RECENT CASES

Conflict of Laws—Foreign Statute of Limitation Applied—[Federal].—Plaintiff employee sued defendant, a Michigan corporation, in a federal district court in Michigan, alleging he had contracted tuberculosis as a result of the defendant's failure to ventilate properly a tunnel in a Minnesota mine as prescribed by a Minnesota statute.[1] The Minnesota statute of limitations provides that all actions based "upon a liability created by statute" shall be brought within six years,[2] while the Michigan statute of limitations requires personal injury actions to be brought within three years.[3] The district court applied the Michigan statute in bar of the action. On appeal, *held*, that the Minnesota statute of limitations controlled. Judgment reversed. *Maki v. George R. Cooke Co.*[4]

It is a fundamental policy of the conflict of laws that the decision of a case should depend as little as possible upon the accident of its being brought in one forum rather than in another.[5] However, this policy in favor of uniformity of decision is qualified to the extent that in matters of procedure the law of the forum will control.[6] This exception is required by reasons of practical convenience. A court would be greatly hampered if it followed peculiar foreign rules of practice when deciding a case in accordance with foreign substantive law.[7] However, going beyond the necessities of convenience, courts have tended to expand the procedural category where possible in order to effectuate certain domestic policies. Since resort to "public policy" as a device for extending the operation of domestic law has been severely criticized,[8] courts have felt it necessary to dress up considerations of policy in terms of the distinction between substance and procedure in order to apply domestic law.[9]

English courts, desiring to keep their judicial machinery free from stale claims, litigation of which is thought to inconvenience defendants and also to require considerably more time than "fresh" claims, have uniformly labeled statutes of limitation as pro-

[1] Minn. Stat. (Mason, 1927) § 4174.

[2] Minn. Stat. (Mason, 1927) § 9191.

[3] Mich. Stat. Ann. (Henderson, 1938) § 27.605.

[4] 124 F. (2d) 663 (C.C.A. 6th 1942).

[5] Rest., Conflict of Laws c. 12, intro. note, at 699 (1934); Sohn, New Bases for Solution of Conflict of Laws Problems, 55 Harv. L. Rev. 978, 981 (1942); cf. Erie R. Co. v. Tompkins, 304 U.S. 64 (1937); Sampson v. Channell, 110 F. (2d) 754 (C.C.A. 1st 1940).

[6] Rest., Conflict of Laws c. 12, intro. note, at 699, § 585 (1934); Story, Conflict of Laws §§ 556, 557 (Bigelow's ed. 1883); Stumberg, Conflict of Laws 128 (1937).

[7] Stumberg, Conflict of Laws 128–29 (1937); Rest., Conflict of Laws c. 12, intro. note, at 699 (1934).

[8] Stumberg, Conflict of Laws 152 (1937); Goodrich, Conflict of Laws 14–15, 231–35 (2d ed. 1938); Rest., Conflict of Laws § 612 (1934); Goodrich, Foreign Facts and Local Fancies, 25 Va. L. Rev. 26 (1938).

[9] Stumberg, Conflict of Laws 128 n. 1, 129, 137, 141, 148–49 (1937); Lorenzen, The Statute of Frauds and the Conflict of Laws, 32 Yale L. J. 311, 327 et seq. (1923); Lorenzen, The Statute of Limitations and the Conflict of Laws, 28 Yale L. J. 492 (1919); cf. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333 (1933).

cedural.[10] This attitude is understandable in light of the fact that continental statutes contain limitation periods which in many cases are several times as long as their Anglo-American counterparts.[11] Continental courts, on the other hand, have ordinarily treated problems of limitations as substantive, having regard primarily for the justified expectation of the parties as embodied in the uniformity principle.[12]

American courts have followed the English precedent.[13] However, while the adoption of the approach that statutes of limitation are procedural might have been considered advantageous from the English standpoint, it is not well adapted to use within our American federal system, where uniformity is especially desirable,[14] and where large discrepancies in the length of periods of limitation do not exist. For unless such a large discrepancy exists between statutes of limitation, the application of one limitation rather than the other will have little or no effect on the machinery of the forum—far less effect than certain matters concerning burden of proof which have been held to be substantive.[15] Likewise, from an interstate standpoint, it cannot be asserted that statutes of limitation are an expression of the "strong" public policy of the forum, and so must prevail over "foreign" law, any more than this can be said of any other ordinary law in force at the forum.[16] Lastly, and most important, in our federal system, with distances shrinking, it is often easy for a plaintiff, whose action has been barred by the limitation under the "proper law,"[17] i.e., the law of the jurisdiction whose sub-

[10] Goodrich, Conflict of Laws 201 (2d ed. 1938); Lorenzen, The Statute of Limitations and the Conflict of Laws, 28 Yale L. J. 492, 496 (1919). "English lawyers give the widest extension to the meaning of the term 'procedure.'" Dicey, Conflict of Laws 798 (Keith's ed. 1927).

[11] For instance, the German Civil Code (1896) § 195 provides for a basic limitation period of thirty years. The French Civil Code (1904) art. 2,262 provides for a basic limitation of thirty years. Art. 2,263 provides for a period of twenty-eight years.

[12] Lorenzen, op. cit. supra note 10, at 495 et seq.

[13] Oliver v. Crewdson's Adm'r, 256 Ky. 797, 77 S.W. (2d) 21 (1934); Connecticut Valley Lumber Co. v. Maine Central R. Co., 78 N.H. 553, 103 Atl. 263 (1918); Harris v. Quine, L.R. 4 Q.B. 653 (1869); Stumberg, Conflict of Laws 140 (1937); Goodrich, Conflict of Laws § 82 (2d ed. 1938); Dicey, Conflict of Laws 799 (Keith's ed. 1927).

[14] Cf. Rest., Conflict of Laws § 612, comment c (1934).

[15] While rules of pleading are said to be procedural, whether the burden of proof of contributory negligence falls upon the plaintiff or the defendant has been held in some jurisdictions to be determined by the lex loci delicti rather than the lex fori. Fitzpatrick v. Internat'l R. Co., 252 N.Y. 127, 169 N.E. 112 (1929); Olson v. Omaha & Council Bluffs Street R. Co., 131 Neb. 94, 267 N.W. 246 (1936); Precourt v. Driscoll, 85 N.H. 280, 157 Atl. 525 (1931); Southern R. Co. v. Robertson, 7 Ga. App. 154, 66 S.E. 535 (1909). And since Erie R. Co. v. Tompkins, 304 U.S. 64 (1937), federal courts have applied local rules regarding burden of proof on the basis that such rules were substantive. See Sampson v. Channell, 110 F. (2d) 754 (C.C.A. 1st 1940); Developments in the Doctrine of Erie R. Co. v. Tompkins, 9 Univ. Chi. L. Rev. 113, 122–23 and nn. 53–54 (1941).

[16] Rest., Conflict of Laws § 604, comment a, § 612, comment b (1934).

[17] The term "proper law" is used here instead of the more familiar term "lex loci," in view of the fact that the latter term denotes the "law of the place where the cause of action arose," a metaphor closely connected with the so-called vested rights theory of conflict of laws. A considerable difference of opinion exists as to the desirability and validity of the vested rights

stantive law is applicable, to "shop around"[18] for a forum with a longer limitation, and so succeed with the action. This has prompted a number of states to pass so-called "borrowing" statutes, which provide that where a cause of action is barred by the proper law, it is also barred at the forum.[19] Similarly, a defendant, by dodging tactics, may be able to defeat an action valid under the proper law.

Justification for calling statutes of limitation procedural is usually derived from the well-known rule that a simple promise to pay a debt barred by the statute of limitations is enforceable without additional consideration; and since new contractual rights may not be created without consideration, it is concluded that statutes of limitation affect only the remedy and leave the right in abeyance.[20] This conceptual argument is a non sequitur. In the first place, if it is the new promise which is enforceable, it is difficult to see how the old right can still be said to exist. Secondly, even if the old promise were enforceable on the basis of the new one,[21] the argument fails to explain how a defendant can bind himself to release his bar to the remedy without new consideration. The fact that either promise is enforceable would seem to be better explained as an exception to the doctrine of consideration.[22] Indeed, some courts have held the antecedent debt to be "moral consideration."[23] The situation is analogous to a promise to pay a debt discharged in bankruptcy,[24] and a promise made after attaining majority to pay debts incurred while a minor,[25] both of which are enforceable without new consideration. It has never been contended that because debts discharged in bankruptcy or incurred during minority may be reaffirmed without new consideration, these aspects of the law of bankruptcy and the law respecting minors are procedural rather than substantive. A final indication that a statute of limitation affects more than the remedy is found in the fact that if an action has been barred by the statute of limita-

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theory. See Stumberg, Conflict of Laws 7–15 (1937). Because of the question-begging character of "lex loci," the term "proper law" is chosen. It has achieved considerable currency in England and Canada as denoting that body of substantive law which is applicable to a given set of facts. See Cheshire, Private International Law 638 (1938).

[18] This practice is impliedly condemned in Erie R. Co. v. Tompkins, 304 U.S. 67, 74, 75 (1937); cf. Savigny, Conflict of Laws 250 (Guthrie's transl. 1880).

[19] Stumberg, Conflict of Laws 142 (1937); Goodrich, Conflict of Laws 202 (2d ed. 1938).

[20] Connecticut Valley Lumber Co. v. Maine Central R. Co., 78 N.H. 553, 555, 103 Atl. 263, 264 (1918); Huber v. Steiner, 2 Bing. (N.C.) 202, 215 (1835).

[21] Considerable differences exist both among courts and writers with respect to the question of whether the new promise or the barred promise must be sued on. The better and more widely accepted view seems to be that the liability is embraced in the new promise. See 25 Va. L. Rev. 379 (1939). The American Law Institute takes the view that it is the new promise which is enforceable. Rest., Contracts § 86 (1932).

[22] See Rest., Contracts, § 86 (1932).

[23] McQueen v. First Nat'l Bank, 36 Ariz. 74, 283 Pac. 273 (1929); Koons v. Vouconsant, 129 Mich. 260, 88 N.W. 630 (1902); McCormick v. Brown, 36 Cal. 180 (1868).

[24] Murphy v. Crawford, 114 Pa. 496, 7 Atl. 142 (1886); Stewart v. Reckless, 24 N.J.L. 427 (1854).

[25] Hatch v. Hatch, 60 Vt. 160, 13 Atl. 791 (1887); see Tobey v. Wood, 123 Mass. 88 (1877); Madden, Persons and Domestic Relations §§ 204–5 (1931).

tion and the statute is amended and extended to the point where the "remedy" is restored, the action will nevertheless not be revived.[26]

The rule that statutes of limitation are procedural has not met with universal favor in this country. Modern writers have generally advocated that limitations be regarded as substantive.[27] Courts, too, have shown dissatisfaction and have chipped away at the rule through the exception device. Thus, where the courts have found themselves able they have struck a compromise between the uniformity principle of giving uniform effect to a cause of action wherever it is brought, and their desire to apply domestic law. Hence, the courts have purported to give substantive effect to limitations which are incorporated into statutes creating a liability unknown to the common law, as, for example, the wrongful death statutes.[28] The courts have distinguished this type of limitation on the ground that it is a condition which has been attached to the right itself, and so follows the right wherever it goes.[29] Although it is difficult to see how mere physical incorporation or the fact that the limitation refers to a statutory cause of action affects the substantive or procedural character of limitations, this rationale has enabled the courts to do two things. First, where a cause of action has been barred by the proper law they can refuse to enforce it at the forum, thus doing homage to the uniformity principle. Second, where a cause of action is not barred by the proper law, they can apply the limitation of the forum if that should be shorter,[30] thus insuring the

[26] Hopkins v. Lincoln Trust Co., 233 N.Y. 213, 135 N.E. 267 (1922); Chambers v. Gallagher, 177 Cal. 704, 171 Pac. 931 (1918); Yancey v. Yancey, 5 Heisk. (Tenn.) 353 (1871); Girdner v. Stephens, 1 Heisk. (Tenn.) 280 (1870). There is a line of cases holding that where a statute of limitations has run, the defendant has acquired a vested right in the statute. Valleytown Township v. Women's Catholic Order of Foresters, 115 F. (2d) 459 (C.C.A. 4th 1940); Chambers v. Gallagher, 177 Cal. 704, 171 Pac. 931 (1918). But it has also been held that the running of the statute against a debt does not give a vested right, and that a vested right can be acquired by virtue of a statute of limitation only in tangible property. Campbell v. Holt, 115 U.S. 620 (1885). But where the defense of the statute is regarded as a vested right irrespective of whether it concerns realty, it would appear that the defendant may enforce this right in any state. Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N.W. 433 (1899).

[27] Stumberg, Conflict of Laws 141 (1937); Cheshire, Private International Law 638 (2d ed. 1938); Savigny, Conflict of Laws 249–50 (Guthrie's transl. 1880); Goodrich, Conflict of Laws 201 (2d ed. 1938); Lorenzen, The Statute of Limitations and the Conflict of Laws, 28 Yale L. J. 492, 495 (1919). See Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333 (1933). Although following the rule, Mr. Justice Story expressed dissatisfaction with it and suggested that he would prefer the proposition that an action barred by the lex loci should also be barred in the forum. LeRoy v. Crowninshield, Fed. Cas. No. 8,269 (C.C.A. Mass. 1820). Similar discontent with the rule was expressed by Cockburn, C. J., concurring in Harris v. Quine, L.R. 4 Q.B. 653, 657 (1869). The rule is accepted in Minor, Conflict of Laws § 210 (1901).

[28] Ford, Bacon & Davis, Inc. v. Valentine, 64 F. (2d) 800 (C.C.A. 5th 1933); Dennis v. Atlantic Coast Line R. Co. 70 S.C. 254, 49 S.E. 869 (1904); The Harrisburg, 119 U.S. 199 (1886); Goodrich, Conflict of Laws 202 (2d ed. 1938); see Osborne v. Grand Trunk R. Co., 87 Vt. 104, 88 Atl. 512 (1913).

[29] Story, Conflict of Laws § 582 (Bigelow's ed. 1883).

[30] Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930); Engel v. Davenport, 194 Cal. 344, 228 Pac. 710 (1924), rev'd 271 U.S. 33 (1926); Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931).

supremacy of domestic law. However, some courts have been consistent with respect to incorporated limitations and have held that if this kind of limitation is to be substantive where the limitation of the proper law is shorter than that of the forum, it must also be substantive where the limitation of the proper law is longer than that of the forum, and hence apply only the former in all cases.[31] This line of decisions was relied upon by the court in the instant case.

The above exception to the rule that statutes of limitation are procedural was greatly extended by the case of *Davis v. Mills*.[32] This was a suit against the directors of a corporation under a Montana statute.[33] No limitation was included in the statute, but there was a provision in a Montana general statute of limitations which limited actions against directors to three years.[34] Mr. Justice Holmes held that even though the limitation was not incorporated into the statute creating the liability, it nevertheless referred specifically enough to this type of liability to qualify the right created. Since the limitation of the proper law had run, the right was extinct. As a result of this case, the necessity for physical incorporation has been dispensed with. It is to be observed that the limitation in question would seem to have applied equally well to common law causes of action against directors, although this was not adverted to by Mr. Justice Holmes. However, it would not seem to be an unfair interpretation of the case to say that under it the same limitation can be procedural and substantive in turn depending upon whether or not the cause of action sought to be enforced is of a statutory or a common law character.[35] The fact that this distinction has no basis whatsoever in considerations of policy seems to indicate further the desire of the courts to qualify the rule that limitations are procedural.

Davis v. Mills dealt with a situation where the limitation of the proper law was the shorter one, and so there was no real conflict with the lex fori. The importance of the instant case lies in the fact that it extends *Davis v. Mills* to a situation where the limitation of the forum is shorter than that of the proper law.

The result of the instant case, if it is followed, will be to make the limitation period on a statutory cause of action uniform no matter where the action is brought. In view of the trend which the *Davis* case and the instant case illustrate, it may be that the distinction between statutory and common law causes of action as bearing on the procedural or substantive character of limitation will ultimately be overthrown, and all limitations may be recognized as substantive. Modern American courts are less fearful of the "foreign" law of a sister state than they used to be. Moreover, the need for uniformity is growing. Lastly, statutes of limitation of the "proper law" have been ap-

[31] Cristilly v. Warner, 87 Conn. 461, 88 Atl. 711 (1913); Keep v. National Tube Co., 154 Fed. 121 (C.C. N.J. 1907); Negaubauer v. Great Northern R. Co., 92 Minn. 184, 99 N.W. 620 (1904); Theroux v. Northern Pac. R. Co., 64 Fed. 84 (C.C.A. 8th 1894); but see Louisville & Nashville R. Co. v. Burkhart, 154 Ky. 92, 157 S.W. 18 (1913).

[32] 194 U.S. 451 (1904); cf. Osborne v. Grand Trunk R. Co., 87 Vt. 104, 88 Atl. 512 (1913).

[33] Mont. Comp. Stat., 5th div. § 460 (1887).

[34] "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law, but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created." 2 Mont. Code (1895) pt. 3 § 554.

[35] Cf. Rest., Conflict of Laws § 605, comment a, § 606, comment a (1934).

plied a sufficient number of times to demonstrate that such an expedient does not upset the machinery of the forum.[36] Perhaps in this last connection a distinction may arise between claims governed by the law of a sister state and claims governed by the law of a foreign country.

Constitutional Law—Court Review of Rate Base Determinations—Smyth v. Ames Overruled?—[United States].—The Federal Power Commission, pursuant to its authority under the Natural Gas Act of 1938,[1] entered an interim order that the defendant company reduce its annual operating revenues by $3,750,000. For the purposes of this order the commission accepted the company's estimates of the reproduction cost of its properties, the value of its gas reserves, the life of its properties, and its operating income, but rejected the company's claim of $8,500,000 for going value and part of its claim for future capital expenditures. The circuit court of appeals vacated the order because the commission had not made a separate allowance for going concern value and had amortized the cost of the properties over their entire service life and not merely over their unexpired service life from the date of regulation or entry of the commission's order.[2] The United States Supreme Court reversed this decision. *Held:* 1) that going value measured by the previous cost of getting business and maintaining excess capacity need not be separately included in the rate base in view of the failure to show that these items had not been recouped as expenses during the unregulated period; 2) that amortization was properly calculated upon the basis of original rather than reproduction cost, over the entire life of the properties and not merely over their unexpired life, and by the sinking fund method with interest equal to the rate of return; and 3) that, considering the decline of general business profits and the absence of hazard, a rate of return of 6½ per cent was not confiscatory. Three justices concurred on the grounds that the due process clause does not give courts power to invalidate rates as unreasonable and that under the statute the commission has "a broad area of discretion for selection of an appropriate rate base" subject to the "barest minimum" of court review. *Federal Power Com'n v. Natural Gas Pipeline Co. of America.*[3]

Although the three concurring justices[4] and some commentators[5] seem to regard this case as substantially changing court review of rate making, more cautious comment would emphasize the Federal Power Commission's third failure[6] with the present court to obtain explicit reversal of *Smyth v. Ames,*[7] and the fact that three justices felt obliged to concur separately. Mr. Chief Justice Stone in the majority opinion identi-

[36] Notes 28, 31 supra.

[1] 52 Stat. 821 (1938), 15 U.S.C.A. § 717 (1939).

[2] Natural Gas Pipeline Co. v. FPC, 120 F. (2d) 625 (C.C.A. 7th 1941).

[3] 62 S. Ct. 736 (1942).

[4] Ibid., at 750.

[5] See 29 Pub. Utilities Fortnightly 505 (1942); N.Y. Times, p. 31, col. 6 (March 17, 1942); Public Utility Rate Regulation: The End of the Rule of Smyth v. Ames, 51 Yale L.J. 1027 (1942). But see Hale, Does the Ghost of Smyth v. Ames Still Walk?, 55 Harv. L. Rev. 1116 (1942).

[6] See the briefs of the Federal Power Commission in Railroad Com'n of California v. Pacific Gas & Electric Co., 302 U.S. 388 (1938), in Driscoll v. Edison Light & Power Co., 307 U.S. 104 (1939), and in the principal case.

[7] 169 U.S. 466 (1893).