THE NEBRASKA BORROWING STATUTE:
A HISTORY AND TRANSLATION

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INTRODUCTION

Despite academic criticism, American case law retains the rule that questions of limitations are questions of procedure.1 Nebraska is no exception.2 However, while the cases recite this doctrine, the controlling rule with regard to limitations, where a case contains a foreign element, is not usually found in the cases. Rather, most state legislatures have intervened to impose a legislative rule of choice, a borrowing statute, applicable to at least some cases with a foreign contact.3 In Nebraska, for example, the borrowing statute provides that:

All actions and causes of action which are barred by laws of any other state, territory or country shall be deemed barred in this state; but no action shall be barred by laws of any other state, territory or country unless the same would have been barred by the provisions of this Chapter had the defendant been a resident of this state for the period herein prescribed.4

The scope of the Nebraska Borrowing Statute is less than clear. For example, the statute adopts the bar of “any other state, territory or country . . . .” The reference to the law of “any other state, territory or country,” if taken literally, would allow a defendant to plead in bar the shortest statute of limitations he could find anywhere, in any case. The language of the statute states no requirement of connection between a cause of action and

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a foreign statute. Since the statute is not on its face limited to causes of action arising outside of Nebraska, literal construction would allow selection of an unrelated period of limitations even in cases arising in Nebraska. It seems obvious that the legislature did not contemplate the result which a literal interpretation would achieve. Therefore, the generality of the statute must be subject to some limits. In addition to the difficulties in determining what type of cases the borrowing statute applies to and what law it borrows, the statute also contains the opaque proviso referring to the Nebraska period of limitations.

While the operation of the borrowing statute eludes reading, it is transparent to history. The difficulties with the statute are the product of repeated amendment. However, when the amendments are considered seriatim, the meaning of the statute, obscured by the amendment, emerges. The history of the statute demonstrates the type of cases to which it applies, the law it selects, and the working of the proviso.

HISTORY OF NEBRASKA BORROWING STATUTE

The first session of the Nebraska Territorial Legislature adopted a number of Iowa statutes, including a borrowing statute. This borrowing statute provided that:

But when a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter.5

This statute remained in effect until 1858, when the legislature adopted a borrowing statute modeled on Ohio’s.6 This new statute provided that:

Where the cause of action has arisen in another state or country between non-residents of this territory, and by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this territory.7

Then, in 1861, the legislature returned to the Iowa model. The new borrowing statute provided that:

When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense [sic] in this territory, as though it had arisen under the provisions of this act.8

The 1861 borrowing act was part of a statute generally amending the several Nebraska statutes of limitations. The 1861 act contained another provision, which stated that:

All actions, or causes of actions, which are or have been barred by the laws of this territory, or any state or territory of the United States, shall be deemed barred under the laws of this territory.9

This provision, Section 14 of the 1861 act, was a savings clause applicable to cases barred under the prior limitations statutes, which the 1861 act replaced. This is made clear by the juxtaposition of Section 14 with Section 15 of the 1861 act, which provided that:

All actions, the causes of which have accrued prior to the passage of this act, and which are not barred by the provisions of existing laws of said territory, or of any state or territory of the United States, and which would be barred under the provisions of previous sections of this act, may be commenced within twelve months from the date of the passage of this act, and not afterward, and all actions which will be barred within six months after the passage of this act by the provisions of previous sections of this act, may be commenced within six months from the date of the passage of this act, not afterward.10

While Section 14 of the 1861 act was a savings statute, when the 1861 act was codified into the revised statutes of 1866, it was codified as a separate borrowing statute. From 1866, the Nebraska Code of Civil Procedure contained two borrowing statutes. Section 18 was the first. It provided that:

All actions, or causes of action, which are or have been barred by the laws of this territory, or any state or territory of the United States, shall be deemed barred under the laws of this territory.11

Section 21 was the second. It provided that:

When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this

9. Id. § 14 at 54.
10. Id. § 15 at 54.
territory as though it had arisen under the provisions of this title.12

One additional statute must be set out before all of the statutes necessary for an understanding of the evolution of the current borrowing statute are in hand. That is the tolling statute. It was Section 20 of the Code of Civil Procedure, and it provided that:

If, when a cause of action accrues against a person, he be out of the territory, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the territory, or while he is absconded or concealed; and if, after the cause of action accrues, he depart from the territory, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.'

An examination of the case law under the three statutes, Sections 18, 20 and 21, makes their interrelationship clear.

Operation of Section 20

Edgerton v. Wachter14 is the first important case construing Section 20. It involved a suit on an oral contract. The suit was brought more than four years after breach, while the period of limitations for suits on oral contracts in Nebraska was four years. However, until one year before the commencement of the action, at which time he moved to Nebraska, the defendant had been a resident of Iowa. The defendant sought the benefit of the Nebraska period of limitations. However, the Nebraska Supreme Court held that the cause of action was not barred in Nebraska.

The cause of action arose in the State of Iowa; the statute of limitations commenced to run on it there, . . . it continued to run until he moved with his family out of the state. During all of said time, notwithstanding his repeated personal absences from the state of Iowa, he had a last and usual place of abode there, where process could have been served on him, although he was personally absent. But during none of this time had he a last and usual place of abode or residence in Nebraska, although he was generally there during business hours. I do not think that the statute of limitations could be running on the same cause of action in two different states at the same time; and, if I am not mistaken in this view, then it necessarily

12. Id. § 21.
13. Id. § 20.
14. 9 Neb. 500, 4 N.W. 85 (1880).
follows that it did not commence to run upon the cause of action in this case until the removal of the plaintiff in error with his family to the city of Plattsmouth, about a year before the commencement of the action.\footnote{15}{Id. at 501, 4 N.W. at 86.}

A second case involving the construction of Section 20, is \textit{Hartley v. Crawford}.\footnote{16}{12 Neb. 471, 11 N.W. 729 (1882).} That case was a suit on an Ohio judgment rendered more than five years before the commencement of the action. The defendant sought to rely on the five year period of limitations contained in Section 10 of the Nebraska Code of Civil Procedure. However, the defendant had never been a resident of the state of Nebraska. The Nebraska Supreme Court held that the action was not time-barred.

When this cause of action “\textit{accrued}” which was at the date of the judgment in Ohio, the defendant was “out of state,” and he has never come into it. He is therefore clearly within the letter, and we think the spirit also, of this provision. . . . The language of the state is general, and applies to all personal causes of action to which a bar is provided in the preceding sections. If the legislature had intended that Section 20 should only apply to causes of action arising in this state, or in favor of our own citizens, it is not at all likely that language of so general import would have been employed.

We are of the opinion that Sections 10 and 20 must be taken together in judging upon the facts of this petition, and that under these the action is not barred.\footnote{17}{Id. at 472-73, 11 N.W. at 730.}

The rule espoused in \textit{Edgerton v. Wachter} and \textit{Hartley v. Crawford} is a solution to the problem that: the rule that limitations are a matter of procedure potentially favors debtors. Flight is a very inexpensive form of bankruptcy. By fleeing to a state with a shorter period of limitations than that obtaining where the debt was incurred, a debtor would be legally protected from suit. However, the judicial interpretation of Section 20 prevented Nebraska from becoming a debtors’ haven. Under Section 20, as construed in \textit{Edgerton v. Wachter}, and \textit{Hartley v. Crawford}, the Nebraska period of limitations did not run in favor of a non-resident.\footnote{18}{Cf. Ball Engine Co. v. Bennett Co., 98 Neb. 290, 152 N.W. 550 (1915).} As to one who was not a resident when a cause of action accrued, if he later became a resident, the period of limitations ran not from the accrual of the cause of action, but from the date of commencement of residency.\footnote{19}{Harrison v. Union Nat’l Bank, 12 Neb. 499, 11 N.W. 752 (1882).}
On the other hand, the construction given Section 20 in *Edgerton v. Wachter* and *Hartley v. Crawford* potentially gave creditors the upper hand. Though a debt was long barred at the place where it was incurred, and would have been barred had the defendant been a resident of Nebraska for the requisite period, limitations in Nebraska began to run only from entry into the state. A debtor who left time-barred claims behind and acquired property in Nebraska might have found himself sued on the stale claim in his new home.

**Operation of Sections 18 and 21 with Section 20**

It was the conflation of the rule that limitations are a matter of procedure with the rule that limitations do not begin to run until entry into Nebraska which created the need for a borrowing statute.\(^2\) Where these rules would otherwise have revived a time barred claim, Sections 18 and 21 came to the assistance of a debtor. The two sections were always construed by the Nebraska Supreme Court as if they were one. They operated to allow a defendant, who by reason of non-residency could not rely on the Nebraska period of limitations, to rely on the period of limitations of his former residence, if the cause of action was barred there.

The operation of Sections 18 and 21 is illustrated by *Hower v. Aultman, Miller & Co.*,\(^{21}\) and *Minneapolis Harvester Works v. Smith.*\(^{22}\) In *Hower v. Aultman, Miller & Co.*, the defendant, then a resident of Indiana, contracted a debt in that state. He later removed to Kansas, where he continuously resided for the period of time necessary to bar an action on a promissory note under Kansas law. The Nebraska Supreme Court held that the defendant was entitled to rely upon the Kansas statute of limitations.

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20. The American rule that limitations are matters of procedure had its origin in a decision by Chancellor Kent in *Ruggles v. Keeler*, 3 Johns. 263 (N.Y. 1808). *Ruggles v. Keeler*, also, created the need for the borrowing statutes. In addition to holding that limitations were matters of procedure, Kent held that the statute of limitations has no operative effect until a defendant came into the forum. This result followed from his holding that the tolling provision applicable to nonresidence periods applied not only to those who were residents when a cause of action arose, but later left the state, but also to those who were nonresidents at the time the cause of action arose. The gloss placed by *Ruggles v. Keeler* on the New York tolling provisions has generally been applied to the tolling statutes of other states. *Ester, Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 43-44 (1962); *Vernon, The Uniform Statutes of Limitations on Foreign Claims Act: Tolling Problems*, 12 VAND. L. REV. 971, 982-83 (1959); *Developments in the Law: Statutes of Limitation*, 63 HARV. L. REV. 1177, 1282-83 (1950).

21. 27 Neb. 251, 42 N.W. 1039 (1889).

22. 36 Neb. 616, 54 N.W. 973 (1893).
By section 18 of the civil code it is provided that "All actions or causes of action which are or have been barred by the laws of this state, or any state or territory in the United States, shall be deemed barred under the laws of this state.

If the statute of limitations had run against the claim in the state of Kansas where plaintiff in error resides, and the cause of action was barred by the law of that state as alleged in the answer, this was a defense to the action, and the answer could not be assailed by demurrer as not presenting a defense.\(^2\)

_Minneapolis Harvester Works v. Smith_, was a suit on a contract made in Iowa by defendant, while he was an Iowa resident. Before the statute of limitations in Iowa had run, the defendant removed to Nebraska. He had been a resident of Nebraska for only three years when the suit was filed. In this case, the Nebraska Supreme Court had an opportunity to fully discuss the interrelationships between Sections 18, 20, and 21 of the Code of Civil Procedure. The court first noted the effect of Section 20 on the case. It stated that:

Under the provision of the section quoted, the statute of limitations did not begin to run against the note in this state until the defendant moved to Nebraska. Since he had not, when suit was brought, been a resident of the state for five years, the note was not outlawed here. The time the note had run after its maturity, until the defendant moved into the state, cannot be added to the time of his residence here in order to create a bar of the statute.\(^4\)

The court then quoted Sections 18 and 21 of the Code of Civil Procedure. It noted that the effect of these statutes was that:

If the statute of limitations of the state of Iowa had run in favor of the defendant while he was yet a resident of that state, then, under the provisions of the above sections, this action must fail.\(^2\)

However, since the Iowa statute had not run when defendant moved to Nebraska, the action was not barred. The court stated:

Inasmuch, therefore, as the petition shows that only four years had elapsed between the maturity of the note and the time the defendant moved to this state, the action was not barred at the time he became a resident here.\(^6\)

The second gap in the protection of the Nebraska statute of limitations which Section 20 created arose when a resident in

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23. 27 Neb. at 255, 42 N.W. at 1040.
24. 36 Neb. at 619, 54 N.W. at 974.
25. Id.
26. Id. at 620, 54 N.W. at 974.
whose favor the Nebraska statute was running left the State. The removal from the state tolled the running of the statute until the defendant returned. If, while the defendant was a nonresident, the statute of limitations of his new place of residency ran, then under Sections 18 and 21, he could assert the bar of the statute of the new residence. *Webster v. Davies* illustrates this situation. In that case, defendant, while a resident of Nebraska, entered into certain promissory notes. After the notes matured, the defendant moved to Wyoming. While the defendant was a resident of Wyoming, the Wyoming period of limitations on such notes ran. Thereafter, while he was visiting in Nebraska, a suit on the notes was commenced against him. The Nebraska Supreme Court held that defendant was entitled to rely upon that statute of limitations of Wyoming.

It has been quite generally decided that the provision of section 20 which tolls the statute during the absence of a defendant from the state does not apply where his absence has been of such a character as to entitle him to the benefit of the statute of limitations of another state to which he has removed. . . . Plaintiff in error argues that Sections 18 and 21 apply only where the cause of action arose in another state and became there barred, and that they do not apply to a case which arose in this state while the defendant was here a resident and where the bar of the foreign statute was created by his removal from this state after the cause of action arose . . . . Our statute does not, in either Section 18 or Section 21, require that the cause of action should have arisen in the state the benefit of whose statute is claimed . . . . We think it is immaterial, under our statute . . . where the cause of action arose, or where the defendant resided when it arose. If he has resided in another state so long as to be protected by the statutes of that state, such fact is a good defense to an action here. 28

From an examination of the cases interpreting Sections 18, 20 and 21, the interrelations of the three sections can be determined. The three statutes proceed on the conceptual assumption that the statute of limitations of only one state can be running on a cause of action during any given period of time. The only statute that could run in a defendant's favor was the statute of his place of residence. The law of the place where the cause of action arose was irrelevant, unless it was the place of the defendant's residence. If a defendant was a resident of Nebraska when the cause of action

27. 44 Neb. 301, 62 N.W. 484 (1895).
accrued, then the Nebraska statute governed the time of suit. If a
defendant was a resident of Nebraska when the cause of action
accrued, but then removed from Nebraska, the Nebraska statute
govered, unless the statute of the place to which he removed
became a bar while he resided there. If one was not a resident of
Nebraska when a cause of action accrued, but was a resident when
he was sued, the Nebraska statute governed and ran from the date
he became a Nebraska resident, unless the statute of his previous
place of residence had barred the cause of action before he became
a Nebraska resident.

PRESENT NEBRASKA BORROWING STATUTES

Section 20 of the Code of Civil Procedure remains intact in
Section 25-214.\textsuperscript{29} Sections 18 and 21 have been merged into Section
25-215,\textsuperscript{30} and in the process of merger, they have been altered. It
is, therefore, necessary to examine the process of amendment, to
determine whether it works a change in result.

Sections 18 and 21 remained substantially unaltered until
1905. In that year, Section 21 was amended. The amended
Section 21 read as follows:

Section 21. [Action barred another state.] When a
cause of action has been fully barred by the laws of any
state or country where the defendant has previously re-
 sided, such bar shall be the same defense in this state as
though it had arisen under the provisions of this title. Pro-
vided that provisions of this section shall be construed to
apply only to the causes of action arising without this state,
unless the action would have been barred had the debtor
continued to reside in this state.\textsuperscript{31}

The 1905 amendment was aimed at the decision in Webster v.
Davies. The effect of the amendment was to make Section 21
inapplicable to causes of action arising in Nebraska “unless the
action would have been barred had the debtor continued to reside
in this state.” That is, if a defendant removed from Nebraska, he
could only assert the bar of the statute of a foreign state, if the
 statute of limitations of Nebraska would have run had he remained
here.

The operation of the amendment can be illustrated by two
hypotheticals. First, assume that a defendant breached a written
contract, on which the statute of limitations in Nebraska is five

\textsuperscript{29} NEB. REV. STAT. § 25-214 (Reissue 1964).
\textsuperscript{30} Id. § 25-215.
\textsuperscript{31} Ch. 170, [1905] Laws of Neb. 654.
years. At the time of breach the defendant was a resident of Nebraska. He remained in Nebraska for one year, and then moved to a state which has a three year statute of limitations on actions for breach of a written contract. He remained there for three years and then returned to Nebraska. He was sued in Nebraska. He could not assert the bar of the foreign statute, since had he remained in Nebraska, the Nebraska statute would not have run.

Now assume that the defendant departed Nebraska one year after the cause of action on the written contract accrued. He then moved to a state which has a three year statute of limitations for actions on breach of written contracts. He remained there for four years, and then returned to Nebraska. He could assert the bar of the foreign state's statute of limitations. This was so, because if he had remained in Nebraska the period of limitations would have run.

After 1905, Sections 18, and 21 remained unaltered until 1913. The 1913 revision gave Section 25-215 its current form. It provided that:

All actions and causes of action which are barred by laws of any other state, territory or country shall be deemed barred in this state; but no action shall be barred by laws of any other state, territory or country unless the same would have been barred by the provisions of this chapter had the defendant been a resident of this state for the period herein prescribed.32

32. NEB. REV. STAT. § 25-215 (Reissue 1964); cf. REPORT OF COMM’N FOR REVISION GEN. LAWS OF NEB. § 8018 (1913).

Section 18 of the Code of Civil Procedure became NEB. COMP. STAT. § 6588 (1911), Section 20 became § 6590, and Section 21 became § 6591. It is important to note that Section 21 was Section 6591 of the 1911 compiled statutes because the current reviser's notes to Section 25-215 indicate that it is based on Section 18 of the Code of Civil Procedure. However, Section 25-215 received its current form in the report of the Statutory Revision Commission of 1913. In that revision, it is Section 8018. The notes of the Statutory Revision Commission show that the new statute is based on Section 6591 of the compiled statutes of 1911 (Section 21 of the Code of Civil Procedure). However, the 1913 revision is not based exclusively on either Section 18 or Section 21. Rather, it is a conflation of language from each of the two statutes. In order to see the change clearly, Sections 6588 (the former Section 18) and 6591 (the former Section 21) from the compiled statutes of 1911 are set forth, and the language from each statute that continues in the 1913 revision is italicized:

... 6588 Sec. 18 [Actions barred by laws of other states.] All actions or causes of action, which are or have been barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state.

... 6591 Sec. 21 [Action barred by laws of other state.] When
The Operation of the Borrowing Statute

An obvious approach to the problem of limiting the statute is to confine its operation to cases arising outside of Nebraska. However, this would leave open the question of what foreign law to select. Since the statute was passed against the backdrop of a rule applying the law of the forum, the statute could be read to reverse this usual rule and to select the limitations period of whatever jurisdiction current Nebraska conflicts doctrine selects to govern the substantive aspects of a case.\textsuperscript{33} For example, in a tort case that a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title. Provided that the provisions of this section shall be construed to apply only to causes of action arising without this state unless the action would have been barred \textit{had the debtor continued to reside in this state.}

33. Two law review comments, \textit{Legislation Governing the Applicability of Foreign Statutes of Limitation}, 35 Colum. L. Rev. 762, 769 (1935); \textit{Note: Conflict of Laws—Statutes of Limitations}, 14 Neb. L. Bull. 267, 271 (1936), in virtually identical language, cite Taylor v. Union Pacific R. Co., 123 F. 155 (C.C.D. Neb. 1903), for the proposition that Nebraska borrows the law of the place of the wrong in tort cases. The reading given to Taylor in the two law review notes is completely incorrect. Taylor was a case where a plaintiff injured in Iowa by one of defendant railroad’s trains brought suit in Nebraska. The railroad relied upon the Iowa statute of limitations. Plaintiff demurred to the railroad’s answer. The demurrer was sustained on the grounds that the railroad had failed to plead facts sufficient to bring it within the Iowa statute of limitations. Thus, any indication in Taylor that the Iowa statute applies is dicta, since the defense of the Iowa statute was stricken for factual insufficiency.

However, a close examination of Taylor will reveal that the application of the Iowa statute of limitations did not turn on the fact that Iowa was the place of the wrong. Rather, if the Iowa statute was applicable, it was because Iowa was a place of residence of the defendant. Thus the court notes:

\begin{quote}
\textit{it is clear that the statute of Iowa commenced to run at the date of the injury, and continued to run and was barred by the law of that state in two years thereafter, provided the defendant did business and maintained within the state an agent upon whom process could be served.}
\end{quote}

123 F. at 156 (emphasis added). For the statute to run the corporation had to have an agent “during all of said period . . . upon whom service of process could be made.” 123 F. at 156. The requirement that there be an agent during the whole period upon whom service could be made is necessary, because otherwise the corporation would not have “a legal habitation” in the state. 123 F. at 156.

Taylor does not turn on the fact that Iowa was the place of the tort. Rather, Iowa was the place of the tort, and, if an agent was in the state for the period of the statute, it was a place of residence of the corporation. In other words, Taylor recognizes that it is the state of residence whose statute will be borrowed, but holds that in the case of a corporation, it is a resident in any state in which it is authorized to do business and maintains an agent for service of process.
would be the law of the place of the wrong. However, neither the assumption that the borrowing statute applies only to cases arising outside of Nebraska, nor the assumption that the borrowing statute was passed because of dissatisfaction with the rule that the forum applies its own statute of limitations is borne out by a review of the history of the borrowing statute.

The history of the borrowing statute resolves the difficulties of construction with which we started. The borrowing statute is only engaged, when because of the tolling statute, a defendant may not rely on the Nebraska period of limitations. When the borrowing statute operates, it selects the law of a former place of residence, if the action is time barred there. If the action is not time barred in any former place of residence, the Nebraska period of limitations applies. In any event, Nebraska will not adopt a foreign period of limitations until a period of time from accrual of the cause of action as long as that prescribed by the Nebraska statute of limitations has lapsed.

The statute omits the language from the former Section 21 which directly referred to the law of the place “where the defendant had previously resided.” However, the statute contains the reference to continued residence in the proviso. The proviso makes no sense if the borrowing statute can be invoked by one who is at all relevant times a Nebraska resident. Thus, the requirement of non-residence remains built into the statute.

Similarly, the omission of the reference to a former place of residence does not change the rule that Nebraska borrows the law of the place of residence rather than the law of the place where the cause of action arose. The language referring to the defendant’s residence in Section 21 had always been redundant since the residency requirement was built into the interrelationship between the tolling statute and the borrowing statute. Both statutes were underpinned by the notion that the statute of limitations of only one jurisdiction can be running against a cause of action at any given time. While the defendant is a resident of Nebraska, the Nebraska statute runs. If defendant is not a resident of Nebraska,

35. The statute was applied to a cause of action which arose in Nebraska in Webster v. Davies, 44 Neb. 301, 62 N.W. 484 (1895). After having a statute which borrowed the place where the cause of action arose from 1858 to 1861, the legislature replaced it with a statute borrowing the law at the place of residence. See text at notes 7-8 supra.
then the statute of his place of residence is running. If a defendant becomes a resident of Nebraska after a cause of action accrues against him, then the Nebraska period of limitations begins to run and the statute of his former residence is tolled. However, if before he becomes a Nebraska resident the statute of his prior residence has run, there is no tolling since the bar is already complete. In that situation, under Section 25-215, he may assert the bar of his former residence. Similarly, if a cause of action accrues against a defendant while he is a Nebraska resident, and then he removes from Nebraska, the Nebraska statute of limitations is tolled by Section 25-214. However, if the period of limitation of his new residence runs while he is out of Nebraska, then on return to Nebraska he may assert the period of limitations of the new residence under Section 25-215. However, in all cases it is the law of residence which is controlling.37

In 1905, Section 21 of the Code of Civil Procedure was amended by adding the proviso, “that the provisions of this section shall be construed to apply only to the cause of action arising without this state, unless the action would have been barred had the debtor continued to reside in this state.”38 The effect of this amendment to the statute, as to cause of action arising in Nebraska, was to limit the operation of the borrowing statute to cases in which a period equal to the Nebraska period of limitations has run.

In 1913, the limitation of the proviso to causes of action arising within Nebraska was removed.39 The limiting provision then became applicable to all attempts to use foreign law as a bar.40 In addition, the language with regard to continuation of residence was removed. Thus the statute now provides that a foreign statute of limitations will not bar a cause of action in Nebraska “unless the same would have been barred by the provisions of this chapter had the defendant been a resident of this state for the period herein prescribed.”41 After the 1913 amendment, a


39. *See* text at note 32 *supra*.


cause of action is only barred by a foreign statute of limitations, if the period of time from accrual of the cause of action to the filing of suit is as long as the period of limitations prescribed by Nebraska law.\textsuperscript{42}

The operation of the statute is best understood from example. Suppose that “D” is a resident of Nebraska as is “P”. While both of them are motoring in a state where the period of limitations on torts is two years the automobiles they are operating collide. “P” suffers personal injury. “D”, unharmed, returns to Nebraska. Three years later “P” brings suit against “D” in the appropriate Nebraska District Court. “D” sets up the statute of limitations of the state of the occurrence as a defense. The defense would fail. Limitations are a matter of procedure. Nebraska would apply its own statute of limitations, unless the borrowing statute applied.\textsuperscript{43} The borrowing statute does not operate in this case, since there was no period of tolling. Therefore, the suit is timely.

In our second example, “D” is a resident of a state with a two year tort statute. “P” is a resident of Nebraska. While they are both operating motor vehicles in D’s home state, they are involved in a collision. Two years after the accident “D” moves to Nebraska. One year later “P” files suit against “D” in the appropriate Nebraska District Court for the personal injuries. “D” sets up statute of limitations of the state of prior residence as a defense. In this example there was a period of tolling: until “D” became a resident of Nebraska. During the period of tolling the statute of limitations of a place of residence ran. Therefore the borrowing statute applies. However, because of the proviso, the defense of foreign limitations is futile. The total period of time since the accrual of the cause of action is not the four years prescribed by Nebraska. Therefore, the claim is not time barred.

\textsuperscript{42} The Nebraska cases indulge a presumption against substantive change in the process of statutory revision. Stephenson School Supply Co. v. County of Lancaster, 172 Neb. 453, 110 N.W.2d 41 (1961); Hctor v. State, 141 Neb. 329, 3 N.W.2d 558 (1942). Where the intent to make substantive change is apparent, the substantive change will be given force. In re Estate of Berg, 139 Neb. 99, 296 N.W. 460 (1941); Finn v. State, 107 Neb. 417, 186 N.W. 544 (1922).

\textsuperscript{43} The question of substantive change by the 1913 amendment was raised in Farmers & Merchants Bank v. Merryman, 126 Neb. 684, 254 N.W. 428 (1934), which found no prejudice to the complaining party from the change. Id. at 688, 254 N.W. at 430.
A final example would have "P" and "D" both residents of Nebraska. The accident occurs in Nebraska. One year after the accident "D" moves to a state with a two year tort statute. He remains there for three years and then returns to Nebraska. Upon "D's" return, "P" files suit against him in the appropriate Nebraska District Court for personal injuries. "D" sets up the statute of limitations of his prior residence as a defense. Here the defense prevails. The tolling statute operated to prevent the Nebraska statute of limitations from becoming a defense. While the tolling statute was operating, the statute of limitations of a place of residence ran. The total time elapsed since accrual of the cause of action is greater than the four years prescribed by the Nebraska statute of limitations. Therefore, Nebraska will allow the foreign statute to serve as the bar.

All of our examples thus far have dealt with individuals. Corporations do not so easily fit into this pattern. Where the corporation is at all times amenable to process in Nebraska, so that there is no tolling, there is no difficulty. Nebraska would apply its own statute of limitations. However, where there is tolling difficulty can arise.44

The difficulties arise from the problem of determining where the residence of corporation is. A sensible answer would be to allow a corporation, which had not been amenable to process in Nebraska, to rely on the period of limitations of its place of incorporation, if that period had run, on the grounds that it was resident there.45 As an alternative, either inclusive or exclusive, a corporation might be allowed to rely upon the period of limitations of the place where the cause of action accrued, if it has at all times been amenable to service of process there.46 This approach har-

44. The statute is tolled whenever the corporation does not have an agent subject to process in Nebraska. Ball Engine Co. v. Bennett Co., 98 Neb. 290, 152 N.W. 550 (1915). It begins to run when the corporation becomes subject to process. The United States Express Co. v. Ware, 87 U.S. (20 Wall) 543 (1875) (Nebraska Law). However the operation of the tolling statute, Section 25-214, is modified by statutes such as the long arm statute. See, Gatleff v. Little Audrey's Transp. Co., 317 F. Supp. 1117 (D. Neb. 1970) (Nebraska Law).

45. The state of incorporation functions as an analog to the jurisdiction of domicile of an individual. RESTATEMENT (SECOND) OF CONFLICTS § 41, comment a at 169 (1971).

46. This appears to be the approach taken in Taylor v. Union Pacific R. Co., 123 F. 155 (C.C.D. Neb. 1903). A state in which a corporation is subject to process, though the state is not connected with the cause of action and the corporation is not there incorporated should be disqualified since its jurisdiction over the cause is at least questionable. RESTATEMENT (SECOND) OF CONFLICTS § 47(2), comment e at 176 (1971).
monizes with the purposes of the borrowing statute. However, it must be conceded that corporations do not easily fit into the language of the statute.

CONCLUSION

The primary purpose of this study has been the explanation of the borrowing statute. Hopefully, it has accomplished that purpose. However, the study has an additional goal. That a statute as potentially important as the borrowing statute is almost unintelligible without a close examination of its history should be an embarrassment to the bar. When the confused state of the borrowing statute typifies the condition of many of the Nebraska statutes governing civil practice, then the time for a thorough going revision of those statutes has arrived. Statutes governing procedure should facilitate the expeditious resolution of litigation. Statutes like the borrowing statute convert the process of litigation into the traversal of a mine field.