CONFLICT OF LAWS—STATUTES OF LIMITATIONS—FOREIGN JURISDICTION'S GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS BARS A NON-RESIDENT'S PRODUCTS LIABILITY ACTION—*Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973).

On October 21, 1966, Roy Lee Heavner, a resident of North Carolina, purchased a Pullman Trailer with a new Uniroyal tire mounted on it from the Pullman outlet in Charlotte, North Carolina.[1] Pullman, Inc. is a Delaware corporation doing business nationwide as a retailer of trailers.[2] Uniroyal, Inc. is a New Jersey corporation doing a nationwide business through the manufacture, sale, and distribution of tires.[3] On April 17, 1967, while driving the trailer in North Carolina,[4] the tire ruptured causing the trailer to collide with a highway abutment,[5] resulting in both damage to the truck and severe personal injury to Heavner.[6] On September 25, 1970, "more than three years after the accident, but less than four years from the delivery of the tire" to the plaintiff,[7] Heavner and his wife brought suit in the New Jersey superior court, law division,[8] against Uniroyal, the manufacturer of the tire, and Pullman, the retailer of the vehicle, alleging that the accident was caused by a defect in the tire.[9] Consequently, the law division was confronted with a situation in which a North Carolina resident sought recovery in New Jersey on a cause of action arising in North Carolina solely because one of the defendants was incorporated in New Jersey.[10]

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1 Heavner v. Uniroyal, Inc., 63 N.J. 130, 134, 305 A.2d 412, 414 (1973).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at 133, 305 A.2d at 413.

6 Heavner v. Uniroyal, Inc., 118 N.J. Super. 116, 118, 286 A.2d 718, 719 (App. Div. 1972).

7 63 N.J. at 134, 305 A.2d at 414.

8 118 N.J. Super. at 116, 286 A.2d at 718.

9 *Id.* at 118, 286 A.2d at 719. Heavner sought recovery "for personal injuries to himself and contemporaneous damage to his vehicle." 63 N.J. at 133, 305 A.2d at 413. His wife "sought a *per quod* recovery for loss of consortium." *Id.* The plaintiffs alleged that the defendants were liable "for breach of express and implied warranty, strict liability in tort, strict liability for misrepresentation, and negligence." 118 N.J. Super. at 118, 286 A.2d at 719.

10 The court noted that the plaintiffs demanded judgment " 'in accordance with the laws of the State of New Jersey.' " 63 N.J. at 134-35 n.3, 305 A.2d at 414. While this case has never been decided on the merits, the note indicates the court's belief that this was a forum shopping situation:

> Plaintiffs have shopped not only for a forum where their suit might not be barred by the statute of limitations, but also where the substantive law would seemingly be more favorable than that of North Carolina.

Before answering, both defendants moved to dismiss the personal injury claim based on the New Jersey two-year statute of limitations for personal injuries.[11] The trial court dismissed the personal injury counts, and the plaintiffs appealed.[12] Despite the plaintiff's contention that since the action was based on a sale, the four-year statute of limitations imposed by the Uniform Commercial Code should apply,[13] the appellate division affirmed,[14] and on petition the New Jersey supreme court granted certification.[15]

Although certification was based on the question of whether the personal injury or the Code statute of limitations was applicable, a new issue was raised at oral argument.[16] This issue concerned the wisdom of automatically applying the New Jersey statute of limitations in a

Id. at 134 n.3, 305 A.2d at 414. The court noted that at the time of the commencement of the action, North Carolina probably did not recognize either strict liability in tort or claims for loss of consortium. *Id.* at 135 n.3, 305 A.2d at 414. Based upon New Jersey substantive conflicts principles, the mere fact that Uniroyal, Inc. is incorporated in New Jersey was not enough to apply New Jersey substantive law. *Id. See also* notes 75-81 *infra* and accompanying text. As a result, the court's discussion "is based upon our view that New Jersey would apply North Carolina substantive law to the cause of action." 63 N.J. at 135 n.4, 305 A.2d at 415.

11 63 N.J. at 133, 305 A.2d at 413. N.J. STAT. ANN. § 2A:14-2 (1952) provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

The applicable North Carolina statute of limitations is three years for both personal injury and property damage actions. *See* N.C. GEN. STAT. §§ 1-15, 1-52(1), (4), (5) (1969). The accrual date under the New Jersey statute is said to be the date of the injury. *See* note 96 *infra*.

12 The trial court entered final judgment on both the personal injury and loss of consortium claims pursuant to N.J.R. 4:42-2 (1973), which provides in part:

> If more than one claim for relief is made in an action . . . the court may direct the entry of a final judgment upon less than all of the claims . . . .

13 118 N.J. Super. at 118, 286 A.2d at 719. The Code statute of limitations is contained in N.J. STAT. ANN. § 12A:2-725 (1962) and provides in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.

Under this section, a cause of action accrues upon tender of delivery. *See* note 97 *infra*. The Code did not take effect in North Carolina until July, 1967, so it could not apply to the instant cause of action. 63 N.J. at 134, 305 A.2d at 414.

14 118 N.J. Super. at 119-20, 286 A.2d at 720. The court relied on Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968), and Justice Hall's concurring opinion in Associates Discount Corp. v. Palmer, 47 N.J. 183, 193, 219 A.2d 858, 864 (1966), when stating that

> actions of this kind, even though they may arise out of the consequences of sales, are essentially personal injury actions and as such are controlled by the two-year statute of limitation provision.

118 N.J. Super. at 120, 286 A.2d at 720.

15 60 N.J. 317, 288 A.2d 579 (1972).

16 63 N.J. at 133 n.1, 305 A.2d at 414. After this issue was raised, the court received supplemental memoranda from the parties on the question. *Id.*

situation in which all of the incidents of the transaction occurred in North Carolina.[17] In *Heavner v. Uniroyal, Inc.*,[18] the New Jersey supreme court resolved both issues in a decision which adds a new dimension to the analysis of statutes of limitations in conflicts of law situations. In reaching its decision, the court concluded that the North Carolina statute of limitations was controlling because New Jersey had only a minimal governmental interest in the outcome of the litigation.[19] In addition, the court decided that the Uniform Commercial Code limitation period was inapplicable since the action was one for personal injuries.[20]

While statutes of limitations are generally considered to be statutes of repose[21] and are said to reflect a public policy against the prosecution of stale claims,[22] the substantive policy considerations involved in such statutes are an attempt to define "the maximum time within which, in the estimation of the legislature of that state, substantial justice can be done in the particular case."[23] These considerations include a determination of the length of time that human memory is thought reliable as well as the practicality of preserving both written and oral evidence.[24] Thus, if written evidence is required to substantiate a claim, the statute of limitations is likely to be longer than if oral evidence is all that is required. This approach is based upon the

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17 *Id.* at 135 n.3, 305 A.2d at 414.

18 63 N.J. 130, 305 A.2d 412 (1973).

19 *Id.* at 141, 305 A.2d at 418. The court stated:

> [W]hen the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred.

Id.

20 *Id.* at 157, 305 A.2d at 427.

21 Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868). The Court reasoned:

> [Statutes of limitations] are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose . . . .

Id. See also State v. Standard Oil Co., 5 N.J. 281, 295, 74 A.2d 565, 571 (1950), *aff'd*, 341 U.S. 428 (1951).

22 Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868); State v. Standard Oil Co., 5 N.J. 281, 295, 74 A.2d 565, 571 (1950), *aff'd*, 341 U.S. 428 (1951); Air Prods. & Chems. Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 203, 206 N.W.2d 414, 419 (1973).

23 Comment, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 498 (1919).

24 *Id.*

likelihood that written evidence will not substantially diminish in reliability with the passage of time.[25]

These policy considerations, however, do not necessarily determine which state's statute of limitations will govern in a conflict of laws situation. Under traditional conflicts principles, it must first be determined whether statutes of limitations are substantive or procedural, for under accepted doctrine, a court will apply the substantive law of the place where the cause of action arose[26] and the procedural law of the forum hearing the suit.[27] The distinction between substance and procedure is based on whether the law to be applied in a particular factual setting affects the "right" to bring the action, or merely the "remedy" which might be afforded.[28] A failure of proof in one of the basic areas of the law such as contract, tort, or property, is said to affect the right to bring the action and is therefore substantive.[29] However, a failure in one of the peripheral areas of the litigation—the serving of summonses, the filing of pleadings, the nature of the trial itself, or the admission of evidence—is said to affect only the remedy and is thus procedural.[30] One of the rationales for this approach is the theory that while judges sitting in a jurisdiction removed from the location of the cause of action could readily ascertain the substantive law of the loca-

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25 *Id.*

26 Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955) ("it is a well-settled conflict-of-laws rule that the forum will apply the foreign substantive law . . . ."); Wilcox v. Wilcox, 26 Wis. 2d 617, 625, 133 N.W.2d 408, 412 (1965) (" 'The law of the place of the wrong determines whether a person has sustained a legal injury.' ").

New Jersey has also followed this doctrine. Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 180, 180 A.2d 129, 131 (1962) ("It is well settled that where, as here, the alleged wrong . . . occurred in Pennsylvania, the New Jersey court will apply the substantive law of Pennsylvania as it finds it.").

27 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971) provides in part:

> (1) An action will not be maintained if it is barred by the statute of limitations of the forum . . . .
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> (2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state . . . .

See Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955); Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 180, 180 A.2d 129, 131 (1962). *See also* Busik v. Levine, 63 N.J. 351, 366, 307 A.2d 571, 579 (1973).

28 M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327 (1839). The Court there stated:

> [T]he point under consideration will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy?

Id. See also Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930).

29 *See* Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 416 (1941).

30 *Id.*

tion, an overwhelming burden would be placed upon forum judges if they were likewise forced to use the procedural law of the foreign state.[31]

In many situations, the distinction between substance and procedure seems fairly obvious. In other cases, however, particularly situations involving statutes of limitations, this distinction is not as apparent. Does the determination that statutes of limitations "represent a public policy about the privilege to litigate,"[32] reflect a decision that statutes of limitations affect the rights of the parties to litigate, or only the manner in which they must litigate? Despite the Continental view to the contrary,[33] Anglo-American courts have generally held that statutes of limitations affect only the remedy and are therefore procedural in nature.[34] While the origin of this determination is somewhat unclear,[35] by the early nineteenth century, the procedural char-

31 Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 180, 180 A.2d 129, 131 (1962). After recognizing this potential difficulty, Justice Jacobs stated that "these considerations would appear to have little pertinency to the bar of limitations." *Id.* Justice Hall, in *Heavner*, also criticized this allegation:

> A statute of limitations is, however, not subject to the same problems as strictly procedural matters. The limitation period of the foreign state can generally be ascertained even more easily and certainly than foreign substantive law.

63 N.J. at 136, 305 A.2d at 415.

32 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

33 McDonnold, *Limitation of Actions—Conflict of Laws—Lex Fori or Lex Loci?*, 35 TEXAS L. REV. 95, 99 (1956) ("The majority of Continental jurists . . . hold that the law governing the creation of an obligation should also govern its prescription." (footnote omitted)); Comment, *supra* note 23, at 492-93.

34 Campbell v. Holt, 115 U.S. 620, 625-27 (1885). This was not a conflict of laws case. The cause of action arose in Texas during a period when the statute of limitations had been legislatively suspended. When the statute was reinstated, the plaintiff failed to bring a claim within the required time. Texas was not a state at this point, and the Texas Constitution, submitted to the United States Congress, provided that no statute of limitations would be effective until the new Texas Constitution was approved by Congress. The Texas courts interpreted this to mean that the statute of limitations had not been reinstated, but was still suspended. *Id.* at 621. The United States Supreme Court, in considering the case, offered a history of common law statutes of limitations. *Id.* at 622-27. *See also* Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942-43 (2d Cir. 1930); State v. Standard Oil Co., 5 N.J. 281, 295, 74 A.2d 565, 571 (1950), *aff'd*, 341 U.S. 428 (1951).

35 Several commentators have indicated that the impetus for the doctrine may have come from the Dutch jurist, Paul Voet, during the seventeenth century. 3 E. RABEL, THE CONFLICT OF LAWS 508-09 (2d ed. 1964) [hereinafter cited as RABEL]; McDonnold, *supra* note 33, at 102; Comment, *supra* note 23, at 492. Additionally, it has been contended that the real reason for the rule is an historical one; when the problem of conflicts first came before the English courts in the middle of the eighteenth century, the common law had already developed without foreign influence and, therefore, the courts were "inclined to restrict the operation of foreign law and look upon the statute of limitations . . . as affecting the remedy." Comment, *supra* note 23, at 496. Rabel suggests that the doctrine Voet was espousing was not concerned with a substantive-procedural distinction

acterization of statutes of limitations was firmly entrenched in the Anglo-American legal system.[36] Thus, a situation unique to Anglo-American law developed. If a plaintiff had a cause of action accruing in one jurisdiction, but failed to bring the action within that state's statutory period, he would not be barred from bringing the suit in a state with a longer limitations period, provided that he could secure service of process there. Likewise, if the defendant could only be served in a jurisdiction with a short statute of limitations, the plaintiff's cause of action might be barred even though still valid in the state where the transaction arose.

The often incongruous results of the application of the Anglo-American approach to limitations problems are illustrated by the early federal case of *Le Roy v. Crowninshield.*[37] *Le Roy* was a contract action in which the plaintiff was barred by the statute of limitations in New York, where the contract was executed. However, because the plaintiff was able to serve the defendant in Massachusetts, which had a longer statute, recovery was permitted.[38] An opposite result was reached in

but rather a *situs* theory based on the location of the defendant. RABEL, *supra* at 509. Another writer suggests that it was Huber, another Dutch jurist, who actually originated the theory that statutes of limitations are procedural. Ailes, *Limitations of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474, 487 (1933). Ailes quotes Huber as writing:

> *"Ratio haec est quod praescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendae."*

Id. (footnote omitted). Freely translated, the above quotation states:

> The rationale is this; since prescription and execution do not pertain to the strength of the contract, but to the time and method of the action instituted.

[36] *See* Townsend v. Jemison, 50 U.S. (9 How.) 200, 200-01 (1849); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327 (1839); Le Roy v. Crowninshield, 15 F. Cas. 362, 368-71 (No. 8,269) (C.C.D. Mass. 1820); Don v. Lippmann, 7 Eng. Rep. 303, 307-08 (H.L. 1837); The British Linen Co. v. Drummond, 38 Eng. Rep. 683, 687 (K.B. 1830); Williams v. Jones, 33 Eng. Rep. 441, 446 (K.B. 1811). In New Jersey, one of the earliest cases in this area appears to be Summerside Bank v. Ramsey, 55 N.J.L. 383, 26 A. 837 (Sup. Ct. 1893), where the court stated in the context of a suit on a foreign judgment that it must be barred by the limitations period of the forum. *Id.* at 384, 26 A. at 837.

Although the cases in the conflicts area did not appear to arise until the early nineteenth century, Professor Ailes has stated that one of the earliest statutes of limitations was enacted in England in 1623 and served as the basis for many American statutes. Ailes, *supra* note 35, at 480. The statute, An Act for Limitation of Actions, and for avoiding of Suits in Law, 21 Jac. 1, c. 16, § 3, at 99 (1623) provides in part:

> And be it further enacted, That all Actions of Trespass *Quare clausem fregit*, all Actions of Trespass . . . shall be commenced and sued within the Time and Limitation hereafter expressed, and not after; (that is to say), the said Actions upon the Case . . . within Three Years next after the End of this present Session of Parliament . . . and the said Actions of Trespass, of Assault, Battery, Wounding, Imprisonment, or any of them, within One Year next after the End of this present Session of Parliament, or within Four Years next after the Cause of such Actions or Suit, and not after . . . .

[37] 15 F. Cas. 362 (No. 8,269) (C.C.D. Mass. 1820).

[38] *Id.* at 372.

the English case of *The British Linen Company v. Drummond*,[39] where a contract was made in Scotland which had a forty-year statute of limitations.[40] The plaintiff, however, brought the action in England, which had a six-year statute.[41] On demurrer by the defendant, the plaintiff was precluded from recovering on the debt which could have been recovered if suit had been brought in the place of the making of the contract.[42]

While in Anglo-American jurisdictions, the rule that statutes of limitations are procedural is considered "so firmly established that we are apt to regard it as the universal rule,"[43] it is an approach that has not been without exception and criticism. Due perhaps in part to the desire of legislatures and courts to circumvent the often unjust results caused by characterizing statutes of limitations as procedural, two principal exceptions to the "universal rule" have evolved.[44] If a right which did not exist at common law is created by statute and the statute itself delineates a time limit in which the action must be brought, then "[t]he time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone."[45] Thus, in *The Harrisburg*,[46] a state statute creating liability for negligence on navigable waterways also required that any action thereunder be brought within one year was interpreted as a limit on the right itself. The United States Supreme Court concluded that, "[t]ime has been made of the essence of the right, and the right is lost if the time is disregarded."[47]

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39 38 Eng. Rep. 683 (K.B. 1830).

40 *Id.* at 684.

41 *Id.*

42 *Id.* at 687. The issue presented in *British Linen* was the converse of the one in *Heavner*. In *Heavner*, if the North Carolina statute had been longer than the one in New Jersey, the question would have been whether the New Jersey court would continue to "borrow," thus saving a cause of action barred in New Jersey, the place of the suit. Although the *Heavner* court declined to decide this question, the indication seems to be that it would agree with the decision rendered in *British Linen*. One of the qualifying clauses in the *Heavner* decision stated that this rule would only be applied where the foreign state's "limitation period has expired at the time suit is commenced here." 63 N.J. at 141, 305 A.2d at 418.

43 Comment, *supra* note 23, at 492.

44 63 N.J. at 139-40, 305 A.2d at 417.

45 The Harrisburg, 119 U.S. 199, 214 (1886).

46 *Id.*

47 *Id.* In Davis v. Mills, 194 U.S. 451 (1904), a suit involving the liability of trustees of a mining company which was limited by statute to one year, the Court held:

> [T]he fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere.

In New Jersey, the Wrongful Death Statute[48] is an example of such a statutory right. The statute provides that "[e]very action brought under this chapter shall be commenced within 2 years after the death of the decedent, and not thereafter."[49] In *Peters v. Public Service Corp.*,[50] an action brought under the statute, the court of chancery had occasion to evaluate the timeliness of an application to amend the complaint by substituting one defendant for another. After reviewing the case law interpreting the statute, the vice-chancellor concluded that courts were without power to interfere with the limitations specified in the Act. The court concluded that the provision operated as a " 'limitation of the liability of the wrong-doer as well as of the remedy.' "[51]

The second exception to the general rule is the so-called "borrowing statutes." According to one author, these statutes have been enacted by about three-fourths of the states[52] and permit the court of the forum to apply the limitations period of the place where the wrong occurred under certain conditions defined in the statute.[53] The purpose of these statutes is to prevent "the accident of the choice of a particular forum [from having a] substantial effect on the result reached in an individual case."[54] The Pennsylvania and New York statutes serve as examples of the varying nature of "borrowing" legislation. The Pennsylvania statute[55] provides that a cause of action will be barred

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The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability . . . .

Id. at 454.

48 N.J. STAT. ANN. § 2A:31-1 *et seq.* (1952).

49 *Id.* § 2A:31-3.

50 132 N.J. Eq. 500, 29 A.2d 189 (Ch. 1942), *aff'd per curiam*, 133 N.J. Eq. 283, 31 A.2d 809 (Ct. Err. & App. 1943).

51 132 N.J. Eq. at 503, 29 A.2d at 193 (quoting from Lapsley v. Public Serv. Corp., 75 N.J.L. 266, 266, 68 A. 1113 (Sup. Ct. 1908)). The court went on to say that these limitations " 'are not properly statutes of limitations as that term is generally understood, but they are qualifications and conditions restricting the rights granted by the statutes.' " *Id.* at 503-04, 29 A.2d at 193 (quoting from Annot., 67 A.L.R. 1070, 1070 (1930)).

52 Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287, 294 (1960). Vernon states that at least 38 states have enacted such statutes. *Id. Accord*, Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 79 n.2 (1962). For two respresentative statutes, see notes 55 and 57 *infra*. The New Jersey legislature has never seen fit to enact such a statute. Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 181, 180 A.2d 129, 131 (1962).

53 *See* notes 55 and 57 *infra*.

54 Vernon, *supra* note 52, at 297 (footnote omitted).

55 PA. STAT. ANN. tit. 12, § 39 (1953) provides:

When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth.

This statute has no limitations. Whenever the cause is barred where it arose, it will be barred in Pennsylvania. For a discussion of this statute, see Mack Trucks, Inc. v. Bendix-

in Pennsylvania if it is barred in the place where the cause of action arose.[56] The New York statute,[57] on the other hand, offers courts a choice. If the plaintiff is not a New York resident, the court will choose either the New York statute of limitations or that of the foreign state, applying whichever is shorter. If, however, the plaintiff is a New York resident, the statute of limitations of New York will automatically apply.[58]

The above exceptions represent instances "where it has been possible to escape"[59] from the general rule that the statute of limitations of the forum will apply. Where this escape has not been possible, judicial criticism of the rule has not been unknown.[60] As early as 1820, Mr. Justice Story, then a Circuit Judge, stated:

> The distinction between a right and a remedy is admitted. But can a right be truly said to exist . . . when all remedy upon it is legally extinguished?[61]

Judge Learned Hand expressed similar sentiments when he observed that a right which exists without a remedy is of questionable value:

Westinghouse Automotive Air Brake Co., 372 F.2d 18 (3d Cir. 1966), *cert. denied*, 387 U.S. 930 (1967).

56 PA. STAT. ANN. tit. 12, § 39 (1953).

57 N.Y. CIV. PRAC. § 202 (McKinney 1972) states:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

This statute appears to reflect the policy that no action can be brought in New York after the time limit set by the New York legislature. For an interpretation of this statute, see Nolan v. Transocean Air Lines, 276 F.2d 280 (2d Cir.), *modified*, 365 U.S. 293 (1960).

58 N.Y. CIV. PRAC. § 202 (McKinney 1972). Vernon also interprets the New York statute as having this meaning. Vernon, *supra* note 52, at 296. Both Vernon and Ester present exceptionally well-researched articles explaining the different types of borrowing statutes. Vernon, *supra* note 52, at 293-98; Ester, *supra* note 52, at 79-84. *See also* the different types of statutes and their applicability to specific cases in Annot., 75 A.L.R. 203 (1931) and Annot., 149 A.L.R. 1224 (1944).

59 Davis v. Mills, 194 U.S. 451, 454 (1904).

60 In 1885, Justice Bradley, dissenting in Campbell v. Holt, 115 U.S. 620, 631 stated: "Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate . . . ." Justice Jackson was also critical of the rule when he observed that "it is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion." Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 313 (1945). *See also* Justice Jacobs' criticism of the rule in Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 180, 180 A.2d 129, 131 (1962).

61 Le Roy v. Crowninshield, 15 F. Cas. 362, 368 (No. 8,269) (C.C.D. Mass. 1820). It is perhaps a tribute to Justice Story that his criticism in the *Le Roy* case has been troublesome to those in favor of the rule. *See* Campbell v. Holt, 115 U.S. 620, 626 (1885), where Justice Miller explained that despite the criticism, Justice Story subsequently followed the rule. Professor Ailes also had difficulty trying to reconcile the Story opinion. Ailes, *supra* note 35, at 484-85.

> Our own statutes of limitation do in fact extinguish the right so far as they extinguish all remedies, for a right without any remedy is a meaningless scholasticism . . . .[62]

Despite these observations, both Judges Story and Hand felt compelled to abide by the traditional rule.[63] In more recent years, however, at least two courts have intimated a change in the rule, though subsequently deciding the cases on other grounds.[64] In *Seymour v. Parke, Davis & Co.*,[65] the federal district court for New Hampshire determined that it did not have jurisdiction[66] over a products liability case in which the plaintiff, a Massachusetts resident, sued a Michigan drug company for the death of plaintiff's decedent who had ingested the drug in Massachusetts.[67] The cause of action was barred by the statute of limitations in Massachusetts[68] and the plaintiff frankly admitted that he was, in effect, forum-shopping.[69] The court observed that to apply the statute of limitations of New Hampshire would invite "Massachusetts residents to bring personal injury actions in the District Court of New Hampshire" whenever the action has been barred by the Massachusetts two-year statute.[70]

This uniquely Anglo-American way of dealing with statutes of limitations finds its most severe criticism among legal scholars. Responding to the same irony which troubled many of the judicial critics, legal scholars have also questioned the concept that a right can

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62 Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930).

63 In both of these cases, the court concluded that the law of the forum should control. Le Roy v. Crowninshield, 15 F. Cas. 362, 371 (No. 8,269) (C.C.D. Mass. 1820); Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 944 (2d Cir. 1930).

64 Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18, 24 (3d Cir. 1966) (Freedman, J., dissenting), *cert. denied*, 387 U.S. 930 (1967); Seymour v. Parke, Davis & Co., 294 F. Supp. 1257, 1263 (D.N.H. 1969), *aff'd*, 423 F.2d 584 (1st Cir. 1970).

65 294 F. Supp. 1257 (D.N.H. 1969), *aff'd*, 423 F.2d 584 (1st Cir. 1970).

66 *Id.* at 1263.

67 *Id.* at 1258.

68 *Id.*

69 *Id.* at 1258 n.2.

70 *Id.* at 1261. In Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18 (3d Cir. 1966), *cert. denied*, 387 U.S. 930 (1967), the suit primarily concerned the Pennsylvania borrowing statute. In his dissenting opinion, however, Judge Freedman stated:

> Indeed, while limitations of action may fall under the heading of procedure, to the litigant a determination that his suit is completely barred by the statute of limitations is substantively far more drastic and important than a ruling on the extent of his right to indemnity.

372 F.2d at 24. Judge Freedman also stated that he saw no "reason to restrict the modern Pennsylvania conflicts rule to so-called substantive law questions." *Id.*

exist without a remedy for its enforcement.[71] Recognizing this difficulty, the commentators have consistently advocated that limitations be treated as substance rather than procedure.[72] In articulating this approach, it has been suggested that:

> In theory it should be frankly acknowledged by any court in this country and abroad that the effect of lapse of time on an obligation is an incident of the law governing it.[73]

In deciding *Heavner*, the court stated at the outset that the traditional rule of mechanically applying the statute of limitations of the forum was judicially created and, like its counterpart, the automatic application of the substantive law of the place where the action arose, could be judicially changed.[74] The latter rule has been significantly eroded over the past ten years as a result of *Babcock v. Jackson*,[75] a case involving a New York resident who was injured in a car driven by another New Yorker while on a touring excursion in Ontario, Canada.[76]

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71 In *Heavner*, Justice Hall stated that "a partial catalog" of critics included Professors Leflar, Goodrich, Lorenzen, Vernon, McDonnold, Sedler, and Ester. 63 N.J. at 136-37, 305 A.2d at 415-16. Other critics include Professor Beale, the Royall Professor of Law at Harvard University, as well as the reporter on the Conflicts of Laws for the American Law Institute, who stated:

> There is undoubtedly a certain theoretical inconsistency involved when a court enforces a right, avowedly arising by reason of the law of another jurisdiction, which would not be enforced by the courts of that jurisdiction.

3 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 604.1, at 1621 (1935).

72 *See* Vernon, *supra* note 52, at 291. The author suggested:

> Whenever considerations call for the application of the contract, tort or other "substantive" law of a foreign jurisdiction, it would appear that its time bar should also be recognized.

Id. See also G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 146 (3d ed. 1963); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 50 (1971) [hereinafter cited as Weintraub].

73 RABEL, *supra* note 35, at 534. Despite the virtual unanimity of criticism, one author appears to consistently stand behind the traditional approach to the statute of limitations. In his lengthy article, Ailes reaches the conclusion that despite policy considerations to the contrary, the Anglo-American rule offers convenience and simplicity and that any attempt at legislative deviation from the doctrine would be ill-advised. Ailes, *supra* note 35, at 502.

In addition to the general critics of the traditional rule, change has also been suggested on constitutional grounds. Early criticism based on both the due process and full faith and credit clauses seems to have been refuted. *See* Note, *Time Limitations on Contractual Actions in the Conflict of Laws*, 48 COLUM. L. REV. 136, 142-43 (1948). More recently, a constitutional attack based on the commerce clause has been suggested. *See* Comment, *The Commerce Clause—A Needed Replacement for the Due Process and Full Faith Clauses as a Choice Influencing Consideration in Multistate Statutes of Limitations*, 21 AM. U.L. REV. 609 (1972). *See generally* Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806 (1971).

74 63 N.J. at 135-36, 305 A.2d at 415.

75 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

76 *Id.* at 476, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

In rejecting the contention that the Ontario substantive law should be applied, Judge Fuld said:

> Justice, fairness and "the best practical result" may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.[77]

This approach has come to be known as the grouping of contacts approach[78] although, as later stated by Judge Fuld, it requires more than a mere counting of the contacts on either side.[79]

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77 *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749 (citation omitted).

78 *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. The *Restatement* has also adopted this approach. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) provides in part:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . .
> (2) Contacts to be taken into account . . . to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

In addition, many of the leading conflicts scholars approve of the *Babcock* result. See *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963), in which six of these scholars discussed the decision. David F. Cavers said:

> Courts striving to emulate Babcock . . . may not achieve uniformity but they are likely to attain a much closer approximation to justice than those seventy-odd past decisions that have rubber-stamped the place-of-injury rule . . . .

Id. at 1229. Professor Elliott Cheatham stated that he agrees with the rationale of the New York court of appeals. *Id.* at 1230. Brainerd Currie called the decision "as heartening as it is historic." *Id.* at 1233. Professor Albert Ehrenzweig believed that the decision follows the doctrine that he previously espoused in his treatise. *Id.* at 1245-46. Professor Leflar stated that *Babock*

> affords a more tangible theoretical base for a fresh start on the choice of law in torts problem than does any other recent American decision.

Id. at 1251. Finally, Willis L. M. Reese stated that "[t]he closely reasoned and well articulated opinion provides a firm basis upon which other courts can build." *Id.* at 1257. *But see* Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections Upon The Opinion And Its Implications*, 1964 INS. COUNSEL J. 428, 428 which states:

> [I]t seems clear that the *Babcock* opinion will throw the law governing torts into a state of utter confusion, will bring forth a hodge podge of decisions based neither on rhyme nor reason, will breed uncertainty, will encourage forum shopping by the parties, will increase provincialism throughout this federalized country and will allow recovery solely that one might recover.

79 Dym v. Gordon, 16 N.Y.2d 120, 133, 209 N.E.2d 792, 800, 262 N.Y.S.2d 463, 474 (1965), in which the New York court of appeals was again faced with an automobile

Several years later, on very similar facts, New Jersey adopted the *Babcock* rationale in *Mellk v. Sarahson*.[80] The New Jersey court, in arriving at its decision not to apply the guest statute of the state in which the accident occurred, stated:

> The advantages of uniformity, certainty and predictability often attributed to the *lex loci delicti* approach must yield when an unvarying and mechanical application of this rule would cause a result which frustrates a strong policy of this state while not serving the policy of the state where the accident occurred.[81]

It is in light then, of the already accepted erosion of the "right" aspect of the right-remedy dichotomy, the exceptions to the general rule regarding statutes of limitations as procedural, and the criticism of the rule, that the *Heavner* court determined that the mechanical application of the traditional approach that statutes of limitations are procedural was no longer necessary.[82] In order to avoid this mechanical application, the court decided to judicially "borrow" the North Carolina statute of limitations.[83] The court justified the judicial enactment of a "borrowing" rule, something which is generally within the purview of the legislature, by citing the observation of one legal scholar that:

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guest case. In *Dym*, both the plaintiff and defendant were residents of New York who had taken temporary residence in Colorado for the purpose of attending school there. The automobile trip during which the accident occurred originated in Colorado and the accident also took place there. The suit, however, was brought in New York. *Id.* at 122, 209 N.E.2d at 793, 262 N.Y.S.2d at 464-65. The majority of the court determined that Colorado had the most significant contacts with the issues presented. *Id.* at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 470. Judge Fuld dissented from this decision, believing that *Dym* was essentially the same as *Babcock* and that the majority had interpreted *Babcock* incorrectly. The *Babcock* decision, according to Fuld, "does not profess to be, a talisman of legal certainty, nor does it of itself provide a formulary means for resolving conflicts problems." *Id.* at 129, 209 N.E.2d at 797, 262 N.Y.S.2d at 470. Judge Fuld concluded that his decision was not based "on a 'quantitative' assessment of the contacts of the respective jurisdictions," as was suggested in the majority opinion. *Id.* at 133, 209 N.E.2d at 800, 262 N.Y.S.2d at 474.

80 49 N.J. 226, 235, 229 A.2d 625, 630 (1967). In *Mellk*, both plaintiff and defendant were New Jersey residents who decided to visit a mutual friend in Madison, Wisconsin. The accident occurred near Cincinnati, Ohio. *Id.* at 227-28, 229 A.2d 625-26. The suit, brought in New Jersey, was dismissed on the trial level, the judge holding that Ohio law was controlling. *Id.* at 228, 229 A.2d at 626.

81 *Id.* at 234, 229 A.2d at 629. A similar result was reached in a factual situation analogous to the one in *Dym*. *See* Pfau v. Trent Aluminum, 55 N.J. 511, 263 A.2d 129 (1970).

82 63 N.J. at 140-41, 305 A.2d at 418.

83 *Id.* at 141, 305 A.2d at 418. The court stated: "In essence, we will 'borrow' the limitations law of the foreign state." *Id.*

> "The absence of a borrowing statute should not prevent application of the statute of the locus; for a policy against forum shopping can be set out by the judiciary as well as the legislature."[84]

While the *Restatement (Second) of Conflict of Laws* § 142 recognizes "borrowing statutes" as exceptions to the general statutes of limitations rule,[85] the judicial use of the "borrowing" concept to reach a result so long advocated by legal scholars is unique. It is a judicial determination to excise statutes of limitations from the law-of-the-forum concept and treat cases on an individual basis. There are, however, limits to the *Heavner* decision. The "borrowing" rule will only apply when all of the significant interests involved are located in the foreign state.[86] Rather than being detrimental to the new rule, the limits may be an attraction, since they give the New Jersey "borrowing" rule the flexibility of allowing a case-by-case determination, a result which would be difficult to achieve through legislation.

It is because of the application of this flexible approach in the future that the *Heavner* court found it necessary to decide the second question whether the general personal injury or Uniform Commercial Code statute of limitations was controlling. Although rendered perhaps unnecessary by the answer to the conflicts question, the court believed that the issue must be determined for those future cases in which New Jersey might have a substantial enough interest[87] to apply its own limitations period.

Prior to the enactment of the Uniform Commercial Code in New Jersey,[88] there were two basic statutes of limitations. Actions for per-

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84 *Id.* at 140, 305 A.2d at 418 (quoting from Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. REV. 813, 850 (1962)). Subsequent to the *Heavner* decision, the New Jersey supreme court again defended judicial lawmaking, with particular reference to *Heavner*. Busik v. Levine, 63 N.J. 351, 367, 307 A.2d 571, 579 (1973). The court stated that it "has the power and the continuing responsibility to change these judge-made rules of law as justice may require." *Id.* at 358, 307 A.2d at 575.

85 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971) states:

> (1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.

The comment explaining this section, however, speaks only in terms of borrowing "statutes." *Id.* comment *f* at 397.

86 63 N.J. at 141, 305 A.2d at 418. See note 19 *supra* for complete text of the limitations.

87 63 N.J. at 141-42, 305 A.2d at 418. Because of its decision to "borrow," the court noted that the property damage claim would also be dismissed. *Id.* at 141 n.7, 305 A.2d at 418.

88 The Uniform Commercial Code was adopted in New Jersey on November 30, 1961 and went into effect on January 1, 1963. *Preface* to N.J. STAT. ANN. § 12A (1962).

sonal injuries were governed by a two-year statute of limitations,[89] while actions for breach of a contract were governed by a six-year statute.[90] Before the advent of the Code, New Jersey courts were faced with the problem of deciding which statute of limitations was applicable in an action for personal injury based on a breach of an implied warranty. Although characterizing the action as hybrid, "having its commencement in contract and its termination in tort,"[91] *Raskin v. Shulton, Inc.*[92] gave a definitive answer to the problem in 1966. The court in *Raskin* held that regardless of the name of the action, it was basically one for personal injuries and therefore the personal injury statute was applicable.[93]

The adoption of the Uniform Commercial Code added a third limitations period to actions involving breaches of sales contracts.[94] While the introduction of the Code would seem to solve the difficulties presented in cases such as *Raskin*,[95] in fact, the introduction of the sales article created two additional problems with which the *Heavner* court was forced to deal.

The first of these problems concerned the accrual date of the cause of action. Although for purposes of commencing the running of the statute of limitations, the accrual date for a personal injury action has been interpreted as meaning the date of the injury,[96] under the

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89 N.J. STAT. ANN. § 2A:14-2 (1952). See note 11 *supra* for the complete text of this statute.

90 N.J. STAT. ANN. § 2A:14-1 (1952). This statute was not strictly limited to contract actions. For purposes of this discussion, however, only the contract section is relevant. The statute provides in part:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another . . . *or for recovery upon a contractual claim or liability*, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, *shall be commenced within 6 years next after the cause of any such action shall have accrued.*

Id. (emphasis added).

91 Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 64, 207 A.2d 305, 311 (1965).

92 92 N.J. Super. 315, 223 A.2d 284 (App. Div. 1966).

93 *Id.* at 318, 223 A.2d at 286. The suit was based on a breach of both express and implied warranties. *Id.* at 316, 223 A.2d at 285.

94 N.J. STAT. ANN. § 12A:2-725 (1962) provides in part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.

95 Pennsylvania has treated this problem as having been solved by the enactment of the Code. Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 420, 197 A.2d 612, 614 (1964). For a discussion of *Gardiner* and similar cases, see note 112 *infra*. *See generally* Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 704-07 (1965).

96 Rosenau v. City of New Brunswick, 51 N.J. 130, 137, 238 A.2d 169, 172 (1968).

sales article of the Code the accrual date is defined as the date of tender of delivery, regardless of when the buyer discovered the breach.[97] Thus, if the Code section were applicable, it is entirely possible for the cause of action to be barred before the plaintiff is even injured. This was the situation in *Mendel v. Pittsburgh Plate Glass Co.*,[98] a New York case in which a manufacturer delivered a defective plate glass door to a business in 1958 but the flaw was not discovered until 1965 when it caused injury to a customer. Even though the plaintiff brought his suit soon after the accident, the New York court of appeals decided that under the Code the cause of action would have been barred since 1962.[99]

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97 N.J. STAT. ANN. § 12A:2-725(2) provides in part:

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . .

98 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). Although this case arose prior to the effective date of the Code, the court indicated the effects the Code would have on the case. *Id.* at 342 n.1, 344-45, 253 N.E.2d at 208, 209-10, 305 N.Y.S.2d at 492, 493-94.

99 *Id.* at 344-45, 253 N.E.2d at 209-10, 305 N.Y.S.2d at 493-94. The action was based on both negligence and breach of implied warranty. *Id.* at 342, 253 N.E.2d at 208, 305 N.Y.S.2d at 491. However, only the claims for breach of implied warranty were dismissed. *Id.* at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495. While it seems inequitable that "an injured party may be barred from a recovery before there was an injury," it would also seem unjust to hold "a manufacturer or seller liable for an indefinite period of time after [the] sale." *Compare* Note, *Warranty—Limitation of Actions—Personal Injury Action Against Manufacturer for Breach of Warranty Governed by Contract and Not Tort Statute*, 39 FORDHAM L. REV. 152, 159 (1970) (footnote omitted), *with* Note, *Strict Liability Unmasked: The Applicable Statute of Limitations*, 27 WASH. & LEE L. REV. 382, 391 (1970); *cf.* Hughes v. Eureka Flint & Spar Co., 20 N.J. Misc. 314, 316, 26 A.2d 567, 568 (Mercer County Cir. Ct. 1939), in which Judge Oliphant expressed similar sentiments concerning suits in negligence.

The decision in *Mendel* has been criticized. *See Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 62, 76, 86 (1970), in which Professor Fred A. Dewey of the University of Cincinnati College of Law, and Professor John E. Murray, Jr. of the University of Pittsburgh School of Law, both comment on the *Mendel* decision. Professor Dewey, in his article, *Products Liability Without Privity: Contract Warranty or Tort*, 45 ST. JOHN'S L. REV. 76 (1970), calls the result arrived at by the court "both incongruous and indefensible." *Id.* at 85. Professor Murray states that the court has "effected a bungling construction which must be unsnarled." Murray, *Random Thoughts on Mendel*, 45 ST. JOHN'S L. REV. 86, 95 (1970). *See also* Note, *Strict Liability—Implied Warranty—Regardless Which Label Is Placed on the Cause of Action, if the Case Arose Prior to Adoption of the Code, the Appropriate Statute of Limitations Is 6-Years From the Time of the Sale of the Product and the Action Sounds in Contract*, 39 U. CIN. L. REV. 413 (1970).

A New Jersey court considered the accrual problem in Garfield v. Furniture Fair-Hanover, 113 N.J. Super. 509, 274 A.2d 325 (L. Div. 1971), where it implied that the personal injury statute would apply. Because the case involved a bailment, not a sale, the sales article of the Code was not applicable. *Id.* at 512, 274 A.2d at 326-27. If it were, however, the court stated that the action would be governed by the personal injury statute. It further reasoned that "[a]n action to recover damages for personal injuries is essentially a personal injury action, and no other denomination of it can change this inherent character of it." *Id.* at 513-14, 274 A.2d at 327.

The other difficulty which the Code statute of limitations presented concerns the nature of the sales article. Article 2 is essentially applicable only between the buyer and the immediate seller, with added protections for "the family, household, and guests of the purchaser."[100] It does not apply to the manufacturer, or other remote sellers in the distribution chain. Thus, if the statute of limitations of the sales article were to apply in a products liability action in which both the retailer and the manufacturer were joined, two separate statutes of limitations would necessarily be applicable. The plaintiff would have four years under the Code to bring suit against the retailer, but only two years under the general personal injury statute to sue the manufacturer. This "upshot of the Code approach,"[101] according to Justice Hall,

> makes no sense and is unjust to the claimant, who in many instances may be able to obtain jurisdiction only over the ultimate seller and not over the manufacturer. . . . We cannot attribute any such intention to the Legislature when it adopted the Code.[102]

Paralleling the enactment of the Code was the development of a new concept in the products liability field. Based upon the holding in *Greenman v. Yuba Power Products, Inc.*[103] and a new section of the *Restatement (Second) of Torts*,[104] strict liability in tort rendered manufacturers liable for defects in their products.[105] New Jersey adopted the theory of strict liability in tort in 1965 in *Santor v. A & M Karagheusian, Inc.*,[106] where the court noted that strict liability is imposed by law while an implied warranty arises out of the contractual relations of the parties.[107] In 1968, in *Rosenau v. City of New Bruns-*

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100 N.J. STAT. ANN. § 12A:2-318 (1962) provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

Official Comment 3 to section 2-318 provides in part:

> This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser.

101 63 N.J. at 155, 305 A.2d at 426.

102 *Id.*

103 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In a personal injury action allegedly caused by a defective power tool, the court held that the purpose of strict liability is

> to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

104 RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

105 *See* notes 103 and 104 *supra.*

106 44 N.J. 52, 207 A.2d 305 (1965).

107 *Id.* at 64, 207 A.2d at 311.

wick,[108] the supreme court again analyzed the distinction between strict liability and the implied warranties embodied in the sales article, and stated that the Code

> explicitly relates to actions "for breach of any contract for sale" and presumably was not intended to apply to tort actions between consumers and manufacturers who were never in any commercial relationship or setting.[109]

It should be noted that strict liability in tort is a relatively recent concept, having its genesis in the early 1960's.[110] The Uniform Commercial Code, on the other hand, was approved by its sponsors in 1952.[111] Consequently, it would seem that the framers of the Code could not have seen the impending development of strict liability in tort, thus rendering the sales article of the Code somewhat of an anachronism in dealing with *Heavner* type situations.

After reviewing these parallel developments and the associated problem of which statute of limitations to apply, and mindful of the varied resolution of this issue in other jurisdictions,[112] the court in

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108 51 N.J. 130, 238 A.2d 169 (1968).

109 *Id.* at 143, 238 A.2d at 176.

110 *Greenman* was decided in 1963 and the *Restatement* added the new section on strict liability in 1965.

111 *Preface* to AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE iii (Official West Text 1972).

112 In Pennsylvania, the Code statute of limitations is applicable. Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 420, 197 A.2d 612, 614 (1964). Pennsylvania, however, has adopted section 10-103 of the Code, PA. STAT. ANN. tit. 12A, § 10-103 (1970), which provides: "Except as provided in the following section, all acts and parts of acts inconsistent with this Act are hereby repealed." The *Gardiner* decision relied on this later provision. 413 Pa. at 418, 197 A.2d at 613. New York and Alaska have also held that the sales article limitation statute is determinative. Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969); Sinka v. Northern Commercial Co., 491 P.2d 116 (Alas. 1971). Ohio and Rhode Island have indicated that where the suit is between the buyer and his immediate seller, the Code statute is applicable. Val Decker Packing Co. v. Corn Prods. Sales Co., 411 F.2d 850 (6th Cir. 1969) (applying Ohio law); United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co., 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970) (Code statute applies only where there is a buyer-seller relationship); Operating Eng'rs Local 57 v. Chrysler Motors Corp., 106 R.I. 248, 258 A.2d 271 (1969) (where buyer sues manufacturer, personal injury statute applies because no buyer-seller relationship exists sufficient to invoke the Code provision); Kelly v. Ford Motor Co., — R.I. —, 290 A.2d 607 (1972) (in accordance with *Operating Eng'rs Local 57*). Tennessee originally resolved the question by determining whether the complaint alleged a breach of warranty or relied upon the theory of strict liability in tort. Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594 (1970). A recent Tennessee decision, however, indicated that the Code statute can only be applied where there is a buyer-seller relationship. Hargrove v. Newsome, 225 Tenn. 462, 470 S.W.2d 348 (1971), *cert. denied*, 405 U.S. 907 (1972). Finally, both Oregon and Connecticut have indicated that where the action sounds in strict liability in tort, the personal injury statute of limitations should apply. Arrow Transp.

Heavner decided to apply the general two-year limitations period rather than the four-year provision contained in the Code. The court concluded:

> When the gravamen is a defect in the article and consequential personal injury and property damages are sought, they will be taken for what they actually are, no matter how expressed.[113]

It appears that the central thrust of the *Heavner* decision rests in the resolution of the choice of law problem. If the court had merely wanted to affirm the lower court's decision analyzing the general statute of limitations rather than the Uniform Commercial Code provision, it seems that a lengthy opinion would have been unnecessary. Both previous case law and legislative intent[114] comport with the decision to apply the general personal injury statute in a products liability action. It is, rather, the conflicts disposition of the case that is significant. While the court specifically invoked "borrowing" language, the decision suggests much more than judicial legislation. As previously indicated, the traditional conflict of laws principle which provides that the substantive law of the location where the cause of action arose automatically controls the action has, over the past ten years, been effectively eroded by the decisions following *Babcock*. Professor Weintraub has suggested

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Co. v. Fruehauf Corp., 289 F. Supp. 170 (D. Ore. 1968) (applying Oregon law); Abate v. Barkers, Inc., 27 Conn. Supp. 46, 229 A.2d 366 (New Haven County C.P. 1967). *See also* Tyler v. Street & Co., 322 F. Supp. 541 (E.D. Va. 1971), where the court, in interpreting Virginia law, concluded that if the action is essentially one for personal injuries, the personal injury statute should apply. *Id.* at 543. One author, however, suggests that the application of the sales article limitation would be a better solution to the *Tyler* case since the Code would avoid placing an indefinite liability on manufacturers. *See* Note, *Breach of Warranty—Applicable Statute of Limitations for Personal Injury*, 6 U. RICHMOND L. REV. 182, 188 (1971).

113 63 N.J. at 156, 305 A.2d at 427. In New Jersey, property damage is controlled by the six-year statute of limitations. N.J. STAT. ANN. § 2A:14-1 (1952). Thus, it would appear that in a products liability case, the plaintiff would have only two years to sue for personal injuries, but six years to sue for injury to his property.

114 The *Heavner* court observed that when the Code was adopted in New Jersey, the legislature amended the six-year statute while leaving the personal injury statute unchanged. 63 N.J. at 145-46, 305 A.2d at 420-21. The amendment to the six-year statute provides:

> This section shall not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes.

N.J. STAT. ANN. § 2A:14-1 (Supp. 1973-74). In addition, the official comment to N.J. STAT. ANN. § 12A:2-725 (1962) provides that the section "would change present New Jersey law. The present New Jersey limitation period is six years after the accrual of the cause of action." This would appear to indicate that the study group felt that the Code would only change the six-year statute.

that "[s]tatutes of limitations . . . should always be treated as substantive for conflicts purposes and subjected to complete functional choice-of-law analysis."[115] In addition, the *Heavner* court cited with seeming approval the Wisconsin case of *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*[116] which employed this same analytic approach.[117] The question presented by *Heavner*, then, is whether the judicial principles espoused by the New Jersey court in *Mellk* when determining the applicable substantive law, are now to be applied in dealing with statutes of limitations.

In his explanatory remarks concerning the decision to "borrow" the North Carolina statute,[118] Justice Hall appears to be adopting a type of functional analysis. The newly created "borrowing" rule will only apply where the cause of action and all circumstances relating to it arose in another state and where New Jersey has "no substantial interest" in the matter.[119] The court further explained that the decision is limited since

> there may well be situations involving significant interests of this state where it would be inequitable or unjust to apply the concept we here espouse.[120]

Thus, the resolution of *Heavner* suggests the same type of approach to statutes of limitations questions as courts currently employ in determining substantive conflicts issues, that is allowing the forum to apply

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115 WEINTRAUB, *supra* note 72, at 50 (footnote omitted).

116 63 N.J. at 141 n.6, 305 A.2d at 418 (citing Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973)).

117 Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 202, 206 N.W.2d 414, 418 (1973). *Air Products* was an action between a Pennsylvania plaintiff and a Wisconsin defendant. The court, in determining which state's statute of limitations should control, used the following considerations as guidelines:

> "Predictability of results;
> "Maintenance of interstate and international order;
> "Simplification of the judicial task;
> "Advancement of the forum's governmental interests;
> "Application of the better rule of law."

Id. (quoting from Heath v. Zellmer, 35 Wis. 2d 578, 596, 151 N.W.2d 664, 672 (1967)). The court believed that the second and fourth considerations should be of particular significance in determining the applicable statute of limitations. 58 Wis. 2d at 202, 206 N.W.2d at 418. Finally, the court analyzed both Pennsylvania's and Wisconsin's governmental interests. *Id.* Professor Leflar has also suggested the use of these same five guidelines in determining the applicable statute of limitations. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 282 (1966).

118 63 N.J. at 141, 305 A.2d at 418. See note 19 *supra* for the text of the court's statement.

119 63 N.J. at 141, 305 A.2d at 418.

120 *Id.* (footnote omitted).

the law of the jurisdiction which is most directly affected by the outcome of the particular litigation.[121]

If the *Heavner* court is suggesting, and the inference can be drawn, that such considerations as the significant interests of the respective jurisdictions are to be determinative in deciding the applicable statute of limitations, the *Heavner* decision may well prove to be the most significant inroad in the area of conflicts since *Babcock* in paving the way for a more equitable application of statutes of limitations.[122]

James R. Devine

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121 Babcock v. Jackson, 12 N.Y.2d 473, 481-82, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963) (quoting from Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954)).

122 In the recent case of Henry v. Richardson Merrell, Inc., 366 F. Supp. 1192 (D.N.J. 1973), Judge Coolahan was called upon to interpret the *Heavner* decision in a case which involved the drug thalidomide. The plaintiff, a minor who was born deformed because of the drug, was a Quebec resident whose mother ingested the drug in Canada. The defendant was a Delaware Corporation which manufactured the drug at a plant in New Jersey. *Id.* at 1193. Judge Coolahan stated his interpretation of *Heavner* required that "for choice-of-law purposes statutes of limitation will be assumed to be substantive." *Id.* at 1198. After analyzing the purposes of both Quebec's and New Jersey's statutes of limitations and determining the governmental interests involved, Judge Coolahan decided to apply the New Jersey statute since New Jersey had the more substantial interest in the matter because of the fact that:

> New Jersey served as the center of defendant's thalidomide activities in this country, and New Jersey therefore played a role in contributing to the chain of events terminating in Canada.

Id. at 1207.