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John E. Stanfield

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Mailing address: College of Law; University of Wyoming, Laramie, Wyoming.

NOTES

THE STATUTE OF LIMITATIONS IN ACTIONS FOR UNDISCOVERED MALPRACTICE

Various rules have been applied by the courts in attempting to resolve the problem of when the statute of limitations in malpractice actions should commence to run, where there has been a lapse of time between the commission of the negligent act and its discovery by the patient. The conflict arises in construing the customary statutory phraseology that the action must be commenced within a certain number of years after the cause of action accrues. As a result of these different views which are apparently based on questions of policy, i.e., to what extent the doctor should be protected from potential litigation, this field of the law is somewhat involved.

A majority of the courts base their decisions upon the rule that the statute of limitations commences to run at the instant of the negligent act, regardless of when the patient discovers the injury. The majority rule is based on the questionable theory that discovery of an injury adds nothing to the cause of action which accrues at the instant of the wrongful act.[1] Under this view, it has been stated that the negligent act is not severable

1. Capucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1919).

from its consequences[2] and that future elements of damage attach themselves to the original cause of action and do not become independent causes.[3] Where a patient is completely ignorant of the fact that a sponge has been negligently left in his body, it is difficult to perceive what value can be attached to his theoretical cause of action. Regardless of this inconsistency, it has been held under these circumstances and where the patient did not discover the existence of the sponge during the limitation period, that the statute is a complete bar to the action even though the damages were only nominal during the period with the serious consequences completely unforeseen at that time.[4] It would seem that under these conditions, there has been no practical damage until the patient discovers he has received something during the operation that he did not pay for, namely a pad of gauze which must be removed in a later operation with additional pain and suffering.

This unrealistic approach of the majority rule has resulted in "shocking"[5] consequences in many decisions. The Kansas court held a two year statute had run in an action where radium beads were negligently permitted to remain in the body of a patient, despite assurances to the contrary, ultimately resulting in her death six years later, at which time the beads were discovered.[6] The dissenting judge disapproved of a rule permitting a doctor to set an agency such as radium in operation and escape liability because it takes more than two years for the radium to accomplish the inevitable end—the death of the patient. Another case involved a pair of forceps which were left in a patient and not discovered until thirty months later when one-half of the forceps was discharged from the plaintiff's bowels.[7] The court held this action was barred under a one year statute since the cause accrues ". . . when a party has the right and capacity to sue, and his right of action is not suspended until he ascertains that he has a cause of action."[8] Impractical results such as these have occurred in many other cases[9] and demonstrate only too well the unreasonable character of the majority rule.

A well-recognized exception invented to avoid these harsh results in certain cases tolls the statute until the end of treatment by the physician.

2. Weinstein v. Blanchard, 109 N.J.L. 332, 162 Atl. 601 (1932).
3. Gardner v. Beck, 195 Iowa 62, 189 N.W. 962 (1922).
4. Capucci v. Barone, 266 Mass. 578, 165 N.E. 653 (1919).
5. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372, 374 (1944).
6. Graham v. Updegraph, 144 Kan. 45, 58 P.2d 475 (1936).
7. Carter v. Harlan Hospital Ass'n, 265 Ky. 452, 97 S.W.2d 9 (1936).
8. Carter v. Harlan Hospital Ass'n, see note 7 at page 10.
9. Hudson v. Moore (sponge not discovered for 14 years), 239 Ala. 130, 194 So. 147 (1940); Giambozi v. Peters (plaintiff contracted syphillis through doctor's failure to test blood used in a transfusion, although partial recovery was permitted on a contract theory), 127 Conn. 380, 16 A.2d 833 (1940); Becker v. Porter (leaving portion of dental drill in the jaw of plaintiff), 119 Kan. 626, 240 Pac. 584 (1925); Wilder v. St. Joseph Hospital (sponges not discovered for 10 years), ... Miss. ....., 82 So.2d 651 (1955); Weinstein v. Blanchard (drainage tube not discovered for 18 years), 109 N.J.L. 332, 162 Atl. 601 (1932); Lewis v. Shaver (unauthorized removal of an ovary and the tying of plaintiff's fallopian tubes not discovered for 7 years), 236 N.E. 510, 73 S.E.2d 320 (1952); Murray v. Allen (surgical sponge not discovered for 6 years), 103 Vt. 373, 154 Atl. 678 (1931).

The end of treatment exception probably first set forth in *Gillette v. Tucker*,[10] is based on the theory that so long as the doctor-patient relationship continues the physician has a continuing duty to repair the negligence; therefore, the cause of action does not accrue until the end of the contractual relationship. Despite the fact that the Harvard Law Journal in 1923[11] stated that such a result was indefensible and not followed by any other decisions, it would appear that most of the courts will apply the end of treatment exception at the present time in a case involving the necessary factual situation. Recent cases disclose that only four jurisdictions have expressly repudiated the exception.[12] While some jurisdictions have limited this exception to situations where the treatment itself has been negligent[13] or where the treatment has been connected with the negligent act,[14] these restrictions do not seem to be generally recognized or specified.

The end of treatment exception, while adding a degree of leniency to the majority rule, is unavailable in most cases because of the absence of the necessary factual situation. The wide acceptance of the end of treatment exception evidences a recognition by the courts that concealment of the cause of action is more apt to be a result where treatment continues, due to the confidential relationship between the doctor and his patient. It must be noted, however, that in the usual case the treatment has not been of sufficient length to permit an application of the exception. The surgeon seldom has much to do with the post-operative treatment, and yet most of the cases deal with foreign materials left in the body of a patient during an operation. For this reason, the end of treatment exception does not eliminate the objections to the majority rule, but merely lessens them in special situations.

Probably all of the courts applying the majority rule will toll the statute where there is shown to have been a fraudulent concealment of the cause of action by the physician, together with proof of scienter. Where the allegations are sufficient to raise the issue of a fraudulent concealment by the doctor, the statute is tolled until the plaintiff discovers, or reasonably should discover, the negligent act. Requirements frequently mentioned are that the fraudulent representations or actions must be expressly alleged in the pleadings,[15] it must appear that the doctor had knowledge of the

10. 67 Ohio St. 106, 65 N.E. 865, 93 Am.St.Rep. 639 (1902).

11. 37 Harvard L. Rev. 272, 273.

12. Gangloff v. Apfelbach, 319 Ill.App. 596, 49 N.E.2d 795 (1943); Graham v. Updegraph, 144 Kan. 45, 58 P.2d 475 (1936); Tortorello v. Reinfeld, 6 N.J. 58, 77 A.2d 240 (1950); *cf.*, Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940).

13. Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940); Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941); *cf.*, Tortorello v. Reinfeld, 6 N.J. 58, 77 A.2d 240 (1950).

14. Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931); Passey v. Budge, 85 Utah 37, 38 P.2d 712 (1934); *cf.*, Bernath v. Le Fever, 325 Pa. 43, 189 Atl. 342 (1937).

15. This appears to be the only basis of differentiation between Bernard v. Thompson (the statute was tolled), 138 Tex. 277, 158 S.W.2d 486 (1942) and the case of Carrell v. Denton (action was barred), 138 Tex. 145, 157 S.W.2d 878 (1942).

negligent act,[16] and several cases have held it must be proved that a design existed on the part of the doctor to avoid detection or delay the plaintiff from seeking other information.[17] In addition, some courts have required an allegation evidencing diligence on the part of the plaintiff in attempting to discover the cause of action.[18] In most of the cases, the necessary proof of scienter on the part of the doctor imposes an extremely difficult barrier to recovery. Those cases in which recovery has been permitted have generally involved definite misleading statements by the doctor,[19] or situations where unauthorized acts were performed during the course of the operation without the consent or knowledge of the plaintiff.[20] Other than in these situations, it is a rare case in which the doctor's knowledge of the negligent act can be proved and thus this exception is of little value in preventing the harsh results of the majority rule.

A growing number of courts in recent years have permitted a tolling of the statute for fraudulent concealment without the requirement of scienter.[21] Where a dental drill was left imbedded in the plaintiff's jawbone and not discovered within the prescriptive period, the court in *Morrison v. Acton*[22] held the action was not barred. The court stated the majority rule with exceptions, but recognized that ". . . neither of these theories would be of aid to the plaintiff in the instant case for the reason that there was no continuance of treatment and more than two years had elapsed since the extractions."[23] The court concluded the defendant knew, or was chargeable with knowledge that the drill had broken and was imbedded in the plaintiff's jaw and because of his position of trust, the failure to either disclose the injury or alleviate the condition constituted a concealment amounting to legal or constructive fraud. Courts following this theory generally hold the statute is tolled until the patient discovers or is put upon reasonable notice of the breach of trust. By use of the fiction of constructive knowledge, this view marks an abrupt departure from the majority rule to an extent which permits its classification as a separate and distinct minority rule.

While the cases following this rule of imputed knowledge are not

16. Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940); Saffold v. Scarborough, 91 Ga.App. 628, 86 S.E.2d 649 (1955); Carter v. Harlan Hospital Ass'n, 265 Ky. 452, 97 SW.2d 9 (1936).
17. De Haan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932); Murray v. Allen, 103 Vt. 373, 154 Atl. 678 (1931).
18. Moses v. Miller, 202 Okla. 605, 216 P.2d 979 (1950). Reversed on other grounds in 268 P.2d 900; Colvin v. Warren, 44 Ga. 825, 163 S.E. 268 (1932). Reversed on other grounds in 174 S.E. 257; Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940).
19. Buchanan v. Kull, 323 Mich. 381, 35 N.W.2d 351 (1949); Colvin v. Warren, 44 Ga. 825, 163 S.E. 268 (1932) see note 18.
20. Tabor v. Clifton, 63 Ga.App. 768, 12 S.E.2d 137 (1940).
21. Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934) and Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Adams v. Ison, 249 S.W.2d 791 (Ky. 1952); Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633 (1931) (apparently will imply fraud as a result of the confidential relationship); *cf.*, Breedlove v. Aiken, 85 Ga. App. 719, 70 S.E.2d 85 (1952).
22. 68 Ariz. 27, 198 P.2d 590 (1948).
23. Morrison v. Acton, at page 594.

completely in accord as to terminology and effect, the basic principle appears to be an increased liberality in the construction of the statute with the aid of definite fictions. The courts following this rule generally insist upon an allegation that the doctor knew of the negligent act, or through the exercise of reasonable diligence,[24] ordinary care,[25] or reasonable care[26] might have discovered it, before they will apply the theory. An allegation of reasonable reliance by the plaintiff on the skill or assurances of the doctor has been considered necessary in several cases.[27] The date of discovery should be set forth in the pleadings, togther with some form of allegation showing diligence in attempting to discover the cause of action. Where there was continuing treatment, the Arkansas court held that on the basis of fraudulent concealment arising from imputed knowledge, the defendant was guilty of continuing negligence.[28] However, in a subsequent case where the treatment feature was absent, it was held that the effect of the concealment was to toll the statute.[29] Thus, it would appear that Arkansas is in accord with the other jurisdictions on this point and will impute knowledge even where there is no subsequent treatment. While it depends on a fiction, this rule effectively removes most of the objections to the majority rule.

The most modern view holds that the statute of limitations in a malpractice action does not commence to run until the negligence is discovered, or reasonably should be discovered. The discovery rule was probably first advocated in the case of *Hahn v. Claybrook*,[30] which involved a discoloration of the skin through excessive doses of argentum oxide. The court followed the discovery rule, but held that the plaintiff should have discovered the injury more than three years prior to the commencement date of the action. No serious attempt was made to use the discovery rule again until the California case of *Huysman v. Kirsch*,[31] involving a drainage tube which was left in the plaintiff during an operation. The court announced several theories in support of their ruling that the action was not barred, but the rule which has subsequently been accepted as the holding of *Huysman v. Kirsch* is that the statute does not commence to run until the date of discovery, or the date when, by the exercise of reasonable care the plaintiff should have discovered the wrongful injury.[32] The *Huysman* case overruled earlier California decisions following the majority rule.[33] In the first few decisions after *Huysman v. Kirsch*, the rule was combined with the end of treatment;[34] however, the recent cases indicate that the two views are

24. Morrison v. Acton, see note 22.
25. Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934).
26. Proctor v. Schomberg, 63 So.2d 68 (Fla. 1953).
27. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944); Perrin v. Rodriguez, 153 So. 555 (La. 1934).
28. Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934).
29. Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953).
30. 130 Md. 179, 100 Atl. 83, L.R.A. 1917C 1169 (1917).
31. 6 Cal.2d 302, 57 P.2d 908 (1936).
32. Costa v. Regents of University of Calif., 116 Cal.App.2d 445, 254 P.2d 85 (1953), reversed on other grounds in 254 P.2d 85.
33. Gum v. Allen, 119 Cal.App. 293, 6 P.2d 311 (1931).
34. Greninger v. Fischer, 81 Cal.App.2d 549, 184 P.2d 694 (1947).

now used independently.[35] While the rule arose in a case involving foreign substances, it has since been applied to negligent treatment[36] and the negligent administration of drugs.[37]

The current trend of decisions seems to indicate that the *Huysman* holding, or at least the theory behind it, is a growing minority rule. In some of the recent cases it is difficult to determine whether the discovery rule is being followed or if the decision rests on implied fraud. The Colorado court, in a well-reasoned opinion involving a surgical sponge, held that where the injury is concealed and the plaintiff has used every reasonable effort to discover the cause of his ailments, the statute is tolled.[38] In holding an action was not barred, the Louisiana court stated that the ". . . doctrine that the prescriptive period does not commence until the injured party discovers that he has been damaged is peculiarly applicable to a case such as this . . .", because of the relationship between doctor and patient and concluded that knowledge on the part of the doctor is immaterial.[39] A recent Florida case involving negligent X-ray treatment held that the cause of action ". . . must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued."[40] The court differentiated between notice of consequences and notice of negligence and stated that in the latter situation the statute did not commence to run until discovery. A recent case involved a suit by a husband for the loss of services and companionship of his wife, who underwent a sterilization operation when advised not to have any more children and subsequently became pregnant—resulting in serious injuries.[41] The North Dakota court held the action by the husband was not barred by the statute which commenced to run at the date the wife became pregnant. This would seem to indicate an application of the discovery rule, although it was never specified as such by the court.

The real problem underlying the conflict of decisions, as outlined above, would seem to be one of policy in determining the extent to which doctors should be protected from litigation. Advocates of the majority or early views have argued that the statute was passed because of the uncertain results involved in the treatment of disease and the difficulty of tracing those results as time passes.[42] It has also been asserted that a view other than the majority rule would permit a patient to trace an affliction to an original cause alleged to have happened years ago, with the result that no practicing physician would ever be safe.[43] Another court even stated that doctors were handicapped enough by the pitiable condition of malpractice

35. Myers v. Stevenson, 125 Cal.App.2d 399, 270 P.2d 885 (1954); Hemingway v. Waxler, 128 Cal.App.2d 68, 274 P.2d 699 (1954).
36. Stafford v. Schultz, 42 Cal.2d 767, 271 P.2d 1 (1954).
37. Agnew v. Larson, 82 Cal.App.2d 176, 185 P.2d 851 (1947).
38. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).
39. Perrin v. Rodriguez, 153 So. 555 (La. 1934).
40. City of Miami v. Brooks, 70 So.2d 306, 309 (Fla. 1954).
41. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530, 173 A.L.R. 738 (1947).
42. Monohan v. Devinny, 131 Misc. 248, 225 N.Y.S. 601 (1927).
43. Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934).

victims without having to combat stale claims.[44] Those courts following the modern views contend that the orbit of duty and liability should not be drawn so as to protect the negligent. The Colorado court argued that the statute was enacted for the purpose of promoting justice, discouraging unnecessary delay and forestalling the prosecution of stale claims—not for the benefit of the negligent—and should not be construed to defeat justice.[45] In a recent case,[46] the dissenting judge stated that, in all probability, very few reputable doctors would disagree that the policy of protecting the medical practitioner from the danger of stale law suits should give way to the policy of protecting the public from sub-standard medical care. The dissent concluded with the apt statement that it was the job of the courts to dispense justice rather than to dispense *with* justice.

It is submitted that current tort law adequately protects doctors from unwarranted litigation without the added safeguard of the statute of limitations, which generally serves only to protect the negligent doctor from the just claims of his patient. The general rule with respect to malpractice decrees that the doctor is only liable where he fails to use that degree of care and skill commonly possessed by members of the medical profession in good standing in the same or similar localities.[47] This, in addition to the rule that expert testimony is necessary unless the act is one which may be regarded as within the common knowledge of laymen, has the effect of protecting the doctor from unjust claims. However, where a claim is valid the courts have a duty to prevent malpractice by making the doctor liable for his negligent acts. It should be noted that most of the cases involving the statute of limitations are examples of extreme negligence, or at least sub-standard medical practice, and involve situations where the doctor has left sponges, drainage tubes, needles, surgical wire, dental drills, incision clips, radium beads, forceps, roots of teeth and organs supposedly removed in the body of his patient. In fact, it has been said that ". . . their perusal would almost lead to the conclusion that certain surgeons use such incisions as waste baskets."[48] The social benefit of protecting doctors from unwarranted litigation should not be extended to encompass cases of obvious negligence, for certainly some sort of duty is owed to the public which is forced to rely on the physician. As to the contention that an application of the modern rules of discovery or implied fraud will open the flood gates of litigation, it should be recognized that such a rule would apply only to malpractice cases, of which there are no great number; also, the effect of such a rule is only to permit the case to proceed past the pleading stage at which time the plaintiff must still overcome the safeguards noted above.

An application of the modern rules will enhance the necessary position of trust held by the doctor, while the majority rule serves only to under-

44. Wilder v. Haworth, 187 Ore. 688, 213 P.2d 797 (1950).
45. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).
46. Lindquist v. Mullen, 45 Wash.2d 675, 277 P.2d 724 (1954).
47. Prosser, *Law of Torts* (2nd ed., 1955) p. 133.
48. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372, 374 (1944).

mine the confidence and co-operation necessary to the practice of medicine. The average layman is unable to diagnose his pains and must rely on the representations of the doctor, by means of which he can easily be misled. In some jurisdictions, a negligent doctor need only postpone action by the plaintiff for one year and the law will absolve him of liability. It is certainly both unreasonable and impractical to require a patient to go to another doctor immediately after an operation to ascertain if the operation has been performed correctly. Yet this is the logical result of permitting an allegedly negligent doctor to lull his patient into believing that the use of his hand will ultimately be restored by further operations and treatments until such time as the statute has prevented any action for negligence, as was done in *Gangloff v. Apfelbach*.[49] The doctor should have reasonable time to correct unforseen results of the operation or treatment and should not be harassed by premature litigation instituted in order to save the right of the patient in the event that there is substantial malpractice. Likewise, the patient should be permitted to rely on reasonable representations of the physician without the necessity of keeping one eye on the calendar. Competent physicians should not be hampered in their work by distrust on the part of their patients created by the protection offered to negligent practitioners by the statute of limitations as construed under the majority rule. The modern rules do not make competent physicians subject to increased liability, but do ensure that a negligent physician will be held responsible for his actions.

It would appear from the modern trend, both through a judicial and a legislative viewpoint, that courts are beginning to realize that only the negligent physician is protected by the majority rule—at the expense of the public and of competent practitioners. In cases decided since 1940, only nine jurisdictions[50] have consistently refused to toll the statutes or to permit a portion of the action and two of these decisions were with strong dissents.[51] On the other hand, eighteen jurisdictions have either held that the statute was tolled,[52] or have permitted a portion to remain on a contract

49. 319 Ill.App. 596, 49 N.E.2d 795 (1943).
50. Alabama: Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940).
Kansas: Becker v. Floersch, 153 Kan. 374, 110 P.2d 752 (1941).
Mississippi: Wilder v. St. Joseph Hospital, ____Miss. ____, 82 So.2d 651 (1955).
New Jersey: Tortorello v. Reinfeld, 6 N.J. 58, 77 A.2d 240 (1950).
North Carolina: Conner v. Schenck, 240 N.C. 794, 84 S.E.2d 175 (1954).
Ohio: De Long v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952).
Oregon: Wilder v. Haworth, 187 Ore. 688, 213 P.2d 797 (1950).
Texas: McFarland v. Connally, 252 S.W.2d 486 (Tex. 1952); but see Barnard v. Thompson, 138 Tex. 277, 158 S.W.2d 486 (1942).
Washington: Lindquist v. Mullen, 45 Wash.2d 675, 277 P.2d 724 (1954).
51. De Long v. Campbell and Lindquist v. Mullen, see note 50.
52. Arkansas: Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953).
Arizona: Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948).
California: Stafford v. Shultz, 42 Cal.2d 767, 271 P.2d 1 (1954).
Colorado: Rosane v. Senger, 112 Colo. 363, 149 P.2d 372.
Florida: City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).
Georgia: Saffold v. Scarborough, 91 Ga.App. 628, 86 S.E.2d 649 (1955).
Illinois: Dana v. Neuchiller, 2 Ill.App.2d 170, 118 N.E.2d 885 (1954); but see Gangloff v. Apfelbach, 319 Ill.App. 596, 49 N.E.2d 795 (1943).
Kentucky: Adams v. Ison, 249 S.W.2d 791 (Ky. 1952).

theory.[53] In addition, several statutory reforms have been instigated. The Missouri statute reads, in effect, that the cause of action will not accrue at the date of the technical breach, but only when the resulting damage is ascertainable and sustained.[54] A statutory amendment has been proposed in New York which would provide that the statute commences to run at the date of the discovery, if within six years.[55] It is interesting to note that a statute designed to force adherence to the majority rule was disregarded in a case[56] which followed the rule of implied fraud in an earlier decision[57] —which decision was apparently the cause of the amended statute.

In conclusion, it can be said that those cases involving the running of the statute of limitations in a malpractice action should be considered an exception to the general rules concerning the date of the accrual of the cause of action. Because of the present protective rules concerning proof of medical negligence and the difficulty of securing medical testimony in the actual trial, the modern rules of either discovery or implied fraud should be applied in such a situation by the courts. With respect to the two modern views, probably the California discovery rule depends less on fictions. However, either rule should reach an equitable solution in a given case by permitting the case to proceed past the pleading stage. If the claim is fallacious or unnecessary it will undoubtedly fail on proof, but at least the plaintiff has been given his day in court.

While some courts have stated that they have no alternative other than to follow the legislative dictates in holding that the words "after the cause of action accrues" refers specifically to the date of the wrongful act, other courts have construed the very same words to reach a more practical and reasonable result. It has been pointed out that the courts have both a duty and a right to make a judicial determination of the date of accrual where the legislature fails to state when it shall accrue.[58] The necessity for a reasonable construction can probably be illustrated most clearly by using the words of the Colorado court in *Rosane v. Senger,* when it was stated: "It is . . . an ancient maxim of the common law that 'Where there is a right there is a remedy'. What a mockery to say to one, grievously wronged, 'Certainly you had a remedy, but while your debtor concealed from you the fact that you had a right, the law stripped you of your remedy'."[59]

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Massachusetts: *cf.,* King v. Solomon, 81 N.E.2d 838 (Mass. 1948).
Michigan: Buchanan v. Kull, 323 Mich. 381, 35 N.W.2d 351 (1949).
Missouri: Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943).
Nebraska: Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941).
North Dakota: Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530, 173 A.L.R. 738 (1947).
Oklahoma: Moses v. Miller, 202 Okla. 605, 216 P.2d 979 (1950).
West Virginia: Baker v. Hendrix, 126 W.Va. 37, 27 S.E.2d 275 (1943).
Wisconsin: Krestich v. Stefanez, 243 Wis. 1, 9 N.W.2d 130, 151 A.L.R. 1022.

53. Connecticut: Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940).
New York: Matthews v. Pisani, 138 N.Y.S.2d 543 (1954).
54. Mo. Rev. Stat. § 516-100 (1949).
55. See 1942 Leg. Doc. No. 65 (E), 1942 Report, N.Y. Law Revision Commission 135, as discussed in 27 St. John's L. Rev. 147, 150 (1942).
56. Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953).
57. Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934).
58. Lindquist v. Mullen, 45 Wash.2d 675, 277 P.2d 724 (1954).
59. Rosane v. Senger, 112 Colo. 363, 149 P.2d 372, 375 (1944).