

# Louisiana Law Review

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Volume 10 | Number 3

*Student Symposium: Comments on the Conflict of*

*Laws*

*March 1950*

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## Limitation of Actions in the Conflict of Laws

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### Repository Citation

Mary Bird Perkins, *Limitation of Actions in the Conflict of Laws*, 10 La. L. Rev. (1950)

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the same result as the court of the state in which it is sitting. It was also pointed out that there is no important counter-consideration because the state burden of proof rule can be easily ascertained and applied by the federal court.

That the burden of proof is often the decisive factor in tort cases cannot be disputed. It follows, therefore, that when a court refuses to apply the foreign burden of proof rule, the plaintiff's chances of recovering in the same manner and to the same extent as if the action had been brought at the place of wrong are either enlarged or diminished. Uniformity of result is certainly not accomplished. If we admit the validity of the basic choice of law policy, it must be agreed that the court of the forum should classify as procedural only those foreign laws which would seriously inconvenience the court and hamper the effective administration of justice. The court should not be influenced by a classification made in a purely domestic case; its classification should be controlled by choice of law policy. Is there any strong countervailing argument to justify the court of the forum to classify a burden of proof rule as procedural? Such cases as *Sampson v. Channel* and *Precourt v. Driscoll* furnish the answer. Certainly it cannot be said that ascertaining and applying a foreign burden of proof rule is so onerous a duty as to justify a court to place the ideal of uniformity in jeopardy. The proper rule, then, is that the court of the forum should apply the foreign rule regulating the burden of proving contributory negligence.

The Louisiana cases<sup>39</sup> recognize the general distinction between substantive and procedural matters, but no cases have been found which discuss the precise problems treated herein. Unbound by precedents, the way is open for the courts of Louisiana to give full effect to the basic choice of law policies.

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#### LIMITATION OF ACTIONS IN THE CONFLICT OF LAWS

When there is a conflict between the statute of limitations of the forum and that of a foreign jurisdiction, the law of which applies generally to the legal relation in question (*lex causae*), which statute should be applied? The general rule in Anglo-American common law, contrary to that prevailing on the conti-

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39. *Wasson v. Gatling*, 184 So. 596 (La. App. 1938); *Matney v. Blue Ribbon, Inc.*, 12 So.(2d) 249 (1942), affirmed 202 La. 505, 12 So.(2d) 253 (1942).

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ment,<sup>1</sup> is that statutes of limitation are procedural law and, therefore, the law of the forum applies.<sup>2</sup>

This rule seems to have been developed chiefly for convenience. A court, desiring to keep its dockets clear, is likely to give preference to causes that are not barred under the law creating that court. If a cause were barred under the statute of limitations of the forum, even though not barred in the "jurisdiction of origin," the courts did not wish to congest their dockets, particularly since stale claims are more difficult of proof. In order to justify this action it was found necessary to create a rule of law; hence the rule that statutes of limitation are procedural. In this way the courts were able to apply the statute of limitations of the forum rather than that of the *lex causae*. The result of a general application of this rule was this: If a cause of action was not barred where it arose but was barred at the forum, there was no recovery;<sup>3</sup> if a cause of action was barred where it arose but not barred at the forum, there was recovery.<sup>4</sup>

Louisiana agrees with the majority view that statutes of limitation are procedural and that the statute of the forum prevails. Since 1825, Article 13 of the Code of Practice has provided that, "The forms, the effects, and the prescription of actions, are governed by the law of the place where they are brought. . . ." In the Louisiana cases on the subject, the court, with or without reference to Article 13, accepts and applies the general American rule which classifies statutes of limitation as procedural.<sup>5</sup>

1. Lorenzen, *The Theory of Qualification and the Conflict of Laws* (1920) 20 Col. L. Rev. 247, 256.

2. Ailes, *Limitation of Actions and the Conflict of Laws* (1933) 31 Mich. L. Rev. 474, 486; Lorenzen, *The Theory of Qualification and the Conflict of Laws* (1920) 20 Col. L. Rev. 247, 256; Stumberg, *Principles of Conflict of Laws* (1937) 141; Note (1918) 27 Yale L. J. 1078; Restatement, *Conflict of Laws* (1934) § 604.

3. *British Linen Co. v. Drummond*, 10 B. & C. 903 (K.B. 1830); *McElmoyle v. Cohen*, 38 U.S. 312, 10 L.Ed. 177 (1839).

4. *Huber v. Steiner*, 2 Bing. N.C. 202, 132 Eng. Reprint 80 (C.P. 1835).

5. "The laws of the place of contract, in relation to limitations or prescription must be left out of view. The doctrine appears to be fully established that the *lex fori* alone governs in respect to such matters." *Union Cotton Manufactory v. Lobdell*, 7 Mart.(N.S.) 108 (La. 1828).

"The law of the forum governs the question of prescription. . . ." *Erwin v. Lowery*, 2 La. Ann. 314, 315 (1847).

"It is unnecessary to inquire what would be the effects of such an acknowledgment, under the statute of limitations in Mississippi. Questions of prescription affect the remedy and must be determined by the law of the forum." *Newman v. Goza*, 2 La. Ann. 642, 646 (1847).

". . . the general rule being that the law of the forum governs prescription of actions." *Brown v. Stone*, 4 La. Ann. 235, 236 (1849).

". . . we think it settled by the highest authority, that the prescription of the forum or place where the remedy is sought, must govern in all suits for the recovery of debts." *Bacon v. Dahlgreen*, 7 La. Ann. 599, 605 (1852).

According to the view of most American courts, not only is the period of the statute of limitations of the *lex fori* applied, but the law of the forum is applied also to the incidents connected with the statute of limitations, such as interruptions and the effect of acknowledgments.<sup>6</sup> The law of the forum has been used even to determine if the instrument is a "specialty" within the terms of the forum statute of limitations.<sup>7</sup>

In all of the reported cases on the question, Louisiana apparently agrees with this majority view that the law of the forum is to be applied to all incidents of any problem concerning the limitation of actions. In *Lacaste v. Benton*,<sup>8</sup> a suit on an instrument executed in Mississippi and negotiable by the law of Mississippi but not by the law of Louisiana, it was decided that the Louisiana prescription of five years applicable to negotiable paper did not apply but that the Louisiana prescription of personal actions (ten years) did apply. The court said that the forum, in deciding which of its prescriptive laws to apply, must use its own laws in determining the character of the foreign contract.

In *Young v. Crossgrove*,<sup>9</sup> the Louisiana prescription of ten years was again applied to a Mississippi negotiable instrument, because the instrument was not negotiable under the law of Louisiana. In *Bacon v. Dahlgreen*,<sup>10</sup> the *Crossgrove* case was cited with approval, but it was held that the Mississippi instrument was negotiable under Louisiana law.

As stated above, the rule that statutes of limitation are procedural resulted in the enforcement of claims barred in the foreign state but not in the forum. The enforcement of these claims was certainly not the purpose for which the rule was developed, and the Anglo-American courts recognized the inequity of enforcing claims barred by the law reasonably anticipated by the parties. Hence, exceptions to the rule were developed to take care of some of the claims for which the foreign

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" . . . article 13 of the Code of Practice lays down the rule that a plea of prescription of an action is governed by the law of the place where the action is brought." *Meridian Fertilizer Factory v. Collier*, 193 La. 815, 819, 192 So. 358, 359 (1939).

The same view is expressed in the Louisiana federal cases. *Tinsley v. Mills*, 36 F. Supp. 621 (D.C. La. 1940).

6. *Dunn Const. Co. v. Bourne*, 172 Miss. 620, 628, 159 So. 841, 843 (1935).

7. *Ailes*, *supra* note 2, at 490.

8. 3 La. Ann. 220 (1848).

9. 4 La. Ann. 233 (1849).

10. 7 La. Ann. 599 (1852).

state had a shorter prescriptive period than did the forum. However, the courts did not simply announce that, if the foreign statute provided a longer period of limitation than did the forum, the statute of the forum would be applied, and that if the foreign period was shorter, the foreign statute would be applied to bar the action. On the contrary, the courts, while maintaining their general rule, proceeded by establishing a distinction between (1) foreign "statutes of limitation" which were said to be *procedural* and therefore not applicable by the forum, and (2) foreign prescriptions which not only barred the action but "extinguished" the *substantive* right. The latter class was excepted from the application of the law of the forum.<sup>11</sup> Louisiana recognizes this exception,<sup>12</sup> although in only one Louisiana case was it decided that a foreign time limit was substantive.<sup>13</sup>

There are two kinds of time limitations to be considered in determining whether a foreign prescription falls within this "substantive" exception:<sup>14</sup> (1) *special statutes* which limit the time in which a particular action can be brought and (2) *general statutes* limiting the time in which certain major classes of actions can be brought.

It is generally held that when a statute creates a substantive right not known at common law, and simultaneously provides that suit must be commenced within a specified time, that the time limitation is an integral part of the right and, once the statute has run, the right is "extinguished."<sup>15</sup> Wrongful death statutes have been treated as examples of this type of special statute. Of such a statute, Chief Justice Waite said, in the case of *The Harrisburg*: "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone."<sup>16</sup> Other examples are actions to enforce the statutory liability of stockholders<sup>17</sup> and actions under the Federal Employers' Liability Act.<sup>18</sup>

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11. 3 Beale, *Conflict of Laws* (1935) § 604(3).

12. *Harrison v. Stacy*, 6 Rob. 15 (La. 1843); *Succession of Ducker*, 10 La. Ann. 758 (1855).

13. *Harrison v. Stacy*, 6 Rob. 15 (La. 1843).

14. The well-settled rule that title conferred on an adverse possessor by the loss of the former owner's right to sue for the recovery of property due to the running of a foreign statute of limitations will be recognized by the courts of other jurisdictions will not be discussed herein.

15. Ailes, *supra* note 2, at 495; 3 Beale, *op. cit.* *supra* note 11, at § 605.1.

16. 199 U.S. 199, 214, 7 S.Ct. 140, 147 (1886).

17. *Terminal Co. v. National Bank of Baltimore*, 99 Fed. 635 (C.C.A. 4th 1900).

18. *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199, 39 S.Ct. 75 (1915).

In *Davis v. Mills*,<sup>19</sup> the United States Supreme Court held that, although the new right of action was created in one statute and the statutory limitation provided in a subsequent statute, the right itself was modified, since the separate statute was "directed to the newly created right so specifically as to warrant saying that it qualified the right."<sup>20</sup>

The Louisiana Workmen's Compensation Act was thus treated by the Supreme Court of Mississippi as a special statute creating a new liability and limiting the period of remedy in such a way as to make it substantive law and applicable in Mississippi.<sup>21</sup>

Although there are no reported cases in Louisiana in which a foreign *special* statute of limitation is discussed, it seems probable that, if such a case were to arise, we would adopt the view of our sister states and of the United States Supreme Court.

How does a court decide if a *general* statute of limitations "destroys the right" in such a way as to make it substantive law?

Whenever possible, the forum will use the law of the foreign state—whether statutory or case law—to determine the nature of the statute.

The forum will first look to the decisions of the courts of the state of the foreign statute to see if the statute has been treated as substantive or procedural in non-conflict of laws situations.

In *Baker v. Stonebroker*,<sup>22</sup> The Missouri Supreme Court held that a Maryland statute providing that no bill, bond or judgment should be "good, pleadable or admitted in evidence" after twelve years had "extinguished" the right and thus barred the suit. To reach this decision the Missouri court used a Maryland case which had held that the running of the statute destroyed the claim to the extent that a subsequent acknowledgment could not revive a right of action.

In *Eingartner v. Illinois Steel Company*,<sup>23</sup> the Wisconsin Supreme Court, in seeking to determine if an Illinois statute of limitations was substantive or procedural, admitted that Illinois decisions had held that only the remedy was destroyed, in the

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19. 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067 (1904).

20. *Davis v. Mills*, 194 U.S. 451, 454, 24 S.Ct. 692, 694, 48 L.Ed. 1067, 1070 (1904).

21. *Dunn Const. Co. v. Bourne*, 172 Miss 620, 159 So. 841 (1935).

22. 36 Mo. 338 (1865).

23. 103 Wis. 373, 79 N.W. 433 (1899).

sense that the obligor could revive the obligation, but then cited other decisions in which the completion of the period had been held by the Illinois courts to create a "vested right" of property in the obligor, which right could not be taken away by subsequent legislative action without constitutional violation. The Wisconsin court said: ". . . while the test of whether the statute of limitations of Illinois, when fully run upon a claim, bars the right to such claim in the courts of this state, is whether it extinguishes such right in Illinois, the test of whether such is its effect in such state is whether the right to the benefit of the statutory bar is there considered a constitutional privilege that cannot be taken from its possessor adversely."<sup>24</sup>

Since the Illinois view of the barred cause of action as constitutionally protected property of the obligor agreed with that of the Wisconsin court in the interpretation of its own statute of limitations (although this view is not held by the United States Supreme Court),<sup>25</sup> the Wisconsin court seemed relieved that it could seize on it as a test and ignore the fact that the obligation was subject to revival.

The Mississippi case of *Dunn Construction Company v. Bourne*<sup>26</sup> serves not only as an illustration of the usual treatment of a special statute of limitations, but also as an illustration of the persuasive effect which a decision of the foreign court may have on the forum's classification of a foreign statute of limitations.

Suit was brought under the Louisiana Workmen's Compensation Act. The defendant employer pleaded twelve months' prescription under the Louisiana act. The plaintiff rebutted by pleading that he had sued the defendant's insurer within the twelve months, that the Louisiana Workmen's Compensation Act makes employer and insurer solidarily liable, and that Article 2097 of the Louisiana Civil Code of 1870 provides that a suit against one debtor in solido interrupts prescription with regard to all.

The Mississippi Supreme Court found that the period of limitation of the Louisiana Workmen's Compensation Act had been held by the Louisiana Supreme Court to be *substantive law* (in

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24. *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 379, 79 N.W. 433, 435 (1899).

25. "We are unable to see how a man can be said to have a property right in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the word 'property' it is new to call the defense of lapse of time, to the obligation to pay money, property." *Campbell v. Holt*, 115 U.S. 620, 629, 6 S.Ct. 209, 214, 29 L.Ed. 483 (1885).

26. 172 Miss. 620, 159 So. 841 (1935).

*White v. Louisiana Western Railroad Company*,<sup>27</sup> a non-conflict of laws case in which it was decided that a cause of action arising before a change in the period of limitation could not be affected by the change). The court then said, "We are therefore of the opinion that we are justified in construing this period of limitation to be a part of the substantive law of the state of Louisiana, which is binding upon us, not being contrary to our own public policy. . . ." <sup>28</sup>

Although it willingly applied the prescription of the Louisiana Workmen's Compensation Act, the Mississippi court refused to use Article 2097 of the Civil Code of 1870 to determine that suit against the insurer interrupted prescription as to the employer. The court held, "The general statute of limitations and interceptions thereto, or interruptions thereof, are part of the procedure of Louisiana and not part of its substantive law . . . they cannot be applied by us. . . ." <sup>29</sup>

If the foreign state has other statutes regulating the effect of the statute of limitations, the court of the forum will look to them in much the same fashion as it would look to the jurisprudence of the foreign state to determine the effect of the statute.

*Wood and Selick v. Compagnie General Transatlantique*<sup>30</sup> was a federal circuit court case in which suit was brought for negligence in the carriage of goods at sea. The contracts embodied in the bills of lading stipulated that French law should govern. The question was whether the prescription of one year of the French Commercial Code should apply or whether the provision was merely procedural and did not apply in an American court. To decide whether the prescription destroyed the right or merely barred the remedy, the court looked to the French Civil Code. They concluded that, by the provisions of the French Civil Code, the defense of prescription must be pleaded by the defendant, and not only was a promise to perform, after the statutory period had run, binding without new consideration, but that the obligor could "renounce" prescription in various ways, and that all these provisions tended to show that the substantive right was never destroyed and that the French prescriptive period was procedural law. Since foreign procedural law is not applicable in the United States, the action was held maintainable.

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27. 174 La. 303, 140 So. 486 (1932).

28. *Dunn Const. Co. v. Bourne*, 172 Miss. 620, 628, 159 So. 841, 843 (1935).

29. 172 Miss. 620, 628, 159 So. 841, 843.

30. 43 F.(2d) 941 (C.C.A. 2d, 1930).

In *McMerty v. Morrison*,<sup>31</sup> the Missouri court approached the Louisiana law of prescription in much the same way as the United States circuit court approached the French law in the *Wood and Selick* case. The action—one on a promissory note—was not barred in the forum, but the Louisiana prescription of five years was pleaded. The question was “whether the civil code prevailing in Louisiana, where it prescribes the time for bringing actions, is to be regarded as a mere statute of limitations, or whether it operates as a complete extinguishment of the debt.”<sup>32</sup> After an examination of the Civil Code, it was decided that since prescription might be waived by an express or tacit renunciation, or by a new promise or acknowledgment, there was no extinguishment of the debt and hence the Louisiana prescriptive period did not apply in Missouri.

In *Smith v. Webb*,<sup>33</sup> the Texas Court of Civil Appeals, in an action on a tort committed in Louisiana and barred by the Louisiana prescription of one year, but not by the statute of the forum, applied the statute of the forum because the general Louisiana codal provisions indicated that the Louisiana prescription was procedural.

The law of the foreign state, whether embodied in decisions or codified, has been regarded by most courts as a satisfactory basis for classifying foreign statutes of limitation as substantive or procedural. Robertson has endorsed this idea, saying “The judge of the forum will not sit as a court of appeal on the foreign law. If the foreign law considers its rule to be either substantive or procedural, he will not decide that it has no business to do so. . . .”<sup>34</sup>

However, some commentators have questioned the validity of this basis for classification.

Lorenzen writes, “According to the proponents of the secondary classification theory, if the law of the forum says that the statute of limitations (that is, of the forum) is substantive and the law governing the contract says it (i.e., the statute of the locus) is procedural, the action would be maintainable even though it is not brought within the time prescribed by either law. The statute of limitations of the forum would be applicable only to contracts governed by the law of the forum and the foreign

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31. 62 Mo. 140 (1876).

32. 62 Mo. 140, 143.

33. 181 S.W. 814 (Tex. App. 1916).

34. Robertson, *Characterization in the Conflict of Laws* (1940) 246-247.

statute of limitations, being procedural, would be disregarded as the courts do not enforce the procedural laws of another country."<sup>35</sup>

In a German Supreme Court case<sup>36</sup> this unfortunate result was actually reached. The action was upon a Tennessee contract. The Tennessee statute of limitations was held to be procedural, according to American law, and the German statute was held to be substantive. Thus no statute of limitation was held to apply and the action was allowed, although the period of both statutes had expired.

It does not seem, however, that such an anomaly is likely to arise in any American forum for the reason that, in addition to a special statute that might be "substantive," every state is likely to have a general *procedural* limitation which would eventually prescribe any contract action.

Certainly, when a forum does not follow the general rule and recognize that the characterization by a foreign state of its own statute is binding, then the forum is not using the substantive law of the foreign state, because classification by a state of its own statutes is substantive law.

When the forum has no jurisprudence or other statutory law of the foreign state to guide it, the forum must interpret the statute according to its language. Such interpretations have been far from consistent.<sup>37</sup> But if there is an applicable decision or statute of the foreign state, the forum, in most cases, will choose to disregard the language of the statute. Even though the foreign statute uses language which indicates that it is "substantive" or that it is "procedural," the court of the forum usually feels compelled to follow a decision or statute of the foreign court which embodies a contrary conclusion.

The cases of *Baker v. Stonebroker*,<sup>38</sup> *Wood and Selick v. Compagnie General Transatlantique*,<sup>39</sup> and *McMerty v. Morrison*<sup>40</sup> illustrate the insistence of the forum on following the classification of the foreign state. In each of these cases the strict language of the statute indicated that it was "substantive." But

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35. Lorenzen, *The Qualification, Classification or Characterization Problem in the Conflict of Laws* (1941) 50 *Yale L.J.* 743, 759.

36. German Supreme Court (January 4, 1882) 7 *R.G.Z.* 221.

37. "The conclusion is irresistible that statutes are often labelled 'substantive' or 'procedural' depending upon the result sought." *Alles*, *supra* note 2, at 493.

38. 36 *Mo.* 338 (1865).

39. 43 *F.(2d)* 941 (C.C.A. 2d, 1930).

40. 62 *Mo.* 140 (1876).

in each of them, the statute was held to be procedural on the basis of a statute or decision of the foreign state.

Does Louisiana follow the method of the majority of American states in classifying general statutes of limitation, that is, by relying on the law of the foreign state and only construing the language of the statute when there is no relevant statute or decision of the foreign state? Though there are but few Louisiana cases in which the problem is even raised, it may safely be said that Louisiana does use this popular method of classification.

In *Taylor and Haddon v. Joor*<sup>41</sup> and *Succession of Ducker*<sup>42</sup> a Mississippi statute was pleaded which provided that judgments should not be revived by scire facias, nor any action brought on them, after the expiration of seven years. On the face of the statute, the prescription was held to be inapplicable in Louisiana. In the *Joor* case there was no contention that the statute was substantive. In the *Ducker* case the question was raised but not supported by any law of Mississippi, hence dismissed with little discussion.

In *Harrison v. Stacy*<sup>43</sup> a Mississippi statute was pleaded which provided that a claim against a decedent's estate *should be forever barred and the estate discharged therefrom* unless it were presented within the required time. In accordance with the opinion generally held by the American courts with regard to such "statutes of non-claim," the Louisiana Supreme Court held this statute to be substantive.

In *Succession of Ducker*<sup>44</sup> the same Mississippi statute as was raised in the *Stacy* case was pleaded, and the court decided that it was procedural solely because there had been a ruling by the Mississippi court subsequent to the *Stacy* case that it merely "barred the remedy."<sup>45</sup>

In both the *Stacy* and *Ducker* cases the court accepted the idea that a foreign "substantive" statute of limitations might bar the action without making any attempt to reconcile this conclusion with the language of Article 13 of the Code of Practice which

41. 7 La. Ann. 272 (1852).

42. 10 La. Ann. 758 (1855).

43. 6 Rob. 15 (La. 1843).

44. 10 La. Ann. 758 (1855).

45. The Mississippi statute pleaded in the *Stacy* and *Ducker* cases was not a statute of limitation but a "statute of non-claim," an entirely different type of statute. See Rheinstein, *Cases on Decedents' Estates* (1947) 1076-1079. However, because the Louisiana Supreme Court treated the statute as an ordinary statute of limitation, the *Stacy* and *Ducker* cases are support for the proposition that Louisiana will give preference to a foreign state's characterization.

plainly states that the prescription of actions is governed by the law of the place where they are brought.

Since Louisiana is apparently willing to apply the case law of the foreign state in the classification of its statute of limitations—even when such an application is almost an absurdity in view of the language and the purpose of the statute—it seems clear that there should be an equal willingness to apply the statutes of the foreign state in classification.

These cases were, of course, decided before Louisiana had enacted legislation “borrowing” the bar of other states, but in cases where such legislation does not apply it seems probable that Louisiana will continue to follow the majority method of classification.

Judge Story adopted and lent weight to a qualification of the idea that a foreign statute of limitations may extinguish substantive rights, namely, that both parties must have been present in the jurisdiction throughout the statutory period.<sup>46</sup> This qualification is followed by only a minority of states<sup>47</sup> and there is no mention of it in the Louisiana jurisprudence.

The cases which have been discussed thus far, those applying the “substantive” exception, have been those in which the action was not barred by the forum law, but was barred by the *lex causae*. By the use of this exception, the foreign statute of limitations was allowed to prevail.

However, in cases involving “substantive” prescription, when the forum has a shorter period of limitation, the authorities in America are about equally divided.<sup>48</sup>

Some hold that the longer prescriptive period of the foreign state should govern, just as it would if the statute of limitations of the *lex causae* were shorter than that of the forum—since foreign substantive law is always the “law of the case.” Others hold that the forum should set the “upper limit” of the action and should not be forced to give to foreigners rights denied to its own citizens, as this would violate “public policy.”

The idea that the forum should set the upper limit seems appropriate, in view of the fact that the general rule that statutes of limitation are procedural was developed to prevent the enforcement of *longer* foreign periods. The “substantive” exception

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46. Story, *Conflict of Laws* (8 ed. 1883) § 582.

47. Ailes, *supra* note 2, at 497.

48. *Ibid.*

was developed solely to allow the enforcement of *shorter* foreign periods and not intended to allow suits barred by the forum law.

Even some of those writers who believe that in all cases if the action has prescribed under the *lex causae* it should not be allowed in the forum believe that in the converse situation the shorter period of the forum should govern. Pillet,<sup>49</sup> Weiss,<sup>50</sup> and Lorenzen<sup>51</sup> hold the view that the forum should not be expected to enforce claims barred by its laws.

In those Louisiana cases where the action was barred under Louisiana law, but not under the *lex causae*, the bar of Louisiana was applied with no discussion of whether the foreign law was substantive or procedural. In *Succession of Lucas*<sup>52</sup> a judgment not barred by the French law of Guadeloupe, where it was rendered, was barred from suit in Louisiana by the ten year prescription of personal actions.

There was a suit on a Texas judgment in *White v. Davis*.<sup>53</sup> Both Louisiana and Texas had the same prescriptive period of ten years. The period had run, but the judgment had been revived *ex parte*, which interrupted prescription in Texas. But since the Louisiana law of prescription applied and Article 3547 of the Civil Code provides that judgments must be revived contradictorily to interrupt prescription, the suit was barred.

However, since the 1949 United States Supreme Court case of *Union National Bank of Wichita v. Lamb*,<sup>54</sup> the action of the Louisiana court in the *Davis* case might be held to constitute a denial of "full faith and credit"; but this is merely an application of the "full faith and credit" clause and not an application of general conflict of laws rules.

In the *Lamb* case, a Colorado judgment was obtained in 1927 and revived there in 1945. The plaintiff sued in Missouri on the revived Colorado judgment. Under the Missouri statute of limitations the life of a judgment was limited to ten years from its rendition or revival. Missouri law also provided that there could be no revival of a judgment after ten years from its rendition. The Missouri Supreme Court held that, under the rule that the *lex fori* governs limitations of actions, the Missouri statute of

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49. 2 Pillet, *Traité Pratique* (1923) 299.

50. 2 Weiss, *Traité theoretique et pratique de droit international privé* (2 ed. 1912) 406.

51. Lorenzen, *The Statute of Limitations and the Conflict of Laws* (1918) 28 Yale L.J. 492, 497.

52. 11 La. Ann. 296 (1856).

53. 174 La. 390, 141 So. 6 (1932).

54. 69 S.Ct. 911 (U.S. 1949).

limitations of ten years had run on the original judgment and by Missouri law there could be no revival. On certiorari to the United States Supreme Court, it was decided that there had been a denial of "full faith and credit" to the Colorado *revived* judgment by the Missouri court. The United States Supreme Court differentiated cases in which the forum might apply its own period of limitation to a foreign judgment and a case, such as the present one, in which construing the original judgment as not revived (because of the law of the forum) denies to the *revived* judgment recognition *as a judgment*, and hence violating the "full faith and credit" clause.

In reversing the judgment of the Missouri court, the United States Supreme Court did not discuss the contention, also not passed on by the Missouri Supreme Court, that the revival was by the law of Colorado, not a new judgment, but only an extension of the period of limitation of the old judgment. Justice Frankfurter, in his dissent, said that it was not clear that the Colorado *reviver* created a *new* judgment and that the case should be remanded to the state court for determination of this question.

#### *Tolling Statutes*

Notwithstanding the general rule that the limitation of the forum applies, many states have enacted "tolling statutes" which prevent the statute of limitations from running in favor of an absent debtor.

A small minority of these states limit "the suspensory effects of tolling statutes to instances where the cause of action arose within the state, where the plaintiff became a resident before the bar of the forum was complete or where the defendant was a resident at the time such action arose."<sup>55</sup> But usually these statutes suspend the period of limitation even if the cause of action arose out of state and between non-residents.

These statutes created the possibility that an action might be barred by the law of the state where the "cause of action" arose, but that that bar could not be used because the prescription was procedural and the forum would apply its own prescriptive period, but that such time limit of the *lex fori* could not be used because the defendant was an absentee. This condition may still exist under such a "tolling statute" unless it has been modified by the so-called "borrowing statute."

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55. Comment (1935) 35 Col. L. Rev. 762, 763.

*Borrowing Statutes*

Most of the states have enacted "borrowing statutes" with regard to the statutes of limitation of foreign states. The general idea of the "borrowing statute" is that an action barred "elsewhere" will not be enforceable at the forum, even though it would not be barred by the ordinary limitation of the forum. Where is "elsewhere"? Most of these statutes use the limitation of the state "where the cause of action arose" and hold that, in the case of a contract, this is the place of performance, and in the case of a tort, it is where the injury occurred.<sup>56</sup>

But there are still problems. Some cases have held that when the defendant is suable only at his residence, the cause of action arises there. Some states adopt the bar of the residence of the defendant. "Residence" is usually construed to mean the residence at the time the cause of action arose. But a few cases have construed it as meaning any *later* residence in a state in which the action became barred. Under the decisions interpreting some statutes, the defendant must still be living in the state of "residence" when the bar becomes complete.<sup>57</sup>

In Illinois, a cause of action is said to have arisen in any state where the defendant can be sued and the action is held to be barred if the statute of any one of these states has run.<sup>58</sup>

In Louisiana, the "borrowing statute" is embraced in Article 3532 of the Revised Civil Code of 1870 and first came into our law by Act 168 of 1855.<sup>59</sup> That article provides "Whenever any contract or obligation has been entered into, or judgment rendered, between persons who reside out of the State of Louisiana, and to be paid or performed out of this State, and such contract, obligation or judgment is barred by prescription or the statute of limitations of the place where the contract or obligation is to be performed or judgment executed, the same shall be considered and held as barred by prescription in Louisiana, upon the debtor who is thus discharged subsequently coming into this State."

Article 3547 of the Revised Civil Code, which relates to the prescription of judgments, provided as follows: "All judgments for money, whether rendered within or without the state, shall be prescribed by the lapse of ten years from the rendition of such

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56. *Id.* at 764, 765.

57. 75 A.L.R. 203, 204 (1931).

58. 75 A.L.R. 213 (1931).

59. La. Rev. Stats. of 1870, § 2808 [Dart's Stats. (1939) § 2047].

judgments," to which was added by Act 278 of 1936, "except that no judgment for money rendered without the state if it is prescribed or unenforceable under the laws of the state where it was rendered."<sup>60</sup>

For a judgment, contract, or other obligation of another state, barred there, but not barred in Louisiana, to fall under Civil Code Article 3532, these conditions must be present:

1. The judgment or contract must have been made or rendered out of state between parties residing out of state, and
2. The foreign statute must have run before the debtor came to Louisiana.<sup>61</sup>

In *Newman v. Eldridge*<sup>62</sup> a judgment had been barred in Mississippi. Our court used the Louisiana prescription and allowed the action because the borrowing provision of Civil Code Article 3532 did not apply in that the judgment debtor came to Louisiana before the Mississippi bar was complete.

In the suit of *Roper v. Monroe Grocery Company*,<sup>63</sup> which was certified to the supreme court, the suit had been brought on a Colorado judgment and the debtor, residing in Colorado, did not come to Louisiana until the bar of the Colorado statute was complete. It was held that Article 3532 was applicable although the plaintiff had been a resident of Louisiana.

In *Manderville v. Hunton*<sup>64</sup> and *Young and Geraghty v. Bowie*<sup>65</sup> the Louisiana "borrowing statute" was applied to bar a judgment barred by a Mississippi statute.

An interesting case is *Morton and Hammer v. Valentine*,<sup>66</sup> decided in 1860. This was a suit in Louisiana on a Mississippi judgment. A Mississippi statute, providing that no judgment could be revived by scire facias or action brought on it after seven years from the rendition, was pleaded as applicable under the Louisiana "borrowing statute." But a Mississippi court *had* allowed the judgment to be revived after the seven years. The court said that to be barred in Louisiana under the "borrowing statute" a judgment must be *completely* barred where rendered and since the Mississippi court *had* allowed the revival, obviously the judgment was not barred where rendered. Hence the

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60. Art. 3547, La. Civil Code of 1870.

61. *Walworth v. Routh*, 14 La. Ann. 205 (1859).

62. 107 La. 315, 31 So. 688 (1902).

63. 171 La. 181, 129 So. 811, 14 La. App. 270, 129 So. 815 (1930).

64. 15 La. Ann. 281 (1860).

65. 3 La. App. 8 (1925).

66. 15 La. Ann. 150 (1860).

Louisiana law of prescription was applied, under which the Mississippi scire facias was a suit interrupting prescription, and the suit was allowed.

*Park v. Markley*,<sup>67</sup> a Louisiana court of appeal case, emphasized that neither Civil Code Article 3532 nor the amendment to Article 3547 changes the rule that a judgment barred in Louisiana (although not barred under the law of the state of rendition) will not be enforced in Louisiana, but this conclusion might be limited by the effect of the *Lamb* case.

So, although Louisiana under its "borrowing statute" will enforce a shorter prescriptive period, its courts will not enforce a longer one. However, in an appropriate case involving "substantive" prescription, our court might follow those courts which have adopted longer periods of limitation under like circumstances.

It is apparent that although Article 3532 provides for the use of the foreign statute of limitations as to both foreign contracts and foreign judgments *only* if the bar has completely accrued before the debtor comes to Louisiana, the amendment to Article 3547, which refers only to foreign judgments barred out of state, interposes no such condition.

It seems, therefore, since the amendment to Article 3547 by Act 278 of 1936, that a judgment debtor might plead a foreign statute of limitations that had started running while he was a non-resident of Louisiana, but had only accrued since he had established residence in Louisiana.

Since the matter of enforcing foreign statutes of limitation has now been relegated largely to the field of so-called "borrowing statutes," there is no just reason why the entire field should not be covered by such statutes as to all claims, including those expressed in judgments.

There is also no just reason why a state should enforce obligations created and barred by prescription in a foreign state. Although pleas of prescription may not be good morally and may not be favored by the law, it is probable that this fact is outweighed by the advantage to the public of having its courts kept clear of stale claims. It is suggested that this would be a good field for uniform legislation.

MARY BIRD PERKINS