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LIMITATIONS IN ILLINOIS: THE TOLLING AND BORROWING PROVISIONS

MARK J. SATTER

STATUTES of limitation, for the most part, measure their prohibition in terms of simple mathematical application. Using only the yardstick of years, the statute is definite, unequivocal and precise. Such statutes define in exact terms the requirement that judicial relief be sought within a fixed period after the occasion for its need arises. So long as the practitioner is concerned with litigation involving citizens of his own state, he finds that application of the yardstick of the limitations act is indeed clearly exact. The yardstick becomes far less definite, however, when the statute is invoked in matters involving citizens or persons of other states, or transactions which have occurred in other jurisdictions.

Illinois, in common with almost all other jurisdictions, has incorporated into its limitations act, exceptions involving dealings of its residents with persons outside the state, and exceptions when strangers come into the state to litigate quarrels having origin elsewhere. In the first situation, the running of the statute in favor of a non-resident debtor and against a resident creditor is suspended, and in the latter situation the statute of the place of origin of the cause of action may be borrowed in cases involving non-residents, who use Illinois as a forum.

In the first situation, the act operates to deny the benefit of the statute to a debtor who leaves the state, or who has never come into it, and relieves the resident creditor of the obligation of pursuing his debtor under terms possibly unfavorable to the creditor. In the latter situation, the statute prevents a claimant from prosecuting a claim under Illinois limitations if such are more favorable to him than the statutes prevailing in the state where the cause of action arose.

Along with these exceptions, the Illinois courts have considered limitations involving judgments of sister states, and have ruled that the actual period of the statute of limitations does not depend so

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much on the measurement of time, as on the application of the "borrowing" or "tolling" provisions of the statute. In the matter of the "borrowing" sections, the running of the statute may be considerably shorter than that available to Illinois residents and litigants. In the matter of application of the "tolling" provisions, Illinois courts may consider an obligation alive indefinitely, although the same obligation may be disposed of by the application of limitations acts of sister states.

An examination is here made of the limitations act of Illinois and the interpretation by the courts of the act as affected by the tolling and borrowing sections. Consideration is also given to the interaction of those provisions, and, to some extent, to similar statutes in other jurisdictions. A suggestion is made that a reappraisal of these provisions of the limitations acts may be desirable in order to establish more clear cut limitations in point of time.

Since no limitations existed at common law, the entire principle is a creation of statute. The periods of the limitations of the sister states vary widely. For example, contracts under seal are subject to limitations ranging as follows: four years in California and Texas; five years in Arkansas, Idaho, Kansas, Nebraska and Oklahoma; six years in Arizona, Colorado, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Dakota, Tennessee, Utah and Washington; eight years in Montana and Vermont; ten years in Alabama, Illinois, Iowa, Missouri, North Carolina, Oregon, Virginia, West Virginia, Wisconsin and Wyoming; twelve years in the District of Columbia and Maryland; fifteen years in Ohio; sixteen years in New Jersey; seventeen years in Connecticut; and twenty years in Delaware, Florida, Georgia, Indiana, Maine, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, South Carolina and South Dakota.¹ In none of the states does the limitation period extend beyond twenty years.

The period of limitation in Illinois for personal actions is from one to two years.² Actions on unwritten contracts and for injury to property are limited to five years;³ actions on evidences of indebtedness in writing are limited to ten years⁴ and actions on

¹ The above periods of limitation are cited merely for the purpose of illustrating the variances between the limitations acts of the several states.

² Ill. Rev. Stat. (1951) c. 83, §§ 13-15.

³ Ill. Rev. Stat. (1951) c. 83, § 16.

⁴ Ill. Rev. Stat. (1951) c. 83, § 17.

domestic judgments⁵ and actions to recover real property must be commenced within twenty years.⁶

LIMITATIONS ON FOREIGN JUDGMENTS

In the limitations acts of several of the states an explicit period of time is set out during which actions may be brought based on the judgments of other states.⁷ The Illinois Limitations Act contains no provision directly relating to foreign judgments but does state:

Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided for* shall be commenced within five years next after the cause of action accrued.⁸

The Illinois Supreme Court, as early as 1879, in the case of *Bemis v. Stanley*⁹ construed this section to apply as a limitation to the commencement of actions on foreign judgments, stating:

An action brought in this state upon a judgment rendered in another state, is undoubtedly a civil action, within the intent and meaning of this section of the statute, and unless some other section of the act has provided a period of limitation to govern the time within which an action shall be brought in this state upon a foreign judgment, then Sec. 15 must control.¹⁰

In *Davis v. Munie*,¹¹ the court rejected a contention by the plaintiff that the cause of action upon a judgment rendered in another state did not accrue in Illinois until the defendant moved into the state of Illinois and became subject to the jurisdiction of its courts, saying:

It is claimed, however, by defendant in error, that all parties being non-residents of the state, the cause of action did not accrue in Illinois until the decedent moved into the state and became subject to the jurisdiction of its courts, and that therefore the Statute of Limitations did not begin to run until that time. The section of the statute under consideration says nothing about the place where the cause of action may accrue. It provides only that the action shall be commenced within five years next after the cause of action accrued. Statutes of limitation are statutes of repose intended to prescribe a definite limit of time within which the remedies included within their provisions must be prosecuted. They are designed to afford security from stale demands, when,

⁵ Ill. Rev. Stat. (1951) c. 83, § 24(b).

⁶ Ill. Rev. Stat. (1951) c. 83, § 1.

⁷ N.Y. Civil Practice Act (Gilbert-Bliss, 1941) § 44.

⁸ Ill. Rev. Stat. (1951) c. 83, § 16. ⁹ 93 Ill. 230 (1879).

¹⁰ *Ibid.* at 231. See also, *Schemmel v. Cooksley*, 256 Ill. 412, 100 N.E. 141 (1912); *Ambler v. Whipple*, 139 Ill. 311, 28 N.E. 841 (1891).

¹¹ 235 Ill. 620, 85 N.E. 943 (1908).

from lapse of time, death of witnesses, failure of memory, loss of vouchers, and other causes, the true state of the transaction may be incapable of explanation and the rights of the parties cannot be satisfactorily investigated. Whether the cause of action has accrued within or without the state, the reason for the statute is the same and the legislature has seen fit to make no distinction.

The assumption is unwarranted that the statute does not begin to run until service of process may be had upon the debtor in this state. The statute itself has fixed the time when the cause of action accrues.¹²

In *Truscon Steel Co. v. Biegler*,¹³ the Illinois Appellate Court held that the same force and effect is given to judgments of foreign countries as is given to the judgments of sister states. Here the original judgment was entered in a Canadian court. However, the court applied the rule that a promise to pay the debt had started the limitation period running anew:

A consideration of these cases, we think, shows that the courts were construing particular statutes as to the meaning of the word "contract" as used in the several statutes. As we have heretofore stated, whether a judgment is a "contract" within the meaning of Sec. 15 of our Statute of Limitations is not of importance for the reason that the instant case, which is a suit on a foreign judgment is a "civil action" within the meaning of Sec. 15 (*Bemis v. Stanley*, 93 Ill. 230), and therefore, like other civil actions, the five year bar of the "Statute" is lifted when a new promise to pay the judgment is made before the five years when the suit is commenced.¹⁴

As the court in the *Davis* case indicated, the limitations statutes are designed to afford security from stale demands, and protection from inability to learn the true state of affairs due to lapse of time, death of witnesses, failure of memory, loss of records and destruction of vouchers. Judgments of the courts of record of other states are subject to no such disabilities, and require no more proof than a certification of their authenticity. There exists, therefore, little logic in Illinois for the disparity in recognition of its own judgments and recognition of those of sister states. Forty one of the forty nine jurisdictions grant an *equal* limitation to foreign judgments and judgments of their own states, and even where a longer period exists in favor of domestic judgments, in no state is the difference as great as in Illinois. Generally, as in the New York Civil Practice Act,¹⁵ the same chapter and section embraces consideration of the foreign as well as domestic judgment. It is suggested that the limitation of foreign judgments is one which should be treated specifically

¹² *Ibid.*, at 621 and 944.

¹³ 306 Ill. App. 180, 28 N.E. 2d 623 (1940).

¹⁴ *Ibid.*, at 187 and 625.

¹⁵ N.Y. Civil Practice Act (Gilbert-Bliss, 1941) § 44.

by statute. A simple enactment making the limitation of actions on judgments of foreign states of the same duration as that applicable to domestic judgments would seem desirable.

APPLICATION OF TOLLING PROVISIONS

The tolling provision of the Illinois Limitation Act reads:

If, when the cause of action accrues against a person he is out of the state, the action may be commenced within the times herein limited, after his coming into or return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action. But the foregoing provisions of this section shall not apply to any case, when at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue, were or are residents of this state.¹⁶

The present Illinois tolling statute was passed in 1872, and amended in 1873. The first sentence of the present statute is practically the same as that of 1872, the only change in 1873 being the exception with regard to persons and causes of action having their origin outside the state of Illinois. A statute of almost identical language was enacted in the state of New York¹⁷ and in similar language tolling statutes have been enacted in most jurisdictions.¹⁸

It is proposed here to make a study of the operation of tolling statutes, particularly of Illinois, with some comparison with New York and other like enactments. First, however, an examination will be made of the interpretation given to the tolling statute by Illinois courts, and interpretations given the borrowing statute of this state, particularly in areas where the two may be said to be conflicting in scope.

A. General Operation of Tolling Statute

The Illinois Supreme Court in 1892, in *Wooley v. Yarnell*,¹⁹ gave a broad interpretation to the tolling statute, holding that a resident debtor who left the state of Illinois after incurring an obligation here and then resided in another state for a period greater

¹⁶ Ill. Rev. Stat. (1951) c. 83, § 19. The statute is tolled also during the time that a debtor fraudulently conceals himself. Ill. Rev. Stat. (1951) c. 83, § 23. This provision, however, which is based on individual conduct, will not be examined here.

¹⁷ N.Y. Civil Practice Act (Gilbert-Bliss, 1952) § 19.

¹⁸ For examples of tolling statutes of several states, see: Florida Statutes Annotated (1943) § 95.07; Civil Procedure and Probate Code of Calif. (Deering, 1949) § 351; Texas Civil Statutes (Vernon, 1941) Art. 5537.

¹⁹ 142 Ill. 442, 32 N.E. 891 (1892).

than that covered by the limitation statute of the other state could not upon his return to Illinois plead the Illinois statute of limitations or that of any other state.

The pleas relied upon by the defendant do not contain averments sufficient to bring them within the rule indicated, and necessary to bar the action. It is nowhere averred that the defendant was a non-resident of the State when the note became due and the cause of action accrued. If he was a resident of the State then, and afterwards departed from the State and acquired a residence in another State, his residence there for a time sufficient to bar an action, had one been brought there, would constitute no bar when he returned and was sued in this State.²⁰

In *Hibernian Banking Assn. v. The Commercial National Bank of Chicago*,²¹ the court sustained the right of a mortgage holder to commence action on his mortgage more than ten years after the statute of limitations would have normally expired on the basis that, the debtor being out of the state and the indebtedness not being barred, the mortgage itself was not barred. The court said:

But after the cause of action accrued in this state, Caulfield departed from this state and took up his residence in Dakota and by Sec. 18, and the construction given to it in *Wooley v. Yarnell*, 142 Ill. 442, the time of his absence cannot be counted as any part of the time limited for the commencement of the action, and Sec. 20 does not apply for the reason that the cause of action accrued in the state before his departure, and it could not be said to have arisen in Dakota. The six year statute in Dakota therefore had no application. Deducting the period of his absence, ten years had not elapsed when the suit was begun and the bar of the statute of this state had not become complete.²²

In *Janeway v. Burton*,²³ the Illinois Supreme Court further interpreted this section to toll the running of the statute in the case of a defendant who had never come into the state. Burton had commenced an action of trespass in the Superior Court of Cook County against Janeway and others, and the defendants pleaded the five-year statute of limitations. To the reply of the plaintiff that the defendants were residing in New Jersey and out of Illinois at the time the trespass occurred in Illinois, and had not since been within the state, the defendant rejoined that the action was barred by the six-year New Jersey statute, and the action being barred in New Jersey was barred in Illinois. This plea the court denied, saying:

The bar of the foreign statute, even when pleaded in proper form, is available only when the cause of action accrued in the foreign state. . . . Nor is the bar of the Illinois statute available. Appellants were out of the state when

²⁰ *Ibid.*, at 449 and 893.

²² *Ibid.*, at 539 and 923.

²¹ 157 Ill. 524, 41 N.E. 919 (1895).

²³ 201 Ill. 78, 66 N.E. 337 (1903).

the action accrued, and have not since then come into or returned to the state. The Statute, therefore, never began to run in their favor.²⁴

In a case also involving a non-resident defendant who was not in the jurisdiction of the forum at the time that the cause of action accrued, the New York courts refused to bar the action. Thus, in *Backus v. Severn*²⁵ the court applied the New York tolling provision to deny to a defendant the benefits of the statute of the state of Connecticut, which if applied, would have barred the action.

B. *Effect of Tolling Statutes in Matters Involving Confession of Judgment Clauses*

Generally, Illinois courts apply the tolling provisions even though the creditor could have pursued his remedy in the absence of the debtor from the jurisdiction, as in the case of judgments by confession. Such judgments by confession are subject, however, to peculiar defects arising from their *ex parte* nature. For example, the Illinois Supreme Court in *Matzenbaugh v. Doyle*²⁶ reversed a judgment entered by confession during vacation which judgment was entered more than ten years after the date of warrant of attorney. The court called attention to the entry of the judgment in vacation by a clerk:

The entry of judgment having been made in vacation, before the clerk,—a mere ministerial officer,—it will be aided by none of those presumptions which prevail where judgments are entered in open court; and hence no presumption will be indulged in that evidence was presented or heard other than that appearing in the record. If, then, the authority of the attorney to execute the *cognovit* was not shown at the time the judgment was entered, the clerk was without authority to enter up the judgment, and such entry was improvidently made.²⁷

The record there failed to show either a partial payment within ten years, a new promise in writing, the non-residence of the defendant, or any other fact which would arrest or otherwise affect the running of the statute. The court continued:

The rule that a defendant, to avail himself of the defense of the Statute of Limitations, must plead the statute, which the plaintiff now seeks to invoke, can have no application here, since, as the entry of the judgment by confession was purely *ex parte*, no opportunity was afforded the defendant to set up such defense by plea. It became incumbent upon the plaintiff, therefore, to show affirmatively that his debt, which appeared to be more than ten years

²⁴ *Ibid.*, at 79 and 337.

²⁵ 127 Misc. N.Y. 776, 216 N.Y.S. 381 (Sup. Ct., 1926).

²⁶ 156 Ill. 331, 40 N.E. 935 (1895).

²⁷ *Ibid.*, at 335 and 935.

overdue, was in some way taken out of the operation of the statute, without such plea on the part of the defendant. As he failed to do so, the inference against him must be deemed to be conclusive that his debt was barred at the time he obtained his judgment by confession, and, consequently, that the warrant of attorney was no longer operative.²⁸

The Illinois Appellate Court considered a judgment entered by confession in *Mitchell v. Comstock*.²⁹ A statement of claim filed in the Municipal Court of Chicago was based on a principal note with a warrant of attorney authorizing any attorney to appear and confess judgment. The statement of claim set forth further that the plaintiff had been a resident of the state of Illinois during all of the time in question and that the defendant had resided out of the state since the date of the making and execution of the note fourteen years earlier. A cognovit was filed by an attorney confessing the claim of a plaintiff, and an order entered by the court reciting that the court had read the pleadings including affidavits attached to the statement of claim and, having heard the testimony of plaintiff and another witness and arguments of counsel, found the note was executed by defendant at Chicago, Illinois, that the defendant was not a resident of Illinois and had not been a resident of Illinois since the date of executing the note, and that he had resided out of the state all of that time and that the plaintiff was and still is a resident of this state. Judgment was entered for plaintiff. Upon later petition by the defendant, this judgment was vacated but the order vacating the judgment was later reversed by the Appellate Court which stated:

The judgment in the instant case was entered in term time, as are all judgments in this county. Our Supreme Court has held that such a judgment is entitled to the same presumptions as are indulged in favor of judgments entered after the service of process. . . . The same presumptions are indulged in favor of a judgment by confession entered in term time as in a judgment entered by service of process. . . . The rule is different where the judgment is entered by confession in vacation. . . . In the latter case a compliance with all the statutory requirements to authorize the confession of judgment must appear on the face of the record, while in the former case every presumption will be indulged in favor of the judgment even to the extent of presuming that a sufficient warrant of attorney was produced and proved to the court though another which was insufficient appeared in the files.³⁰

In answer to the contention that the statute against a debtor who had departed from the state was not tolled because the creditor could

²⁸ *Matzenbaugh v. Doyle*, 156 Ill. 331, 337, 40 N.E. 935, 937 (1895).

²⁹ 305 Ill. App. 360, 27 N.E. 2d 620 (1940).

³⁰ *Ibid.*, at 371 and 625.

at all times have enforced his remedy by confession, the court stated:

This argument is another way of saying that the plaintiff cannot recover because the note contained a confession clause. To so hold would be, in effect, to repeal by judicial action the plain language of section 18 of the statute of limitations. . . . There is nothing in the Limitations Act which establishes a definite rule as to the tolling of the statute during the absence of the debtor as between a note that contains a confession clause and one that does not contain such a clause.³¹

The Appellate Court considered this question again in 1941 in the case of *Book v. Ewbank*.³² In this case the court sustained the entry of a judgment by confession in 1939 upon a promissory note due February 26, 1921. The court distinguished the *Matzenbaugh* case in the following language:

It is next insisted that the judgment is void because the face of the note showed that the statute of limitations had run against it, and that before the court could have jurisdiction in the matter, there must be facts and circumstances brought to the attention of the court by affidavit or otherwise, to show the reason why the statute of limitations did not run against the note, but had been tolled. Appellant as his authority for this position cites the case of *Matzenbaugh v. Doyle*, 156 Ill. 331. An examination of that case discloses the court did say that in cases of judgment by confession where it appears on the face of the pleadings that the statute of limitation had run against the note, there should be something to show wherein the statute of limitations had been tolled, for without that the judgment is void. An examination of the facts in this case discloses that the judgment was confessed before the clerk of the court who is purely a ministerial officer. We think a different rule applies to the confession of a judgment in open court, and one before the Clerk of the court. . . . It is our conclusion that it was not necessary or proper for the plaintiff at the time he took the judgment, to state any facts negating the running of the statute of limitations.³³

The question was examined by the Supreme Court in the case of *Parsons v. Lurie*.³⁴ There a plaintiff had confessed judgment on a note more than ten years after its maturity. The court permitted a collateral attack on the judgment by one who was not a party to the proceedings on the theory that the warrant of attorney had expired and the judgment was therefore void, saying:

We have held . . . that the warrant of attorney confers no authority to confess judgment on a note after the plaintiff's remedy for the debt thereby evidenced has become barred by limitation. If there was no authority to confess judgment on the note in question, then the judgment is void and can be attacked collaterally.³⁵

³¹ *Mitchell v. Comstock*, 305 Ill. App. 360, 367, 27 N.E. 2d 620, 624 (1940).

³² 311 Ill. App. 312, 35 N.E. 2d 961 (1941).

³³ *Ibid.*, at 318 and 964.

³⁴ 400 Ill. 498, 81 N.E. 2d 182 (1948). ³⁵ *Ibid.*, at 506 and 186.

None of the foregoing cases question the right of a plaintiff to call to his aid the tolling provisions of the act in suit upon a note that has a confession clause. There does seem to be a question, however, as to correct procedure. In the *Mitchell* case a statement was affirmatively made in the pleadings to invoke the tolling statute and plaintiff's judgment by confession was unassailable. In the *Matzenbaugh* decision the judgment was defeated because as one entered by the *clerk in vacation*, it was held to be entitled to no presumptions, and there being nothing in the record to show facts which would toll the statute, the record was insufficient to sustain the judgment. The Appellate Court decision in the *Book* case indicated that in the case of judgment by confession entered in open court, it is not necessary to allege facts negating the running of the statute of limitations, but the language of the later Supreme Court decision in the *Parsons* case throws some doubt on the reliability of the *Book* case. While it is true in the *Parsons* case that no reliance was made on the provisions of the tolling statute, nevertheless from the reading of the decision it would appear that the court held the power of attorney void after the limitation period had run. As a procedural matter, prudence indicates that pleadings in such circumstances should allege affirmatively any facts which remove the action from the running of the statute.

C. *Effect of Tolling Statute Where Service May Be Had By Operation of Law*

The Illinois tolling statute contains no exceptions regarding service of summons against non-residents by operation of law. The New York statute contains the following explicit exception:

. . . . But this section does not apply in either of the following cases:

1. While a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.
2. While a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served.³⁶

Despite the absence in the statutes of such a provision, the Illinois court has held the tolling provision to be inoperative when invoked

³⁶N.Y. Civil Practice Act (Gilbert-Bliss, 1952) § 19.

on behalf of an Illinois resident against a non-resident operator of a motor vehicle, in an action for injuries, on the ground that the injured party in a motor vehicle accident involving a nonresident of Illinois may effect service by leaving summons with the Secretary of State at any time within the limitations period.³⁷ The Appellate Court held that by the provisions of the Motor Vehicles Act "the Legislature obviously intended to create an exception to section 18 of the Limitations Act which provides for the tolling of the statute while a defendant is out of the State."³⁸

Similarly, in the case of a foreign corporation, the Appellate Court has held that since the foreign corporation operating in Illinois is subject to process in Illinois, it may plead the statute of limitations, even though not an Illinois resident.³⁹

New York courts have applied the tolling provisions of its statute in the case of a non-resident involved in a motor vehicle accident on the basis that appointment of Secretary of State for service of summons is not included in the appointments, for substituted service set forth in the New York statute.⁴⁰ Illinois courts have read into the tolling statute a provision not there found, and the attitudes of New York and Illinois courts on this question are inconsistent.

D. Other Applications of the Tolling Statute

The tolling provision has been held to extend the statute of limitations in favor of foreclosure of a mortgage, during the time the debtor was outside the jurisdiction even though the creditor at any time could have proceeded against the mortgaged property.⁴¹ The question of actual absence is one of fact for the jury.⁴² But the section does not apply when it is shown that only remote grantees of the original mortgagor have been absent from the jurisdiction during the running of the statute.⁴³

Tolling statutes, it can be seen, exist in Illinois as well as in the other jurisdictions examined, for the protection of the resident creditor against the absent or nomadic debtor. In Illinois and in

³⁷ Nelson v. Richardson, 295 Ill. App. 504, 15 N.E. 2d 17 (1938).

³⁸ Ibid., at 510 and 19.

³⁹ Thornton v. Nome and Sinoak Co., 260 Ill. App. 76 (1931).

⁴⁰ Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S. 2d 749 (Sup. Ct., 1938).

⁴¹ Jones v. Foster, 175 Ill. 459, 51 N.E. 862 (1898).

⁴² Emory v. Keighan, 94 Ill. 543 (1880).

⁴³ Von Campe v. City of Chicago, 140 Ill. 361, 29 N.E. 892 (1892).

other states, the language of the tolling provisions conflicts with that of the borrowing provisions of the various statutes of limitations. It is the purpose here to examine the interrelation of these enactments, and suggest a possible resolution to the conflicts which have arisen. First, an examination of decisions involving the borrowing statutes will be undertaken.

APPLICATION OF ILLINOIS BORROWING STATUTES

Matters litigated in Illinois, but which have arisen elsewhere between non-residents of Illinois, are subject to the following statutory provision:

When a cause of action has arisen in a state or territory outside this state, or in a foreign country, and by the laws thereof, an action thereon cannot be maintained by reason of lapse of time, an action thereon shall not be maintained in this state.⁴⁴

By the terms of this section, the Illinois courts, in the consideration of matters which have arisen outside the state, adopt as their own the limitation statutes of the other states.

The statute in force in the state of California is identical except for the addition of the following sentence:

... except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued.⁴⁵

The borrowing statute of New York is more definite in its scope:

Where a cause of action arises outside this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply.⁴⁶

Both the California and New York acts thus in terms limit the application of their borrowing statutes to causes where both parties are or were non-residents, and contain specific exceptions favoring their own residents. While earlier New York decisions indicated that the borrowing statute might extend the limitations period beyond that of the forum,⁴⁷ the New York Civil Practice Act now

⁴⁴ Ill. Rev. Stat. (1951) c. 83, § 21.

⁴⁵ Civil Procedure and Probate Code of Calif. (Deering, 1949) § 361.

⁴⁶ N.Y. Civil Practice Act (Gilbert-Bliss, 1952) § 13.

⁴⁷ See *Meysers v. Credit Lyonnais*, 259 N.Y. 399, 182 N.E. 61 (1932).

clearly limits actions subject to borrowing statutes to the law of the forum.⁴⁸

In Illinois, as between two non-residents litigating a cause arising in another state, both of whom had resided within that state for a period of time greater than that of the statute of limitations of such state, no great question arises when they bring actions in Illinois courts. Such was the situation in *Hyman v. Bayne*.⁴⁹ There an action was commenced in Illinois in assumpsit. Defendant pleaded the then sixteen-year Illinois statute of limitations to which plaintiff replied that defendant had not been within the state of Illinois for the space of sixteen years since the cause of action accrued. Defendant rejoined that the cause of action accrued beyond the limits of the state of Illinois and that sixteen years had elapsed before the suit was brought. He further pleaded, as additional defense, that the cause of action arose in the state of Maryland, that the defendant was a citizen thereof, that neither plaintiff nor defendant were residents of the state of Illinois, and that the cause of action here sued upon was barred in Maryland at the end of three years. He concluded since no action could be maintained in the state of Maryland, none could be maintained in the state of Illinois. The court sustained defendant's plea of the Maryland statute, holding the Illinois borrowing statute applicable.

On the face of it, the Illinois borrowing provision would seem to apply in all situations where a cause of action has arisen *outside* of Illinois, but judicial construction has resulted in its being applied only to a foreign cause of action which involves two non-resident parties.⁵⁰ It obviously does not apply where the cause of action arises in Illinois between two residents, nor does it apply where the cause of action arises in Illinois between two non-residents.

It is maintained in numerous Illinois cases that the borrowing statute necessarily applies only to two non-residents and a foreign cause of action. The reason for such a holding is expressed by Justice Wall in *Berry v. Krone*:

⁴⁸ "Except as provided by section thirteen of this act an action upon any cause of action may be brought in a court of this state within the time limited therefor by the laws of this state, and may not be brought thereafter, and the time limited for bringing a like action by the laws of the place of residence of the person against whom the cause of action arose or by the laws of the place where the cause of action arose, shall not apply." N.Y. Civil Practice Act (Gilbert-Bliss, 1952) § 55.

⁴⁹ 83 Ill. 256 (1876).

⁵⁰ *Berry v. Krone*, 46 Ill. App. 82 (1891).

It will be seen that by the second paragraph of Section 18, it is provided that the preceding provisions are not to apply to any case where neither debtor nor creditor resides in the state when the cause of action accrues. Section 20 then applies to the cases not covered by Section 18; that is, to cases where *both* debtor and creditor are nonresidents when the cause of action accrues. It cannot be supposed that the legislature intended by Section 20 to nullify and sweep away the provision contained in Section 18, and yet this is what has been done unless Section 20 is construed to apply only to those cases which are, by the latter clause of Section 18, carved out and excepted from its operation.⁵¹

This often repeated dicta is open to some question. For example, is it so clear that if two Chicagoans are involved in a collision just over the Indiana state line that an Illinois court would not borrow the Indiana limitation if it were shorter than Illinois? Similarly it is not difficult to imagine two Illinois residents entering into contracts in New York to be performed in New York. Should Illinois courts not apply the New York bar if it is shorter? The cases do not seem to give an answer to this specific problem, unless one takes the above remarks as the definitive answer.

In Illinois the borrowing statute will be applied, if at all, to shorten the period within which action must be brought. In any case where there is a difference between the applicable period of limitation of the forum and that of the state of origin of the cause of action, the shorter period is always used.

In *Warren v. Clemenger*,⁵² defendant, a Canadian resident, had executed a promissory note to plaintiff, also a Canadian resident, some nineteen years before the action was commenced in Illinois. Defendant had resided in many states over the period of nineteen years, but in no one of them for a period equal to the statutory period. The Illinois court applied the Illinois ten-year limitation and barred the suit.

Conceivably it might be possible to borrow another state's statute of limitation in its entirety, that is to borrow both the normal limitation provision and the tolling provisions in a case where they might be pertinent. In *Hyman v. Bayne*,⁵³ a mention of this possibility is made:

It is, however, claimed that the plea was bad, because it failed to aver that appellants remained in Maryland until the bar was completed. But, according to approved precedents, that was unnecessary. It is a well recognized rule of pleading, that, where a statute is set up and relied on for a recovery or as a defense, the party pleading need not refer to or negative an exception or a

⁵¹ *Ibid.*, at 84, 85.

⁵² 120 Ill. App. 435 (1905).

⁵³ 83 Ill. 256 (1876).

proviso, unless it is contained in the enacting clause. When not found in the enacting clause, it must be set up by the other party, and he must show that his claim is not affected by the exception. Hence, it is believed that all approved precedents of pleas of the Statute of Limitations have no averment that the case is not within the saving clause of the statute. If the exception exists, it usually is found in the replication to the plea, and it is thus shown that the statute has not barred the claim for which the suit is brought.

By demurring to the plea, appellee admits that the statute of Maryland is as set out or averred in the plea, and the court cannot take notice of a foreign statute, or presume that it contains any saving clause; that must be brought to the notice of the court by the pleadings, if such an exception exists. This rule is familiar to the entire profession, and requires the citation of no authorities for its support or illustration. We must, therefore, hold that this plea presented a good bar to the action, and that the court below erred in sustaining the demurrer to it, and should have required appellant to reply.⁵⁴

It should be noted however that the exceptional provision had *not* been set out in the pleadings and not having been pleaded it was not actually considered.

Illinois, as the *forum*, might have no objection to permitting suit on a foreign cause of action, for example, between two non-residents where the Illinois period had not run and the shorter bar of the place of origin would have cut off the action there but for the departure of the defendant from such jurisdiction prior to the full running of the time limited. This would permit borrowing the tolling statute of another jurisdiction to a circumscribed extent—that is, in so far as it did not preserve for litigation in Illinois a cause of action beyond the period set for such causes when they arise in Illinois.

No Illinois cases have been found where the court has actually borrowed the foreign tolling provision. As a general rule it is said that this can be done to preserve a cause of action at least for a period *after* the defendant has come into the state of the forum equal to the ordinary limitation of the forum. Thus it is stated:

In cases where it is sought to apply the statute of limitations of a foreign jurisdiction, the court of the forum will apply the statute as a whole and deduct from the time of its running the period of absence from the state where the cause of action accrued if that statute excludes such period. Where a cause of action is not barred in a foreign jurisdiction where it arises because of defendant's absence therefrom it has been held not barred when brought *within the period prescribed by the state of the forum after the defendant begins to reside* therein although the total time is more than such period.⁵⁵

The facts of *Warren v. Clemenger*⁵⁶ and *Strong v. Lewis*⁵⁷ are close to this situation. In neither case was a tolling provision of a

⁵⁴ *Ibid.*, at 264.

⁵⁶ 120 Ill. App. 435 (1905).

⁵⁵ 54 C.J.S., Limitations § 212(b) (1948). ⁵⁷ 204 Ill. 35, 68 N.E. 556 (1903).

foreign statute involved, although the former holding suggests that the Illinois court would not follow the rule set forth in *Corpus Juris*.

The Illinois courts apply different rules as to "when a cause of action arises" when considering cases involving non-residents suing on foreign causes of action than they do when considering action on matters arising between parties, one or both of whom are Illinois residents.

In *Strong v. Lewis*⁵⁸ an obligation was incurred in the state of Virginia, made payable in Virginia in 1881, from which state the debtor shortly thereafter removed to New York, where he resided for a period greater than that covered by the New York statute of limitations. The defendant answered that no action was brought within six years, nor was any action ever brought in New York and that at the time the cause of action accrued, neither the defendant nor the person in whose favor the cause accrued were residents of Illinois.

The court applied the borrowing statute to hold that the action, barred by the state of New York, was likewise barred in Illinois. The court in sustaining the plea of the New York limitation held:

... when appellant permitted appellees' testator to go into the state of New York and permitted the bar of the statutes of that state to become complete, he lost all right under the laws of Illinois, thereafter to maintain suit against him, and that when he came into the state of Illinois, he came clothed with all the privileges that the law of the state of New York conferred upon him.⁵⁹

Since the borrowing provision uses the language "when a cause of action has arisen" the courts of Illinois must define the term before making a finding as to the question of which law is applicable. The term was defined by the court in the *Strong* case as follows:

The words, 'when a cause of action has arisen,' as they occur in the statute pleaded, should be construed as meaning, when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked, or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the *place* where the *cause of action had its origin*.⁶⁰

The language "without regard to the place where the cause of action had its origin" has been treated in *Wooley v. Yarnell*⁶¹ where the court said:

⁵⁸ *Ibid.*

⁵⁹ *Strong v. Lewis*, 204 Ill. 35, 37, 68 N.E. 556, 566 (1903).

⁶⁰ *Ibid.*

⁶¹ 46 Ill. App. 112 (1891).

No one will question the correctness of this expression when it is limited in its application to two litigants, each of whom are residents of other states and neither ever a resident of Illinois. In such cases, if one of such non-residents implead the other in Illinois, the defendant may avail himself of the fact that the action is barred by the law of any state of which he is or was a resident for a sufficient length of time to complete the bar under the laws of that state, without regard to whether the place where the cause of action had its origin was the state of the plaintiff or the defendant. In such cases the cause of action could not have had its origin in Illinois, and the general expression used by the court, that the place of origin of the cause of action is immaterial, must be understood as applicable only when the cause of action has arisen out of this state.⁶²

In *Davis v. Munie*,⁶³ the Illinois Supreme Court further explained the views of the *Wooley* and *Strong* cases when it stated:

. . . that where the maker and payee of a promissory note both resided out of this state at the time of its maturity, a cause of action arose in the state where the payee resided and in any other to which he removed, and if he resided in any state long enough to be entitled to the protection of the Statute of Limitations of such state, such statute would be treated as a bar in this state under § 20 of our Limitations Act; but if the defendant resided in this state at the date of the maturity of his note, and afterward removed to another state and resided there during the full period of limitation as provided by the statute of such other state, while a cause of action would have arisen against him in such other state, he would not be entitled to the benefit of § 20 of our Limitation Act because of the provision of § 16 which saves to the plaintiff, during the defendant's residence out of the state, the benefit of the cause of action which had accrued before his departure.⁶⁴

Where the cause involves an Illinois plaintiff or a default in Illinois a different view is taken. In *Orschel v. Rothschild*,⁶⁵ an action was commenced in Illinois in November, 1920 upon a demand obligation incurred in October, 1914. The obligation was executed at Detroit, Michigan, payable in Chicago. Plaintiff at all times was an Illinois resident and defendant a resident of Michigan. The Illinois statute of limitations on such a claim was ten years; the Michigan statute six years.

The defendant's plea that the Illinois borrowing statute made the shorter Michigan bar applicable was rejected by the court:

The balance unpaid was then due the plaintiff in Chicago. It is the obligation of the defendant under the indemnity contract to pay to the plaintiff what was due, and not the obligation of the latter to seek the former. The money was due in Chicago to the plaintiff, and it follows that the cause of action arose *here immediately upon default and nonpayment*. Putting that con-

⁶² *Ibid.*, at 117.

⁶⁴ *Ibid.*, at 623 and 944.

⁶³ 235 Ill. 620, 85 N.E. 943 (1908).

⁶⁵ 238 Ill. App. 353 (1925).

struction on the facts, Section 20, which covers only cases where 'a cause of action has arisen out of this State,' is inapplicable.⁶⁶

In this case, the court seemed to accept as a matter of course the conflict between the borrowing and the tolling statute, and suggested that, at any rate, the provisions of the tolling statute control.⁶⁷

While the tolling provisions of the Illinois Limitations Act are intended to carve out of the rights given to debtors by the limitations act a reservation in favor of the resident creditor, this reservation as now construed by the Illinois courts and by courts of other jurisdictions operates to suspend the limitations act in some cases indefinitely. An example of the inequitable operation of this statute as now construed can be had by a comparison of the *Strong* case and *Hibernian Banking Assn. v. Commercial National Bank*.⁶⁸ In the *Strong* case, in an action commenced in Illinois, defendant pleaded the bar of the statute of the state of New York where he had resided for a period greater than that of the statutory period of New York. The Illinois court there held that since a cause of action existed in the state of New York for a period of time greater than that embraced by the New York statute of limitations, the defendant became clothed with the privilege of the New York Limitations Act and carried that cloak with him wherever he went. The court there stated that the words "cause of action had arisen" had nothing to do with the place *where* the obligation fell due, but had to do with the possibility of personal jurisdiction over the defendant because of his residence in New York.

The difference in the *Hibernian Bank* case was that the cause of action arose in Illinois. There the court adopted another construction for actions having their origin in the state of Illinois. In that case a debtor after executing a note in the state of Illinois removed to the state of Dakota where he resided for a period longer than that of the Dakota statute of limitations.

But after the cause of action accrued in this state, Caulfield departed from this State and took up his residence in Dakota, and by Section 18 and the con-

⁶⁶ *Ibid.*, at 358.

⁶⁷ "The action here accrued on February 9, 1914. At that time, and when and since the contract was made, the plaintiff was and remained a resident of Illinois, and the defendant was all that time a resident of Michigan. In such a case, that is of diverse residence, it has been held that section 20 does not apply, and that section 20 only applies to cases where both debtor and creditor are nonresidents of this State when the cause of action accrues." *Orschel v. Rothschild*, 238 Ill. App. 353, 358 (1925).

⁶⁸ 157 Ill. 524, 41 N.E. 919 (1895).

struction given to it in *Wooley v. Yarnell*, 142 Ill. 442, the time of his absence cannot be counted as any part of the time limited for the commencement of the action, and Section 20 does not apply for the reason that the cause of action accrued in this state before his departure, and it could not be said to have arisen in Dakota. The six year statute of Dakota, therefore, had no application. Deducting the period of his absence, ten years had not elapsed when the suit was begun, and the bar of the statute of this state had not become complete.⁶⁹

This application of the tolling and borrowing section is consistent with the rule set forth in *Orschel v. Rothschild*,⁷⁰ which subordinates the borrowing section to the tolling section.

The borrowing statute will not be invoked in a cause involving an Illinois resident. This interpretation of the borrowing statute is based on a negative portion of the tolling statute, exempting its operation in the case of non-residents of the state of Illinois.⁷¹

Tolling statutes generally were enacted long prior to mechanical transportation and at a time when there was little travel or movement between cities, let alone states. Such statutes were designed to and did relieve the resident creditor of the difficult task which would ensue were he to pursue a nomadic debtor. But on the sound theory that obligations at some time must be put to rest, even those obligations kept alive by operation of the tolling statute should have some termination. Another interpretation of both the tolling statutes and the borrowing statutes would subordinate the application of the tolling provision to that of the borrowing statute. Such an approach could affect the question and conflict as to interpretations of limitations acts.

Generally the several states, by enacting tolling exceptions in favor of their own residents, have on some occasions gone beyond the benefits sought in the enactments. At the present time, the application of statutes modifying limitations generally operates to extend, for the most part, the limitations act. It is suggested that some consideration be given to greater emphasis on application of limitations acts of the several states with fewer exceptions by way of tolling provisions. Such emphasis would lend a consistent pattern throughout the states in the matter of limitations generally. The adoption by the forum of the limitations act of another state, if not subject to any tolling provision, likewise would result in fewer conflicts as between the states themselves and a limitation existing in one state would likely exist in others.

⁶⁹ *Ibid.*, at 539 and 923.

⁷⁰ 238 Ill. App. 353 (1925).

⁷¹ *Berry v. Krone*, 46 Ill. App. 82 (1891).

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