddocks v. Holmes*, 1 Bos. & Pul. 228 (C. P. 1798).

<sup>149</sup> Generally, the trial court's discretion in refusing the amendment at this stage is sustained. *Rudd v. Byrnes*, 156 Calif. 636, 105 Pac. 957 (1909); *Shank v. Woodworth*, 111 Mich. 642, 70 N. W. 140 (1897); *St. Paul v. Bielenberg*, 164 Minn. 72, 204 N. W. 544 (1925); *Cullen v. Western Mort. & Title Co.*, *supra* note 139; *DeHihns v. Free*, 70 S. C. 344, 49 S. E. 841 (1904). See *Whereatt v. Worth*, *supra* note 139.

<sup>150</sup> *San Joaquin Valley Bank v. Dodge*, 125 Calif. 77, 57 Pac. 687 (1899); *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265 (1897); *McNider v. Serrine*, 84 Iowa, 58, 50 N. W. 200 (1891); *Dreger v. Tarrant*, 165 Wis. 414, 162 N. W. 481 (1917); see *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553 (1903). But see *Orton v. Noonan*, *supra* note 101, indicating that it was better to allow an amendment at any stage than to permit the plaintiff to perfect his tax title. See also *Trower v. San Francisco*, 157 Calif. 762, 109 Pac. 617 (1910) (amendment allowed).

<sup>151</sup> See text *supra* at notes 133–134; *Gottschall v. Melsing and Tazewell v. Whittle*, *supra* note 94.

<sup>152</sup> *Cunliff v. Delaware & H. Canal Co.*, 42 Hun, 654 (N. Y. Sup. Ct. 1886).

<sup>153</sup> *St. Paul Title & Trust Co. v. Stensgaard*, 162 Calif. 178, 121 Pac. 731 (1912); *Buffalo v. Erie County*, 88 Misc. 591, 151 N. Y. Supp. 409 (Sup. Ct. 1915); *aff'd* 171 App. Div. 973, 156 N. Y. Supp. 73 (4th Dept. 1915), 220 N. Y. 620, 115 N. E. 1036 (1917).

<sup>154</sup> *People v. Raquette Falls Land Co.*, 93 Misc. 582, 158 N. Y. Supp. 467 (Sup. Ct. 1916); *Jones v. Burkitt*, 150 S. W. 275 (Tex. Civ. App. 1912); *Morton v. Bartning*, 68 Calif. 306, 9 Pac. 146 (1885).

tained. But even if the plaintiff, because of the defendant's omission to plead the statute of limitations, objected to the proof of a date which tended to show the action was barred, the dates would be admissible for the purposes of identification of the transactions and convenience in the narration of the events. Usually the plaintiff would not think of objecting to proof of the dates, which would likely appear from the testimony of his own witnesses. In other words, the data concerning the defense of the statute of limitations is generally in the case whether the matter is being litigated or not. This is less apt to occur with reference to most other defenses. With them there is probably a tendency to hold that the matters can be considered for the purposes of demurrer to the evidence and motions for nonsuit or directed verdict<sup>155</sup> and of instructions to the jury,<sup>156</sup> even if not pleaded. But seldom<sup>157</sup> would a court consider the incidental evidence as to date as grounds for granting motions at the trial or giving instructions with reference to the statute of limitations when the matter has not been pleaded.

While the data concerning the defense of the statute of limitations are almost always present at the close of the trial, as a matter of legal theory the defense stands isolated from most other matters commonly litigated. Many defenses are closely related to elements of the plaintiff's affirmative case or to other defenses which may have been properly pleaded, *c. g.*, contributory negligence to the defendant's negligence and proximate cause, self-defense to the defendant's acts and various privileges of either party and even payment to a present indebtedness of the defendant. With respect to these and similar matters there is much chance that the parties will completely litigate an aspect of the case which is not raised directly by the pleadings. While it is possible that they may do so in the case of the defense of time limitations, still the break is sharper and hence less apt to

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<sup>155</sup> Keown v. Verlin, *supra* note 143; Mellon v. Great Northern Ry., 116 Minn. 449, 134 N. W. 116 (1912); Boesel v. Wells Fargo & Co., 260 Mo. 463, 169 S. W. 110 (1914); Jones v. Sunshine Grocery & Market, 236 S. W. 614 (Tex. Civ. App. 1922); Smith v. Ogden & N. W. R., 33 Utah, 129, 93 Pac. 185 (1907).

<sup>156</sup> Central R. R. v. Attaway, 90 Ga. 656, 16 S. E. 956 (1893); Hanson v. Kline, 136 Iowa, 101, 113 N. W. 504 (1907); Johnson v. Caughren, 55 Wash. 125, 104 Pac. 170 (1909); Brusie v. Peck Bros. & Co., 135 N. Y. 622, 32 N. E. 76 (1892); see Kronenberg v. Whale, 153 N. E. 302, 307 (Ohio App. 1926).

<sup>157</sup> On the theory that the court could have permitted the point to have been asserted by amendment during the trial, it has been held that a demurrer to the evidence is properly sustained on the ground that the statute of limitations had run. Atwood Mercantile Co. v. Rooney, *supra* note 94; see *In re Glover-McConnell* (D. C. Ga. 1925) 9 Fed. (2d) 683, 685. It is very questionable whether a court should grant an amendment at this stage. Hence the argument seems specious. See *supra* note 150.

occur. Unless there is a conscious entrance into the subject, it would seem unfair to the plaintiff to permit the defendant to take advantage of the statute of limitations. Otherwise a plaintiff will not be given a fair chance to insist upon accurate determination of dates or to show the existence of some possible exception which would prevent the statute of limitations from running. There seem to be adequate reasons aside from a mere prejudice against the subject matter of the defense of the statute of limitations why the courts should require that the matter be raised in the pleading stage. In fact the only question in the writer's mind is whether we should not go further and insist that in the absence of special circumstances the defense should be raised in the earliest possible stage and in the most expeditious manner. This of course would result in holding that, whenever possible, the defendant should raise the point by demurrer or by motion and be deemed to have waived the objection if he does not.

#### CONCLUSION

The following is a brief summary of the writer's position. It is by no means the position taken in the majority of jurisdictions.

1. The New York method of asserting the bar of the statute of limitations by motion at a preliminary stage of the action is the most efficient method yet to appear.

2. As a first alternative to the above the demurrer, preferably the special demurrer, should be permitted to raise the point in all possible cases. To this end the plaintiff should be obliged to bring himself within any exception upon which he relies, either in the original or amended complaint.

3. In the cases in which the foregoing devices cannot be used and generally in the jurisdictions which refuse to use them, the bar of the statute should be raised specially in the plea or answer.

4. A defendant should not be permitted to raise the defense of limitation of time under the general issue or general denial. This would seem desirable even in those cases in which he relies upon title by adverse possession or a special limitation of a statutory action. All time limitations should have as far as possible the same procedural treatment.

5. It seems sound to consider that the defense is waived unless presented by one of the first three above alternative means. Amendments asserting the defense at a late stage of the proceeding should be allowed only under special circumstances.