CHAPTER 53

Statutes of Limitation: Comparative Conflicts Law

I. THE CONFLICTS THEORIES

I. Procedural Theory

(a) Anglo-American principle. The English courts have laid down the principle generally followed in all common law jurisdictions as well as in Scotland.\(^1\) An English court applies exclusively the English statutes of limitation. An action barred by these is not allowed, even though the claim is governed by foreign law under which no bar is incurred;\(^2\) correspondingly, a claim barred only under the governing foreign law is admissible;\(^3\) this even when the claim has been dismissed abroad on the ground of limitation of action there.\(^4\) The abundant American authority has unhesitatingly followed this model.\(^5\)

(b) Former Continental following. The territorial conception, which the English approach suggests, once induced numerous scholars and courts in France, Germany, and else-

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\(^1\) Dicey, Rule 203 (3) and p. 856; Goodrich 201 § 82.


Scotland: Don v. Lippmann (1837) 5 Cl. & F. 1.


\(^3\) Huber v. Steiner (1835) 2 Bing. N. C. 202.

Scotland: Fergusson v. Fyffe (1846) 8 Cl. & F. 121.


\(^4\) Harris v. Quine (1869) L. R. 4 Q. B. 652.

\(^5\) Wharton 1245 § 535 n. 4; Minor § 210; 3 Beale 1620 § 603.1. On the early cases, see Ailes, "Limitation of Actions and the Conflict of Laws," 31 Mich. L. Rev. (1933) 474 at 488; Restatement §§ 603, 604.
where, to profess a procedural doctrine. Their influence has practically disappeared.

(c) **Present following.** It is difficult to ascertain in what countries the old theory, expressed in decisions and by writers, has been maintained to the present time. This has been reported for the Czechoslovakian in contrast to the Austrian construction of their identical codes, and is probably the practically prevailing attitude in the Soviet Union. It has also been contended for Hungary and the Islamic states.

2. The Situs Theory

It has been taken for granted since Story's writings that the Anglo-American conflicts theory in this matter continues the doctrine of the Dutch statutists. This is not entirely exact. And the true story seems to explain the strange attitude preserved by the French courts. Paul Voet, discussing the standing question involving the case where the statutes of limitation at the domicils of the debtor and the creditor state different periods of time, gave this opinion:

"Respondeo, quia actor sequitur forum rei, ideo extraneus petens a reo, quod sibi debetur, sequetur terminum statuti praescriptum actioni in foro rei. Et quia hoc statutum non

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6 See the list of writers and decisions in Michel 111 ff.; Weiss, 4 Traité 399 n. 1; Michel, 10 Répert. 296 Nos. 33, 34. The most influential of these writers was Labbé, Note, S. 1869-1.49.

7 **Infra** n. 30. The German courts, applying German common law, defied the procedural theory of the Prussian Supreme Court, Förster-Eccius, 1 Preussisches Privatrecht 67.

8 Laufke, 7 Répert. 208 No. 176.

9 Makarov, Précis 262 f.; and more simply, for interterritorial law, in 7 Z.ausl.PR. (1933) 165.

10 Kurie P. IV 4641/1933, 11 Z.ausl.PR. (1937) 173 No. 4, in a special case; and generally as reported in OLG. München (Feb. 2, 1938) H. R. R. 1938, 1402. However, Szászy, Droit international privé comparé (1940) 553 mentions Hungary among countries following the law of the contract.

11 2 Arminjon 350.
exserit vires extra territorium statuentis, ideo, etiam reo alibi convento, tale statutum objicere non poterit." 12

The first sentence says that the court at the debtor's domicil applies its own statute of limitation because it is the law of the place where the debtor must be sued. This is confirmed by Jan Voet:

"... spectandum videtur tempus, quod obtinet ex statuto loci, in quo reus commoratur," 13

and explained by the latter through reference to his distinction between movable and immovable property. 14 A personal action is a movable, hence deemed situated at the domicil of the creditor. However, for the purposes of bankruptcy proceedings and limitation of action, the contrary position is preferable because the judge of the place where the creditor must sue the debtor, has the power to prevent the creditor from exacting the debt:

"Nam et debitum necdum exactum magis esse in potestate judicis, ubi debitor, quam ubi creditor domicilium fovet vel ex eo manifestum est, quod creditor forum competens et judicem debitoris sequi debeat."

This discussion, couched in traditional terms of a standard problem, is not yet based on the procedural construction of limitation, but clearly on the doctrine placing immovables under the *lex rei sitae*, movable chattels under the *lex domicilii* of the owner, and disputing whether personal actions belong to the latter group. In his second sentence, Paul Voet started to consider a case outside of the alternative of the creditor's and the debtor's domicils, where the debtor is sued at a place other than his domicil, but he contented him-

12 Paul Voet, De statutis, s. 10, cap. un., § 1, citing only Gabriel, Commun. conclus., lib. 6, conclus. 11.
14 Id., lib. 1, tit. 8, § 30.
self with the statement that the statute of the debtor has no application.\textsuperscript{15}

In the Netherlands, it was only Huber who on the strength of two Frisian decisions and contrasting the forum with the \textit{lex loci contractus} rather than with the domicil of the creditor, acceded to the theory that "\textit{praescriptio}" like "\textit{executio}" does not belong to the "validity" of the contract but to the time and mode of bringing an action.\textsuperscript{18}

In France, Boullenois, the chief authority relied upon by Story, argued on the lines of the situs theory, leaving it doubtful whether he recommended the \textit{lex fori} or rather the law of the domicil of the debtor.\textsuperscript{17} With him, the two doctrinal currents, of situs and procedure, united in a mixed flow of ambiguous reasoning\textsuperscript{18} which persisted in some French writings throughout the nineteenth century and has prevailed in the French courts up to the present. Quite clearly, Pothier at one place follows the situs theory;\textsuperscript{19} it should not be controversial\textsuperscript{20} that \textit{this} passage means to apply the law of the creditor's domicil.

In this literature, the principle that the debtor's ordinary forum is at his domicil has been kept in mind.\textsuperscript{21} As in the doctrine of assignment,\textsuperscript{22} however, the emphasis has shifted to the protection of the debtor; the defense of limitation is granted in his interest, and therefore is to be based on the law of his domicil.\textsuperscript{23} Some French courts\textsuperscript{24} and consis-
tently the Court of Cassation, repeating the same words, have sanctioned this view. When the question arose what time should be taken to ascertain the law, the debtor's domicil at the commencement of the suit, rather than that at the time of contracting, was held decisive. No doubt, this doctrine approaches closely the application of the law of the forum. Criticism, therefore, points out the same defects as are charged to the lex fori theory: the rule interferes with the natural scope of the law governing the obligation and allows the debtor arbitrarily to choose the applicable law. Also, the effect of prescription is to liberate the debtor but not to protect him.

At present, no theoretical follower of this rule seems to exist. The classification of limitation of action, in the meaning of the French courts themselves, is very probably that it is a substantive institution and a protection of the debtor rather than an application of lex fori.

3. Substantive Theory

For decades the overwhelming authority of the European Continent and Latin America has considered limitation of action as a part of substantive law with extraterritorial applicability. Agreement is practically complete that the law of the contract governs.
(a) Antiquated theories. In the long history of this subject, various suggestions have been advanced in favor of some special laws. The sheer variety of all these theories aroused a false sense of superiority in some advocates of the *lex fori*, but they now belong to the past. As there have been frequent critical reviews of these opinions, a few words will suffice.

L. J. (1919) 493, 496 n. 21; Ailes, *supra* n. 5, 478. See in addition the citations for:

- Canada, Quebec: Wilson v. Demers (Montreal 1868) 12 L. C. J. 222; see, however, on the provisions of Quebec C. C., "a complex hybrid," 3 Johnson 596 n. 1.
- Austria: Walker 325; OGH. (Dec. 29, 1930) Sz. XII No. 315.
- Belgium: Inconsistent, see Michel 10, some courts following, with the French courts, the law of the debtor's domicil.
- Denmark: Borum and Meyer, 6 Répert. 225 No. 84, citing a Supreme Court decision (June 19, 1925).
- France: Cass. civ. (July 1, 1936) Clunet 1937, 302, Revue Crit. 1937, 175; Niboyet 824 § 706, Revue Crit. 1934, 915; Batiffol § 585 and Traité 543 § 541; the Notes (by Prudhomme?) in Clunet 1937, 302; 1938, 278 and 279; Lerebours-Pignonnière (ed. 4) § 358.
- Germany: Cases from 14 Rohge. 258 to (July 6, 1934) 145 RGZ. 121, Clunet 1935, 1190; (March 20, 1936) 151 RGZ. 201; I RGR. Kom., Vorbem. before § 194; Riezler in I Staudinger n. 9 before § 194; Lewald §§ 96-100; Raape, 2 D. IPR. 273.
- Greece: Aeropag (1931) No. 21, 42 Themis 194; (1934) No. 303, 45 Themis 794; 2 Street-Vallindas 131 n. II.
- Norway: Christiansen, 6 Répert. 580 No. 159; S. Ct. (June 12, 1928) Nrt. 1928, 646, 7 Zaasl.PR. (1933) 946.
- Sweden: S. Ct. (Jan. 29, 1929) Nytt Jur. Ark. 1929, 1; 1930, 692 No. 198; see Bagge in Festskrift tillägnad Erik Marks von Württemberg (1931) 19 (cf. 5 Zaasl.PR. (1931) 740, 7 id. (1933) 933 No. 2).
- Switzerland: (Nov. 13, 1886) 12 BGE. 682; (Jan. 19, 1912) 38 id. II 360; (Sept. 26, 1933) 59 BGE. II 355, 8 Zaasl.PR. (1934) 825; (Dec. 5, 1940) 66 id. II 234; (Dec. 3, 1946) 72 BGE. II 405, 414.
- Treaty of Montevideo on Int. Civ. Law (1889 and 1940) art. 51.
- Código Bustamante, arts. 229, 295.
- Brazil: Pontes de Miranda, Recueil 1932 I 625.
- Notably, Wilhelm Müller, Die Klageverjährung im internationalen Privatrecht (Diss. Erlangen 1898); Diéna, 1 Dir. Com. Int. 439 ff. (merely...
Law of the debtor's domicil. In addition to the above-mentioned French views regarding the significance of the debtor's domicil, it is worth remembering that during a certain period the Scotch courts "looked not to the debtor's domicil at the time of the action but rather to his domicil during the whole currency of the term of limitation."\textsuperscript{32} Scandinavian courts, of course, include limitation of action in the law of the debtor's domicil\textsuperscript{33} because they consider this the law of the contract.\textsuperscript{34}

The nationality of the debtor was taken as a test by the special provision of the Peace Treaty of Versailles which puzzled us in the 1920's.\textsuperscript{35} The treaty excluded from government guaranty in clearing proceedings the debts "barred by the laws of prescription in force in the country of the debtor." Evidently it was felt necessary to establish a conflicts rule otherwise lacking in the international forum. Significance of the debtor state's law for the liability of the same state may have seemed natural.

Lex loci solutionis. The literature has amply dealt with the idea of Troplong that loss of action by limitation is a punishment to the negligent creditor and therefore depends on the law governing performance\textsuperscript{36} and other propositions to the same effect, that limitation rests upon the presumption that the payment has in fact been made at the place where it was due.\textsuperscript{37}
Such a presumption of a payment is at present a visible element only in certain short limitations, the model of which are the provisions of the French Civil Code (articles 2271 ff.) that teachers, innkeepers, physicians, attorneys, shopkeepers, etc. must sue for their fees within six months to two years; the law assumes that in such cases payment is often made without receipt. 38 Not even these special provisions suggest a reason why the place of payment should control the termination of the debt. They raise another problem, though. The defense of limitation may be countered by the plaintiff's tendering an oath "on the question whether the thing has been really paid" (article 2275). This procedural act cannot be produced in a court unfamiliar with the ancient deferment of oath, 39 while its formalized effect cannot be entirely reached by ordinary means of evidence. Should, therefore, the forum substitute its domestic statute, which usually also prescribes short periods in similar cases? 40

It would seem that rules of the forum on evidence for the rebuttal of a presumption de facto come nearer to the applicable provision than a domestic statute of limitation. Transition from the legal effects of the ancient procedure by party oath to modern rules of evidence is a well-known historical development analogous to the suggested substitution.

Lex loci contractus. Writers believing that the law of the place of contracting governs contracts either by natural law or by the presumable intention of the parties have advocated this device especially for limitation of actions. 41

(b) Lex contractus. By overwhelming consent in most civil law countries, the law governing the contract as such controls limitation of action. However, doubts have been raised respecting the role of party autonomy.

38 See RADOUANT in Planiol et Ripert, 7 Traité Pratique 726 § 1394.
39 Contra: 1 FRANKENSTEIN 369 who would have the court use the foreign procedure.
40 Thus, NEUNER, Der Sinn 124 f.
41 See the citations in DE NOVA § 23.
Choice of law by the parties. Two questions must be distinguished:

If the parties agree on an applicable law for the contract, does it include limitation of action? This has been wrongly denied by some writers, even supporters of party autonomy in general, because of the allegedly imperative effect of the statutory period of time. Hence, the predestined law, preferably *lex loci contractus*, re-enters the picture. But imperative municipal law is far from being identical with stringent public policy.

Illustration. Willy and Roger de Perrot concluded in Neuchâtel a contract with the company, Suchard S. A., giving them the exclusive right to manufacture and sell the Suchard products (chocolate, cocoa, and sweets) in the United States and Canada. The contract provided for the application of the usages and laws of the United States. The Swiss Federal Tribunal, therefore, in a suit for breach of contract, applied American law, identified with the law of Pennsylvania, to the question of limitation of action, although the contract was made in Switzerland, the defendant company was Swiss, and the plaintiff had returned to Switzerland seventeen years before. BG. (March 15, 1949) 75 BGE. II 57, 65.

May the parties stipulate specifically for a special law to prolong the period of limitation allowed by the law of the contract? This is a practically important question. American courts have raised various objections to any party agreement modifying legal limitations of time for bringing suits and are prone to override a clause backed by foreign

42 *Diena*, 1 Dir. Com. Int. 444-446; *id.*, 2 Principi 264; *Michel* 159; French decisions cited by *Frankenstein* 597 n. 152 seem to join in this view.

43 *Infra* pp. 513 ff. Even the French Supreme Court has recognized the faculty of the parties to eliminate the alleged socially necessary protection of the debtor by his domiciliary law, by stipulating another law in the contract, Cass. req. (March 5, 1928) D. 1928.I.81, S. 1929.I.217, *cf.* the reference to this decision by a French tribunal in Clunet 1938, 281.
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law but disapproved by local policy. However, such clauses have been upheld against the *lex fori.*

We have to concentrate on the main subject.

II. Compromises

(a) Basic Anglo-American exception. From 1726, English courts recognized in theory that foreign law could discharge a debt so as to make its enforcement at the forum impossible. The procedural principle, laid down in the leading cases for limitation, hence, was always accompanied by the exception that a foreign statute "extinguishing" the substantive right, or imposing "a condition upon the right" was to be recognized at the forum. This might have resulted in broad application of foreign limitations. But nothing of this sort developed. In fact, the courts seldom find foreign general statutes of limitation answering that description. The writers explain this by observing that English and American statutes scarcely ever expressly declare the right extinguished, or that the courts are keen on discovering a reason for not making an exception. This tendency, we may add, is greatly aided by the formula of the exception. Genuine statutes of limitation never "ex-

44 See for the cases, Note, 48 Col. L. Rev. (1948) at 140 f., speaking of a confused picture.
45 See *infra* ns. 89, 131.
46 For the same reason, no attention will be given to the "saving" and "tolling" statutes caused by the procedural theory.
47 Burrows v. Jemino (1726) 2 Strange 733, 93 Eng. Re. 815; see for the subsequent decisions, *Ailes*, *supra* n. 5, 493.
48 Huber v. Steiner (1835) 2 Bing. N. C. 202, citing Story who himself spoke of time limitation extinguishing claim and title, which, as well as his case material on the distinction between the title and the right of action, "belongs to property and not to obligation," *Westlake* § 239.
Scotl: Don v. Lippman (1837) 5 Cl. & F. 1, 7 Eng. Re. 304.
Canada: Bryson v. Graham (1848) 3 N. S. R. 271, and decisions *supra* n. 2.
49 Optimistically so understood by De Nova 116, construing a system of twofold characterization.
50 *Ailes*, *supra* n. 5, 493.
51 Stumberg 143.
tistinguish” the right, even though they may use this expression. Thus the statute of Louisiana, identical with the French, has been construed as procedural according to the British model in Louisiana itself,\textsuperscript{52} and in Missouri.\textsuperscript{53} The French Code was read in the same manner by Tindal, J., in \textit{Huber v. Steiner} in 1835\textsuperscript{54} and by Judge Learned Hand in 1930.\textsuperscript{55} Whether the New Jersey statute restricting to three months the time for recovering the amount of a deficiency after foreclosure of a mortgage on New Jersey land, extinguishes the right, has been a riddle in the courts of New Jersey and New York for a long time.\textsuperscript{56}

The general statutes of limitation of Wisconsin\textsuperscript{57} and the Maryland\textsuperscript{58} statute on bills, bonds, and judgments have been recognized as “extinguishing the right,” but although the Wisconsin court seems to reject the British doctrine, in the Maryland case it was only stressed that the debt could not be revived by subsequent acknowledgment. Also, a Czarist Russian ten-year limitation has been applied as terminating the right.\textsuperscript{59}

\textit{Special statutory liabilities}. American courts feel more


\textsuperscript{53} McMerty v. Morrison (1876) 62 Mo. 140, 144.

\textsuperscript{54} Tindal, C. J., in Huber v. Steiner, \textit{supra} n. 3. MENDELSSOHN BARTHOLDY, \textit{46 Brit. Year Book Int. Law} (1935) 31 n. 2 and \textit{AILLES, supra} n. 5, 499 approve Tindal’s construction of C. C. art. 1234 as “procedural.” \textit{Cf. infra} n. 115.

\textsuperscript{55} Wood & Selick v. Compagnie Générale Transatlantique (C. C. A. 2d 1930) 43 F. (2d) 941; HARPER and TAINTOR, Cases 282.


\textsuperscript{57} Brown v. Parker (1871) 28 Wis. 21; Rathbone v. Coe (1888) 6 Dak. 91, 50 N. W. 620.

\textsuperscript{58} Baker v. Stonebraker (1865) 36 Mo. 338; see other cases in \textit{AILLES, supra} n. 5, 493 n. 110.

\textsuperscript{59} \textit{In re Tonkonogoff’s Estate} (1941) 32 N. Y. Supp. (2d) 661.
secure ground when a special rather than a general foreign statute is in issue. Death statutes have been an example of provisions creating a substantive right not known at common law and simultaneously ending it within a specified period. Analogous cases have concerned the liability of trustees of a business trust or of stockholders in corporations and the Federal Employers’ Liability Act. This recognition of applicable foreign limitations has been extended to statutes specifically qualifying a right created by another statute.

A characteristic controversy has developed around the effect of statutes of the forum creating a right similar to the foreign-governed claim in issue but limiting it to a period of duration shorter than the foreign statute. Logic seems to advise that the local prescription is restricted to the domestic-governed right; in this sense, some cases have admitted that nothing prevents the application of the foreign statute even if its period is longer than that of the forum. However, in a contrary view, the statute of the forum expresses public policy barring all suits of the type in question. This division of opinion demonstrates the futility

60 The Harrisburg (1886) 119 U. S. 199; for other cases, and particulars, see Hancock, Torts 134; Ailes, supra n. 5, 495 f.; recently, e.g., Summar v. Besser Manufacturing Co. (1945) 310 Mich. 347, 352, 17 N. W. (2d) 209.
62 Atlantic Coast Line R. R. v. Burnette (1915) 239 U. S. 199; Ailes, supra n. 5, n. 129. See also State ex rel. Winkle Terra Cotta Co. v. U. S. Fidelity & Guaranty Co. (1931) 328 Mo. 295, 40 S. W. (2d) 1050 (contractors' bonds) and cf. Note, 48 Col. L. Rev. (1948) at 139.
65 Parmele in 2 Wharton 1264 § 540b; Hutchings v. Lamson (C. C. A. 7th 1899) 96 Fed. 720; Tieffenbrun v. Flannery (1930) 198 N. C. 397, 151
of both approaches. Evidently, public policy may as well reside in genuine limitation as in preclusion by *lex fori*, and the decisions are visibly veering to the identification of both.  

In their embarrassment, the courts take it as a favorable indication when the foreign statute is called substantive in its own state. This self-characterization may occur for various purposes, such as in order to decide whether interruption of the running time by suing or revival through acknowledgment is possible; whether the statute may act retroactively; whether special pleading is necessary; whether a foreign judgment is enforceable despite domestic bar; or a judgment is dead. The inference for extra-territorial applicability may be more or less convincing.

Insecurity, however, is very natural with such nebulous criteria and the fundamental inadequacy of the distinction between "extinguishing the right" and only affecting the "remedy." The courts must be aware that they speak in a concerted language. What is their real impulse? Not only

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66 In the Maki Case of 1942, *supra* n. 64, the foreign limitation of six years was contained in a Minnesota statute covering all actions commenced "upon a liability created by statute, other than those arising upon a penalty or forfeiture." The domestic (Michigan) restriction of three years to recovery of injuries to person or property is a clear limitation of action. Both provisions thus appear to be genuine limitations of action, rather than "extinguishing" devices.

67 Hollingsworth v. Schanland (1924) 155 La. 825, 99 So. 613 ("peremption").

68 McCracken County v. Mercantile Trust Co. (1886) 84 Ky. 344, 1 S. W. 585.


70 Brown v. Parker (1871) 28 Wis. 21.

a European writer, but also Mr. Justice Holmes has declared:

“In cases where it has been possible to escape from that qualification (as procedural) by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant’s liability wherever he is sued.”

It may be preferred to assume with Ailes that “statutes are often labelled ‘substantive’ or ‘procedural’ depending upon the result sought,” but this does not give a much different impression. Hancock points to the courts of North Carolina and Pennsylvania refusing to recognize the distinction between special statutory provisions and general statutes of limitations, because they are satisfied with the results of the procedural principle:

“The distinction, though groundless, is probably symptomatic of dissatisfaction with the general principle and of a desire to limit its sphere of operation.”

The above-mentioned controversy concerning foreign limitations that are longer than the domestic periods, led a federal circuit court in 1942 to reasoning which sounds like the end of the tortuous development of the procedural construction:

“Why should not this limitation accompany the new right created by the statute wherever enforcement of the right is sought, if the substantive law of a sister state is by comity to be recognized and enforced?”

(b) Borrowing statutes. The application of the lex fori indeed has been finally cut down to half size by statutory

72 MICHEL 157.
73 Davis v. Mills (1904) 194 U S. 451, 454.
74 AILES, supra n. 5, at 493 n. 116 in fine.
75 HANCOCK, Torts 135.
76 Martin, C. J., in Maki v. George R. Cooke Co., supra n. 64, at 666.
clauses, now adopted in a great majority of the states. Their general intention is to protect the defendant against a plaintiff "shopping around" for a forum with a limitation long enough to allow suit. Therefore, they recognize under certain conditions foreign limitation or extinction of a cause of action brought to the forum.

Unfortunately, these statutes are of different types, and all of them are awkwardly drafted. Most of them identify the competent foreign statute by pointing to the law of the place where the cause of action "arose" or "occurred," a language adequate only for tort actions. Some recognize the statute of the state where the defendant resided when the action originated, irrespective of where this happened.

In application to contractual and other nondelictual obligations, the courts have assumed that the cause of action arises at the place of performance. What sort of reasoning is required thereby, has been illustrated by a recent controversy necessitating a decision of the Supreme Court of the United States. A federal statute of 1913 obligated the stockholders of an insolvent national bank to make additional payments, without prescribing a time of limitation. The state statutes of limitation of the forum, including its borrowing statutes, had to supply the rules, but what statutes were to be borrowed, i.e., in what state did the cause of action arise? On the direction of the Comptroller in Washington, the receiver in Louisville, Kentucky, where the defunct bank had at all times actually carried on its transactions, issued the summons. The Sixth Federal Circuit Court declared that the cause of action was the failure to pay the amount at the receiver's place and therefore the Kentucky statute applied. The Third Federal Circuit

Court, however, held that the cause of action, created by a federal law and dependent on the act of federal authority did not arise in one particular state more than in another. It resorted to the law of Pennsylvania as law of the forum. The Supreme Court approved the first opinion, agreeing with the prevailing construction of the place where the cause of action arises. However, it is never correct simply to localize a right flowing from a breach of contract or the violation of a legal obligation at the place where the performance is due, rather than where the obligatory relationship is centered. The supporting reason should have been what was incidentally mentioned, i.e., that the liability in virtue of the federal statute inhered in the membership in the former banking corporation and could have been better localized, under the circumstances, at the central office than in the charter state.

The borrowing statutes, moreover, refer, in one or another respect, to the (factual) residence of the defendant at the time of the origin of the cause of action; in part require that both parties resided in the same state during the full period; and establish more conditions of residence at the time of the action. The complications, doubts, and variety so accomplished are astonishing.

The New York statute distinguishes, like a few others, between residents and nonresidents of the forum, and in particular excludes from the bar such causes as originally accrue in favor of residents of New York. Where how-

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83 New York: Civil Practice Act § 13, as amended by law of April 15, 1943.
ever, a nonresident sues a resident on a foreign cause of action, the shorter foreign limitation is observed.84 The Wisconsin lawmakers exclude the application of a foreign limitation if a claimant for personal injuries was a resident of the forum at the time of such injury.85

As a whole, this broad exception to the procedural principle is a half measure, the statutes, with the exception of that of Kentucky,86 leaving intact all domestic bars in addition to those foreign. Such theories have been called irrational, because a more incisive foreign statute is applied and a weaker one is refused effect.87 On the other hand, complaint has been raised against them as an unwarranted departure from the procedural principle.88

In fact, the borrowing statutes are intended to protect the debtor against the obvious iniquity that, having once acquired repose, he should be again vulnerable to attack merely because he changed his residence. However, it is still less equitable that a creditor should lose his action simply because the debtor changes the place where he can be sued.

(c) Continental proposals. Arguments on exactly the same topic have been much discussed in the European orbits. The authors following the procedural principle themselves felt the desire to restrict the hazards just mentioned. On the other hand, writers of the adversary school of thought sometimes conceded overriding considerations of the forum. All these compromises, however, have been more or less openly established on the ground of public policy which will be presently discussed.

84 Dictum in Kahn v. Commercial Union of America Inc. (1929) 227 App. Div. 82, 237 N. Y. Supp. 94, where a six-month limitation of New York is applied against a thirty-year period of French law, an application in itself understandable. See infra ns. 97, 100.
87 Bar, Book Review on Wharton quoted in 2 Wharton 1245 n. 3.
88 Ailes, supra n. 5, 501 in fine.
(d) **Contractual and corporative limitations.** The Supreme Court of the United States, in a recent majority opinion, enumerates the various modifications imposed on the general principle that *lex fori* governs limitation, and among them mentions contractual stipulations limiting the time for bringing an action, recognized in a long line of cases.\(^89\) The decision adds that limitation of time for suit by the constitution of a fraternal benefit association is protected by the Full Faith and Credit Clause.\(^90\) Among other possible implications, it is doubtful whether the argument is equally valid for all suits between a corporation and its members.

(e) **Federal characterization.** Nothing is more indicative of the awareness, in the United States, of the true character of limitation of action than its recognition first in a hint,\(^91\) then a straight decision,\(^92\) by the Supreme Court of the United States. For the purpose of application of state statutes to lawsuits before federal courts in diverse citizenship cases, the statutes of limitation are expressly termed substantive law, and this has even been extended to equity cases where an exception may have been expected.\(^93\) It should not be objected that characterization for this purpose may soundly be distinguished from conflicts characterization. The manner in which the opinion of the Supreme Court is motivated,\(^94\) refutes any such distinction; indeed, there is

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\(^{90}\) Id. 624. The dissenting opinion by Mr. Justice Black, by a kind of *argumentum ad absurdum*, extends the scope of the majority decision very far. His criticism is shared by Harper, "The Supreme Court and the Conflict of Laws," 47 Col. L. Rev. (1947) 883, 895-900.

On the special subject of the insurance companies, *cf. supra* pp. 324-325.


\(^{93}\) Tunk, "Categorization and Federalism, etc.," 54 Ill. L. Rev. (1939) 271.

\(^{94}\) Mr. Justice Frankfurter, 326 U. S. 109: "And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner
no reason why the contrast of substance and procedure should not be exactly the same in both cases.\textsuperscript{95}

III. The Role of Public Policy

The Anglo-American conception of limitation survives in this country in a vastly reduced and amorphous shape. Its only real support is not procedural characterization but the British territorialism of former centuries which at present must take the appearance of public policy of the forum. This is probably the general opinion, although theoretical considerations are scarce and usually mix the points of view regarding remedy and policy. The former Continental literature, on its way from the same basic conception, took more opportunity for emphasizing, by arguments pro and contra, the role of local \textit{ordre public}.

Around the turn of the century, a considerable group of authors believed they had discovered a sound compromise between the law of the forum and that of the contract in reserving for the court its domestic statute when the period prescribed by it was shorter than that of the \textit{lex causae}.\textsuperscript{96} Some proposals restricted this concession to the longest period known to the forum, usually thirty years. Others have distinguished all "long" and all "short" periods. Finally, Rolin, reporter to the Institute of International Law, allocated to the law of the forum also certain limitations such

\textsuperscript{95} In the United States, constitutional control for the protection of foreign limitation statutes has only been exercised in a few special cases, on which see Note, 48 Col. L. Rev. (1948) 136 at 142-146.

\textsuperscript{96} Cf. \textsc{Estep}, Note, 44 Mich. L. Rev. (1945) 477.
as the French period of five years for rents (C. C., article 2277), in contrast to the very short limitations which in French law rest on a presumption of payment made.\textsuperscript{97} Bar, to protect the defendant, allowed him an option between the local statute and the law of the contract, if sued at his domicil.\textsuperscript{98}

Wherever in these suggestions the \textit{lex fori} was maintained, its clear ground was the reaction of public policy against claims regarded at the forum as superannuated.

This idea was directly formulated so as to form the only exception to the law of the contract, in the resolutions of the Institute of International Law:

Liberatory prescription may also be deemed acquired by the courts seized of litigations by virtue of their own law of the forum, if the invoked limitation, according to this law, constitutes an institution of absolute public policy, preventing the application of any foreign statute, even that normally competent to govern it as, for instance, in the interest of third persons, on consideration of humanity, etc.\textsuperscript{99}

This proposal was an attempt to include the common law courts in a universal rule. However, in Europe itself all such far-reaching exceptions to the law properly governing the obligation are entirely and deservedly discarded.\textsuperscript{100} A public policy, not strong enough to be enforced by the court except when pleaded by the defendant should not be a reason to shield one who changes his abode arbitrarily to the forum, nor should it be a ground to remove limitation from many other important incidents of the governing law. True, statutes of limitation are usually "imperative" in municipal law so that the parties are not allowed to agree in advance to waive the statute or prolong its period of time.

\textsuperscript{97} \textit{Rolin}, 31 Annuaire (1924) at 161.
\textsuperscript{98} 2 \textit{Bar} 99, 101.
\textsuperscript{99} 31 Annuaire (1924) 182 art. III.
\textsuperscript{100} \textit{De Nova} § 130; 2 \textit{Schnitzer} 536.
But, as the Italian Supreme Court has put it, terminating a long-continued controversy in that country:

Although it cannot be denied that limitation of action is founded also on considerations of public order (which are, however, joined by other, not less important, reasons), this does not mean that it belongs to the international public order. Therefore, limitation is not considered by the court without party request; it can be waived after the time has lapsed; and the time is suspended if impossibility to sue is proved.\(^\text{101}\)

The Italian Court still left open (in 1933) the question whether a foreign period of time longer than the domestic period may offend the public policy of the forum.\(^\text{102}\) The better-elaborated German doctrine of courts and writers sharply rejects such inconsistency. Whether a period of limitation is longer\(^\text{103}\) or shorter\(^\text{104}\) than the local statute admits makes merely a technical, but not a moral, and certainly not a fundamental, difference.\(^\text{105}\) In France, the same view seems to prevail after the long controversy.\(^\text{106}\)

The domain of stringent public policy, thus, shrinks to the extent of extreme cases: The Reichsgericht once held the Swiss rule that a deficiency certificate against an in-
solvent debtor is not subject to limitation107 "contrary to the purpose of German legislation," because the statutes of limitation serve also the public welfare, viz., peace and security.108 But embarrassment followed as to the rule positively to apply, and it was not true that every debt must be prescriptible.109 Occasionally, it has been contended that a foreign period should not apply when it is unreasonably short,110 or, under reference to National Socialist intransigence, that a Hungarian thirty-two year period was unacceptable in face of a German two-year period.111

Is it worth while to introduce an element of uncertainty for the sake of such rare discrepancies? Curiously enough, we may point to an American decision which did not hesitate to apply the Ohio borrowing statute in favor of the Pennsylvania statute ending in two years the right to sue for an injury committed in the latter state. Under Ohio law, the plaintiff, only 3½ years old at the time of the injury, would have enjoyed suspension and could have sued after eighteen years.112 Consideration of domestic protection of citizens could have been expected to work in this case, if anywhere. But the court acted wisely in maintaining the rule. Do American courts, as it has been contended, really feel it unbearable that Continental general limitation periods usually are of thirty years?113 If so, this would be the only understandable concession to public policy.

107 Switzerland: Law on Enforcement and Bankruptcy, art. 149.
108 RG. (Dec. 19, 1922) 106 RGZ. 82, Revue 1926, 278. In an analogous case, the French App. Colmar (Mar. 31, 1933) Revue Crit. 1934, 468, 2 Giur. Comp. DIP. (1937) 127 No. 85, held the Swiss provision not offensive to French public order, but stressed the fact that the French thirty-year limitation had not yet run out.
109 WUNDERLICH, supra Ch. 52 n. 3, 481, 506.
110 RAPEE 825.
113 Suggested by Note, 9 U. of Chi. L. Rev. (1942) 724 at n. ii.
The earliest attitude of Story and approval by most modern Anglo-American scholars have not prevented their acknowledgment of the existing principle, short of legislative reforms. On the Continent, conformingly, courts and authors have taken this procedural theory at its face value as the law of the Anglo-American countries, ignoring such important exceptions as the American and Canadian borrowing statutes. The two groups, almost neatly divided on the lines of common law and civil law, thus face the problem how to treat the opposite conception of the statutes of limitation. Here, the three theories of characterization—applying the conception of the forum; of the foreign law; and of analytical jurisprudence—demonstrate their most significant consequences. 114

1. Characterization According to Lex Fori

We have seen that the English courts remain fixed on the axiom that any foreign statute of limitation is inapplicable, excepting conceivable but rarely recognized statutes “extinguishing the right.” This distinction was applied to the French prescription, and it was found that it also did not “extinguish the right”115 and hence did not affect a French note. One hundred years later, an outstanding American judge repeated this investigation and reached the same result. 116 He ascertained in a perfectly correct statement that the French institution is of exactly the same nature as the American general statutes of limitation. But

114 See 5 Z. ausl. PR. (1931) 241, 278; Vol. I pp. 64, 65. On the occasion of a German decision of 1932, the three theories were advanced simultaneously in 1 Giur. Comp. DIP. (1932) 160 ff. No. 40, the first being advocated by the decision and the Note by SIEBERT, and the second with ill-placed vehemence by AGO, the third, my own, being explained by LUDWIG RAISER.


when, for this reason, he again classified French limitation as procedural and therefore inapplicable, he demonstrated the inherent vice of characterization according to the *lex fori*. Not only has a wrong municipal theory transgressed into conflicts law, so that the similarly constructed statutes of the sister states have become inapplicable, but this theory is extended to foreign limitations considered in their own countries as substantive.

The same approach, however, has marked the entire German doctrine.\textsuperscript{117} It seemed to provide escape from other egregious blunders.\textsuperscript{118} Exactly like the English and American judges mentioned above examined the French Code, the courts investigated English law with the identical clear result that limitation of actions was subject essentially to the same rules as German *Anspruchsverjährung*.\textsuperscript{119} The German courts and writers now unanimously state that what imports is only that in the German view limitation is substantive and for this reason the New York statute does operate in a German court. Also, in other countries this form of characterization has found favor.\textsuperscript{120}

On the European side, it is true, the effect is reasonable. But the underlying theory is less admirable, as has been shown just above, on the common law side. So long as the

\textsuperscript{117} ROHG. (June 15, 1875) 15 ROHGE. 186; RG. (May 8, 1880) 2 RGZ. 13; OLG. Hamburg (July 1, 1912) 23 Z.int.R. (1913) 342; RG. (July 6, 1934) 145 RGZ. 121, IPRspr. 1934 No. 29, Revue Crit. 1935, 447; 6 Giur. Comp. DIP. No. 130.

\textsuperscript{118} KAHN, 1 Abhandl. 103 ff., 119; 2 Bar 95 f.; LEWALD 73 § 98; SCHOCH, Klagbarkeit etc., *supra* Ch. 52 n. 3, 110 and n. 2.

\textsuperscript{119} *Infra* n. 122.

\textsuperscript{120} OLG. Hamburg (Jan. 13, 1932) IPRspr. 1932 No. 28 at 59; RG. (July 6, 1934) *supra* n. 117; cf. ECKSTEIN, 6 Giur. Comp. DIP. 152.

\textsuperscript{120} Denmark: S. Ct. (July 19, 1925) 6 Répert. 215 No. 10.

France: 2 ARMINJON 346.

Italy: FEDOZZI-CERETTI 736.

Sweden: Decision of the Swedish Supreme Court, and BAGGE, *supra* n. 30.

Switzerland: (Semble) App. Tessino (Sept. 23, 1929) and Bezirksgericht Zürich (Dec. 19, 1928) 5 Z. ausl.PR. (1931) 725; (probably) 2 SCHNITZER 536, and definitely BG. (March 15, 1949) 75 BGE. II 57, 66.
English and American courts believe in construing a Swedish statute by the method which they learned for the interpretation of the Statute of James I, we shall have no harmonious conflicts solution. And the reader should take a moment to consider the law of a world where an admittedly identical phenomenon is termed, classified, and treated in opposite manners by the two chief legal groups of western civilization!

2. Characterization According to *Lex Causae* (Secondary Characterization)

Reputable authors advise a compromise to the effect that the forum should apply its domestic statute of limitation in principle to all cases decided at the forum, but recognize a foreign-governing law with the content given it in the foreign country. Characterization by *lex causae* and secondary characterization agree on this point. The Swedish statute is applicable since it is considered substantive in Sweden, and the Ontario statute is not applied because it is construed as procedural in Ontario. Thus, while theory (1) provides the German courts with satisfactory decisions and leaves the American courts in the dark, theory (2) rescues the latter courts from their predicament. However, it immediately puts the Continental courts back in an insoluble puzzle. We are again where the Reichsgericht was in 1880.

At that time, the German Supreme Court hearing an action on a note issued in Tennessee, speculated that it could neither apply the Tennessee statute because it was procedural nor the German statute because it was intended only for a German-governed contract. Hence, a Tennessee note could never

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121 AILES, *supra* n. 5, 482; CHESHIRE (ed. 3) 74-75, 834; ROBERTSON, Characterization 64, 248 ff.; PONTES DE MIRANDA, Recueil 1932 I 625 § 7.
122 RG. (Jan. 4, 1882) 7 RGZ. 21, 24; (May 18, 1889) 24 RGZ. 383, 393.
be prescribed as far as the German courts were concerned—an outcome amazing even to the hardboiled specialists of conflicts law. Corrections have been attempted. Thus, it was assumed that American law refers the question of limitation to the domestic law of the forum exercising jurisdiction of the claim and this renvoi ought to be accepted.\textsuperscript{123} Also the Anglo-German Mixed Arbitral Tribunal, in a most involved reasoning, so argued.\textsuperscript{124} Another escape was discovered by scrapping the entire conflicts rule and reverting to the domestic statute on the ground of public policy.\textsuperscript{125} Also this solution, curiously to say, was followed in a decision of the Anglo-German Mixed Arbitral Tribunal on the basis of the German conflicts rule referring to Scotch law.\textsuperscript{126}

But how awkward is a treatment that requires such precarious counteractions! Are we compelled to use in the two groups different approaches for reconciling divergent rules? The situation is not really similar to the conflict between domiciliary and nationality principles that calls for two methods of employing renvoi. The German doctrine has abandoned the entire approach,—a fact that should have given thought to the recent advocates of this artifice.

\textsuperscript{123} OLG. Darmstadt (Nov. 2, 1906) cited by Lewald 73 No. 98; 1 Frankenstein 596; Wunderlich, supra Ch. 52 n. 3, 503, 506. Pacchioni 331 rejects the renvoi but asserts that the lex fori enters into a gap of the foreign law. Contra: The Swedish Supreme Court, see Bagge, supra n. 30.

\textsuperscript{124} Weiser & Co. v. The Heirs of Ludwig Dürr, 6 Recueil trib. arb. mixtes 632, 634: German conflicts law declared applicable refers to English law of contracts which excludes limitation of actions as procedural. Hence, nothing is left but to apply the German provisions on limitation. Schoch, Klagbarkeit etc., supra Ch. 52 n. 3, 116 n. 3, criticizes this decision because it looks at once to a conflicts law instead of asking the preliminary question what is procedural and what substantive law. But how can this be done by a court not having a lex fori, if no characterization can be evaluated as right or wrong, but only as inherent in a determinate system, as the same author contends (at 112 n. 3)? The tribunal followed its course: (July 22 and Oct. 6, 1927) C. G. Baron et Salaman v. Hugo Schnetzer, 7 Recueil trib. arb. mixtes 427; (June 12, 1929) C. A. Rebus v. Theodora Hennig, 9 id. 19.

\textsuperscript{125} RG. (Dec. 19, 1922) 106 RGZ. 82, Revue 1926, 278.

\textsuperscript{126} Cook v. Kutscher (May 31, 1926) Case No. 2263, 6 Recueil trib. arb. mixtes 540.
3. Characterization According to Comparative Analysis

Although we have to recognize the existence of the territorial Anglo-American rule, so far as it reaches and so long as it survives, we need not recognize any mistaken characterization. We apply a foreign "law" in its entirety without regard to its own categorizations. Once a court, whether American or European, knows that limitation is always a part of the substantive law, although it may not be applied in all courts in the same way as other parts are applied, there is no obstacle to the desired application. An American court has to apply Dutch or German statutes of limitation because they belong to the governing law, not only in the eyes of Dutch and German courts but also in correct American theory. Swiss or Argentine courts ought to apply the New York statute for the same reason.

Of course, the force of this view is restricted by the positive Anglo-American law. That it should be reformed, is unquestionable.

4. Conclusion

In theory it should be frankly acknowledged by any court in this country and abroad that the effect of lapse of time on an obligation is an incident of the law governing it. Foreign statutes of limitation are therefore applicable to a foreign contractual or legal obligation.

This theory is for the time being restricted in British jurisdictions, and to an essentially lesser extent in the United States, through the age-old thesis that a court ought to apply its domestic statute of limitation. The resolutions of the Institute for International Law have recognized this phenomenon as an exception based on public policy, but

\[127\] Vol. I p. 66.

\[128\] 31 Annuaire (1924) 182 art. III, quoted supra p. 514.
go so far as to perpetuate the excuse of common law courts for not applying statutes of civil law countries. At most, common law courts may reciprocate with other common law jurisdictions when the other statutes prescribe a longer period than the forum does. Even this is anachronistic.

It would seem easy to enlarge the borrowing statutes in the field of obligations by replacing them through a very brief uniform rule. The uniform statute has simply to provide that an obligation governed by the law of a foreign state or country is exclusively subject to the effects of lapse of time, as imposed by that law on the rights of the creditor. This would end an overcomplicated and unjust legal situation.

V. Scope of the Rule

Whether and when a cause of action arises, is naturally determined by the law governing the obligation, even in common law courts. The conditions of effective lapse of time depend, conforming to the respectively adopted principles, in this country on the lex fori or the borrowed statute, and in Continental courts, except the French, on the law governing the obligation. This law determines also whether the parties are permitted to agree on a longer or shorter period of time.

Illustration. A German buyer sued an Austrian seller for rescission on the ground of implied warranty and for damages on the ground of express warranty. According to the splitting method, the Appeal Court of Hamburg applied German law to the rescission and Austrian law to the damages. In consequence, the question whether the time of limitation was interrupted by a formal expert inspection

129 Glenn v. Liggett (1890) 155 U. S. 533.
130 With all preliminary questions, see 75 A. L. R. (1890) 203.
131 Inst. of Int. Law, 31 Annuaire (1924) 182 art. II; De Nova 170 n. 2; Batiffol 455 § 578. But see for the American decisions, supra pp. 504 n. 44, 512 n. 89.
of the goods, was answered affirmatively as respects rescission, under the German BGB., § 477 par. 2, and negatively, with respect to the damages,\textsuperscript{132} under the Austrian Allg. BGB., § 1977, and an Austrian Supreme Court decision. With a better choice of law, only Austrian law would have been applicable; under the common law approach, only German law.

The Railway Convention of Bern,\textsuperscript{133} however, took the usual easy way out, by limiting action for total loss of goods to one year but referring the causes of interruption and suspension to the law of the country in which the action is brought.\textsuperscript{134} This example has been followed by other conventions of unification.\textsuperscript{135}

German courts have repeatedly dealt with the case where a claim was sued upon in a foreign court; did this act interrupt the period of limitation established by the law of the debt? The answer has been affirmative on the condition that a judgment following the action would be recognized in the forum.\textsuperscript{136} This questionable solution, however, has been restricted to the case where German law governs the obligation,\textsuperscript{137} and is criticized in the literature where it has been recently suggested that the effects of foreign lawsuits on

\textsuperscript{132} OLG. Hamburg (April 28, 1920) Hans. GZ. 1920, Hbl. 182 No. 91.
\textsuperscript{133} Of Oct. 23, 1924, art. 45 § 4, HUDSON, 2 Int. Legislation 1448, revised Nov. 23, 1933, HUDSON, 6 id. 556, in force since Oct. 1, 1938.
\textsuperscript{134} For an application of the then art. 45, see Trib. com. Seine (Nov. 25, 1905) Clunet 1906, 837.
\textsuperscript{135} E.g., Warsaw Convention on international air transportation, of 1929, art. 29 (2) (HUDSON, 5 Int. Legislation 114); Brussels Convention on collisions on the high seas, of 1910, art. 7 par. 3 (BENEDICT, 6 American Admiralty 5); Geneva Convention on collisions in inland navigation, of Dec. 9, 1930, art. 8 (3), not in force (HUDSON, 5 Int. Legislation 818). The Uniform Laws on bills of exchange and on checks chose another more complicated method, see Annex II art. 17 and Annex II art. 26, respectively (HUDSON, 5 Int. Legislation 547 and 913).
\textsuperscript{136} OLG. Hamburg (March 13, 1906) Hans. GZ. 1906, Hbl. No. 50; OLG. Celle (Dec. 11, 1907) 1 ROLG. 158; RG. (Sept. 18, 1925) 129 RGZ. 385, 389, Clunet 1926, 737.
\textsuperscript{137} OLG. Breslau (Dec. 19, 1938) JW. 1939, 344, H. R. R. 1939, No. 375, approved by 2 SCHNITZER 538.
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limitation of action should be subordinated to the rule, *locus regit actum*.\(^{138}\)

\(^{138}\) KATINSZKY, 9 Z. ausl. R. (1935) 855, criticizes confusion of substantive requirements for conflicts law and procedural requirements for recognition; an unjust and inconsistent result. On this basis, KALLMANN, "L'effet sur la prescription libératoire des actes judiciaires intervenus en pays étranger," Revue Crit. 1948, 1 ff., esp. 31, undertakes to formulate a theory.