

Michigan Law Review

Volume 50 | Issue 2

1951

CONFLICT OF LAWS-THE NATURE OF STATUTES OF LIMITATION

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Recommended Citation

Nancy J. Ringland S. Ed., *CONFLICT OF LAWS-THE NATURE OF STATUTES OF LIMITATION*, 50 MICH. L. REV. 302 (1951).

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COMMENTS

CONFLICT OF LAWS—THE NATURE OF STATUTES OF LIMITATION—Several recent cases have again focused the attention of the courts on the nature of statutes of limitation;¹ the question is whether they are procedural or substantive.² For purposes of the conflict of laws this distinction is important, for it is universally agreed that in conflicts cases the substance of the cause of action is governed by the law of the place where it accrued, and the procedural aspects are governed by the law of the forum.³ There is no doubt that the theory which holds the usual statutes of limitation procedural in nature prevails in this country today,⁴ but certain limitation statutes which purport to control statutorily created rights are generally considered substantive, and under this type of statute the law is not completely settled.

I. *In General*

By the early eighteenth century, English courts had adopted the rule that statutes of limitation were procedural in nature,⁵ and this rule was

¹ *Hartwell v. Piper Aircraft Corporation*, (D.C. Pa. 1950) 92 F. Supp. 271; *McMillen v. Douglas Aircraft Co., Inc.*, (D.C. Cal. 1950) 90 F. Supp. 670; *Zellmer v. Acme Brewing Co.*, (9th Cir. 1950) 184 F. (2d) 940; *Lewis v. Reconstruction Finance Co.*, (D.C. Cir. 1949) 177 F. (2d) 654.

² The distinction is drawn between the right and the remedy, but as many writers have pointed out it is difficult to determine where the line between them is. Cook, "Substance and Procedure in the Conflict of Laws," 42 *YALE L.J.* 333 (1933); Goodrich, *HANDBOOK OF THE CONFLICT OF LAWS*, 3d ed., §80 (1949). For a discussion of the "realistic" view that a distinction between substance and procedure is meaningless, see Llewellyn, *THE BRAMBLE BUSH* 82 (1930).

³ Goodrich, *HANDBOOK OF THE CONFLICT OF LAWS*, 3d ed., §81 (1949); Ailes, "Substance and Procedure in the Conflict of Laws," 39 *MICH. L. REV.* 392 (1941); *CONFLICTS RESTATEMENT* §585 (1934).

⁴ Goodrich, *HANDBOOK OF THE CONFLICT OF LAWS*, 3d ed., §85 (1949); *CONFLICTS RESTATEMENT* §603 (1934); 3 Beale, *A TREATISE ON THE CONFLICT OF LAWS* §603.1 (1935); Blume and George, "Limitations and the Federal Courts," 49 *MICH. L. REV.* 937 at 988 (1951).

On the continent, however, statutes of limitations are usually considered substance, pertaining to the right. Ailes, "Limitations of Actions and the Conflict of Laws," 31 *MICH. L. REV.* 474 (1933); Lorenzen, "The Statute of Limitations and the Conflict of Laws," 28 *YALE L.J.* 492 (1919).

Even some American authorities contend that for purposes of the conflict of laws, statutes of limitations should be considered as substantive. Lorenzen, "The Statutes of

accepted by the American courts at an early date.⁶ The idea has been followed in hundreds of conflicts cases,⁷ resulting in the application of the limitation statute of the forum regardless of where the cause of action arose.⁸ The rule also applies to the judgments of sister states, so that a suit may not be maintained on the judgment if the action is barred by the statute of limitations of the forum.⁹ Moreover, it concerns certain preliminary matters, whether for the purposes of the statute an instrument is a specialty or not,¹⁰ and whether a person has reached the age of majority.¹¹ There are strong arguments in favor of this doctrine, primarily that it is simple and convenient to apply and that its application effectuates the stated policy of the forum.

However, as early as 1820, Justice Story pointed out the theoretical inconsistency of this rule which applies the limitation statute of the forum in all cases, for in certain instances this enables the forum to enforce a right no longer enforceable under the law which created it.¹² He suggested that certain statutes of limitation may extinguish the right, as contrasted with others which merely extinguish the remedy, and that

Limitations and the Conflict of Laws," 28 *YALE L.J.* 492 (1919); STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 141 (1937). In *LeRoy v. Crowninshield*, (C.C. D. Mass. 1820) 2 *Mason* 151, 15 *Fed. Cas.* 362, No. 8269, Story expressed an inclination to hold the matter to be substance, were it not for the overwhelming authority to the contrary.

⁵ *Wainford v. Barker*, 1 *Ld. Raym.* 232, 91 *Eng. Rep.* 1051 (1697); *Dupleix v. De Roven*, 2 *Vern.* 540, 23 *Eng. Rep.* 950 (1705); *Anonymous*, 1 *Salk.* 154, 91 *Eng. Rep.* 142 (1707); *Quantock v. England*, 5 *Burr.* 2627, 98 *Eng. Rep.* 382 (1770). 47 *HARV. L. REV.* 315 (1933) points out that the question first arose in England when it was a substantially isolated unit, and the resulting provincialism led to a hostile attitude toward the recognition of foreign law, and a tendency, therefore, to enlarge the concept of procedure and narrow that of substance.

⁶ *Nash v. Tupper*, (N.Y.) 1 *Caines* 402 (1803); *Pearsall v. Dwight*, 2 *Mass.* 84 (1806); *Ruggles v. Keeler*, (N.Y.) 3 *Johns* 264 (1808); *M'Elmoyle v. Cohen*, 13 *Pet.* (38 U.S.) 312 (1839).

⁷ GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS*, 3d ed., §85 (1949); 3 BEALE, *A TREATISE ON THE CONFLICT OF LAWS* §603.1 (1935); 53 *C.J.S.*, *Limitations of Actions* §27 (1948).

⁸ Where an action is barred by the law of the forum, no suit may be maintained thereon, despite the fact that the cause is not barred in the state where it arose. *CONFLICTS RESTATEMENT* §603 (1934); *Nash v. Tupper*, (N.Y.) 1 *Caines* 402 (1803); *M'Elmoyle v. Cohen*, 13 *Pet.* (38 U.S.) 312 (1839). Although the cause of action is barred in the state where it arose, if it is not barred by the statute of the forum a suit can be brought. *CONFLICTS RESTATEMENT* §604 (1934); *Townsend v. Jemison*, 9 *How.* (50 U.S.) 407 (1850); *Miller v. Brenham*, 68 *N.Y.* 83 (1877).

⁹ *M'Elmoyle v. Cohen*, 13 *Pet.* (38 U.S.) 312 (1839); *Farquharson v. Fresno Oil Co.*, (8th Cir. 1925) 9 *F.* (2d) 515; *Lamberton v. Grant*, 94 *Me.* 508, 48 *A.* 127 (1901).

¹⁰ *Watson v. Brewster*, (Pa.) 1 *Barr* 381 (1845); *Bank of United States v. Donnelly*, 8 *Pet.* (33 U.S.) 361 (1834).

¹¹ *Burgett v. Williford*, 56 *Ark.* 187, 19 *S.W.* 750 (1892).

¹² *LeRoy v. Crowninshield*, (C.C. D. Mass. 1820) 2 *Mason* 151, 15 *Fed. Cas.* 362, No. 8269.

where the law which has created a right has taken it away, no action may be maintained thereon despite the fact that the statute of the forum would not bar the action.¹³ In several opinions courts have recognized this idea, but found it inapplicable.¹⁴ Only in a few cases has Story's idea been applied as the determining law;¹⁵ and, in one case, Judge Learned Hand expressly rejected the idea.¹⁶ Story, however, qualified his theory by insisting that the parties reside within the jurisdiction where the cause arose for the statutory period in order that the right might be extinguished.¹⁷ It has been pointed out by several writers that this qualification is illogical, since if the statute actually extinguished the right it would make no difference where the parties resided for the statutory period.¹⁸

II. *Statutes of Limitation Affecting the Right*

Despite strong resistance to any attempt to change the fundamental concept as to the nature of statutes of limitation, as evidenced by the reluctance to accept Story's idea, it has been generally recognized by the courts that there are certain types of statutory rights in which the time limit set by the statute applies to the right itself, not the remedy.¹⁹ This may be true although the time limit is found in a different statute, if the limit is sufficiently directed to the newly-created liability so as to qualify the right.²⁰ Among such statutes, which give rights unknown at the common law, are wrongful death statutes,²¹ workmen's compensation acts,²² employers' liability acts,²³ and those statutes which create certain liabilities for shareholders.²⁴

¹³ *Ibid.*

¹⁴ *Canadian Pac. Ry. Co. v. Johnston*, (2d Cir. 1894) 61 F. 738; *State Bank of West Pullman v. Pease*, 153 Wis. 9, 139 N.W. 767 (1913); *Finnell v. Southern Kan. Ry. Co.*, (D.C. Mo. 1888) 33 F. 427; *Perkins v. Guy*, 55 Miss. 153 (1877); *Kirsch v. Lubin*, 131 Misc. 700, 228 N.Y.S. 94 (1927).

¹⁵ *Rathbone v. Coe*, 6 Dak. Rep. 91, 50 N.W. 620 (1888); *Baker v. Stonebraker*, 36 Mo. 338 (1865); *Brown v. Parker*, 28 Wis. 21 (1871).

¹⁶ *Wood & Selick v. Compagnie Generale Transatlantique*, (2d Cir. 1930) 43 F. (2d) 941.

¹⁷ STORY, *CONFLICT OF LAWS*, 8th ed., §582 (1883).

¹⁸ GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS*, 3d ed., §86 (1949); 27 *YALE L.J.* 1078 (1918).

¹⁹ *CONFLICTS RESTATEMENT* §605 (1934); Ailes, "Limitations of Actions and the Conflict of Laws," 31 *MICH. L. REV.* 474 (1933).

²⁰ *Davis v. Mills*, 194 U.S. 451, 24 S.Ct. 692 (1904).

²¹ *Swisher v. Atchison, Topeka and Santa Fe Ry. Co.*, 76 Kan. 97, 90 P. 812 (1907); *The Vestris*, (D.C. N.Y. 1931) 53 F. (2d) 847.

²² *Ford, Bacon & Davis, Inc. v. Volentine*, (5th Cir. 1933) 64 F. (2d) 800.

²³ *Bell v. Wabash Ry. Co.*, (8th Cir. 1932) 58 F. (2d) 569; *Taylor v. Southern Ry. Co.*, (D.C. Ill. 1934) 6 F. Supp. 259.

²⁴ *Norman v. Baldwin*, 152 Va. 800, 148 S.E. 831 (1929); *Moran v. Harrison*, (D.C. Cir. 1937) 91 F. (2d) 310.

A. *Shorter at the Locus.* If a cause of action arising under these or similar statutes is barred by the law of the place where the right was created, it is also barred at the forum: the running of the statute at the locus not only bars the remedy, but also destroys the right.²⁵ This rule was first laid down by the Supreme Court in *The Harrisburg*, in which Justice Waite said: "Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."²⁶ All courts in which the question has been raised have unanimously accepted this principle.²⁷

B. *Shorter at the Forum.* The main problem under this type of statute is whether a suit may be maintained where the cause of action is barred by the law of the forum under a similar type of statute, but not by the law of the place where the right of action arose. As yet, the question is not conclusively settled.²⁸ In *McMillen v. Douglas Aircraft Co.*,²⁹ suit was brought in a California court to recover for a wrongful death which occurred in Utah; the action was brought within the two year time limit of the Utah statute but after the one year period prescribed by the California statute for such actions. It was held that the California statute constituted a procedural bar to this action. A similar decision was reached in *Hartwell v. Piper Aircraft Corporation*,³⁰ where a suit was brought in a Pennsylvania court to recover for a wrongful death occurring in Florida. The suit was brought within the two year limit of the Florida statute which created the right, but after the one year period fixed by the Pennsylvania law. The court there held that if the law of the forum provides a shorter period for bringing the action than does the foreign law, the shorter period of the forum controls. Again, in *Zellmer v. Acme Brewing Co.*,³¹ an action which arose in a California court to recover for a wrongful death in Nevada, it was held that the California one year limitation statute was applicable rather than the Nevada two year limitation statute. The court in this case recognized that if the foreign time limit had been shorter than that of the

²⁵ CONFLICTS RESTATEMENT §397 (1934); GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS, 3d ed., §86 (1949).

²⁶ *The Harrisburg*, 119 U.S. 199 at 214, 7 S.Ct. 140 (1886).

²⁷ For a collection of some of the cases applying this rule, see 53 C.J.S., Limitations of Actions §30, note 23 (1948).

²⁸ See 146 A.L.R. 1356 (1943) for a collection of cases involving this specific problem.

²⁹ (D.C. Cal. 1950) 90 F. Supp. 670.

³⁰ (D.C. Pa. 1950) 92 F. Supp. 271.

³¹ (9th Cir. 1950) 184 F. (2d) 940.

forum, it would have been applied as part of the substantive right, but it reasoned that while the right might still exist under the law creating it, there was no remedy available in a California court. However, in a case the previous year, *Lewis v. Reconstruction Finance Co.*,³² the opposite result was reached. This was a suit in the District of Columbia to recover for a wrongful death in Nebraska, and the action was brought after the District of Columbia statute of limitations had run, but before the two year limit provided by the Nebraska statute. The suit was allowed, the court concluding that the right remained despite the expiration of the shorter limitation period on similar rights in the forum.

While there is complete agreement that suit on a statutory cause of action, in which the limitation "goes to the right" cannot be brought after expiration of the limitation period at the locus, although it is shorter than that of the forum, there appears to be confusion in the situation in which the time limit of the forum is shorter than that of the locus.³³ An analysis of those cases within the past ten years which have involved the latter problem reveals an equal division among the courts; some hold that in such a case the shorter period of the forum will control,³⁴ while others hold that the foreign statute should govern despite the statute of the forum.³⁵ This statement, however, must be qualified by the observation that there are very few cases to be weighed.

Logical arguments and policy considerations are advanced to support each view. On one side, it is contended that if a foreign statute of limitation is to be considered substantive in the case where a right of action is barred by the law creating it, while not so barred by the law of the forum, it should still be considered substantive, and applied by the forum, in the converse situation, where the right is barred by the

³² (D.C. Cir. 1949) 177 F. (2d) 654.

³³ Leading cases, relied on to support the view that an action must be brought within the time limit of the forum: *Rosenzweig v. Heller*, 302 Pa. 279, 153 A. 346 (1931); *Platt v. Wilmot*, 193 U.S. 602, 24 S.Ct. 542 (1904); *White v. Govatos*, 40 Del. 349, 10 A. (2d) 524 (1939). *Contra*: *Theroux v. Northern Pac. R. Co.*, (8th Cir. 1894) 64 F. 84; *Brunswick Terminal Co. v. National Bank of Baltimore*, (4th Cir. 1900) 99 F. 635; *Negaubauer v. Great Northern R. Co.*, 92 Minn. 184, 99 N.W. 620 (1904).

³⁴ *Hughes v. Lucker*, (3d Cir. 1949) 174 F. (2d) 285; *Cauley v. S. E. Massengill Co.*, (D.C. Tenn. 1940) 35 F. Supp. 371; *McMillen v. Douglas Aircraft Co.*, (D.C. Cal. 1950) 90 F. Supp. 670; *Hartwell v. Piper Aircraft Corp.*, (D.C. Pa. 1950) 92 F. Supp. 271; *Zellmer v. Acme Brewing Co.*, (9th Cir. 1950) 184 F. (2d) 940. Supported by dicta in *Fierstein v. Piper Aircraft Corp.*, (D.C. Pa. 1948) 79 F. Supp. 217; *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A. (2d) 517 (1949).

³⁵ *Calvin v. West Coast Power Co.*, (D.C. Ore. 1942) 44 F. Supp. 783; *Wilson v. Massengill*, (6th Cir. 1942) 124 F. (2d) 666; *Maki v. George R. Cooke Co.*, (6th Cir. 1942) 124 F. (2d) 663; *Lewis v. Reconstruction Finance Corp.*, (D.C. Cir. 1949) 177 F. (2d) 654. Supported by dicta in *Thomas Iron Co. v. The Ensign-Bickford Co.*, 131 Conn. 665, 42 A. (2d) 145 (1945); *Niosi v. Aiello*, (Mun. Ct. of App. D.C. 1949) 69 A. (2d) 57.

statute of the forum and not by the foreign law. There is also the additional argument that since the statute of the forum is itself substantive, it should not be applicable at all to foreign causes of action. On the other hand, local statutes are urged to have a dual function: as substance, limiting locally created rights; and as procedure, barring all actions of a similar nature regardless of where they arise. Even conceding that the foreign statute of limitations is part of the substantive right, and that the right still exists, the question remains whether a remedy is available in the forum; application of the limit of the forum will not affect the substantive right created by the foreign law. However, the main question is whether the policy of the forum is sufficiently strong to prevent the application of the foreign statute of limitations where it is longer than that of the forum. In the usual case it would seem that policy is not strong enough to have this effect,³⁶ and the contrary conclusion reached by some courts indicates a provincial attitude. The purpose of such limitations on the time in which a suit may be brought is to avoid litigation after an extended period, when it is difficult or impossible to determine the facts accurately. The length of the period set by the statute will be dependent on the procedural system of the forum, and perhaps it should apply to all causes of action no matter where they arise.³⁷ But the differences in the time limits set by the various statutes are not usually so great that enforcement of a foreign right, which would be barred by the statute of the forum, would cause any injustice or material inconvenience. Moreover, consistent application of the time limit of the locus will promote uniformity in the enforcement of rights, a result which would be highly desirable.³⁸

III. *Conclusion*

It is well established that the ordinary statute of limitation is procedural in nature; the result is that the time limit of the forum is applied in practically all cases. However, there is an equally well recognized exception to this general rule; where a statute creates a cause of action unknown to the common law, a statute of limitation sufficiently directed to this new right is regarded as part of the substance, because affecting

³⁶ Ailes, "Limitations of Actions and the Conflict of Laws," 31 MICH. L. REV. 474 (1933).

³⁷ Lorenzen, "The Statute of Limitations and the Conflict of Laws," 28 YALE L.J. 492 (1919).

³⁸ Ailes, "Limitations of Actions and the Conflict of Laws," 31 MICH. L. REV. 474 (1933).

the right. It is generally agreed that an action on such a statutory right must be brought within the time prescribed by the statute creating the right, where it is shorter than that of the forum. But, there is a split of authority as to which time limit should prevail where the foreign time limit is longer than that of the forum. An entirely satisfactory result could be reached by holding the foreign statute of limitations substantive and controlling whether longer or shorter than that of the forum.

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