SEVENTY-SIXTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

PRESCRIPTION AND LIMITATION OF ACTIONS

1987

SEVENTY-SIXTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO PRESCRIPTION AND LIMITATION OF ACTIONS

TO:

The Honourable C.J. Sumner, M.L.C.,

Attorney-General for South Australia.

Sir,

One of your predecessors asked us to report generally on the law relating to limitation of actions which we now do. We reported in our Third Report on the need for giving power to extend the time of limitation in actions for testator's family maintenance and in our Twelfth Report on a proposed general law to extend the times within which actions might be brought.

In the earliest days of the law, so far as can be found today, there were no periods of limitation of action at all. Notwithstanding Bracton who says that all actions in the world after fixed times have a limitation, it is almost certain that Coke is right when he says that limitation of actions was by Force of Divers Acts of Parliament (2 Inst. 95). This is not completely true because some of the earlier real actions gradually acquired their own periods of limitation which afterwards had to be varied by statute, but with that slight emendation, which is of no importance at the present day, Coke's statement is correct. The earlier textbooks and abridgements refer to a statement in Spelman's Glossary page 32 that there was at a very remote period in England a set time for the heir of a tenant to claim after the death of his ancestor and that in case of non-claim before the expiration of the time which was a year and a day, the claimant was without remedy. Spelman however is

not regarded as being of any authority today. There is no other book of comparable account which states the fact thus and it may be taken probably not to be so, but was stated by analogy with other claims within a year and a day not relating to limitation of actions except to claims by a stranger after judgment in a real action.

There is however one practical period of limitation which is not quoted in the textbooks. If a person claimed that he held by tenure in ancient demesne, he had to show that he or his predecessor in title held in capite ut de corona on the day on which Edward the Confessor was alive and died i.e. January 5, 1066. Accordingly that date was not only a terminus a quo but also a terminus ad quem. If he or his predecessor ceased to hold title in chief of the Crown on any day before Edward the Confessor erat vivus et mortuus, that would have barred his claim to tenure in ancient demesne with its accompanying special incidents of tenure. As far as the Crown is concerned, the position was clear:- Nullum tempus occurrit regi was and is the rule with regard to the Crown except in so far as it has been altered by statute. In South Australia the position has been altered by Imperial statutes of 1623 and 1769 which we have inherited, and also in relation to proceedings against the Crown in tort or contract by Section 11 of our Crown Proceedings Act 1972. The giving of notices of action and the short periods of action prescribed in relation to actions against many public authorities in South Australia has been ameliorated but not wholly got rid of by Sections 47 and 48 of the Limitation of

Actions Act 1936.

As is said in Broome's Legal Maxims (10th Edn. 1939) page 32

> "The time and attention of the Sovereign must be supposed to be occupied by the cares of government, nor is there any reason that he should suffer by the negligence of his officers, or by their fraudulent collusion with the adverse party."

At the common law that was a completely reasonable attitude. Tenants of the King's forests were continually making assarts in forests as is shown over and over again in the eyres of the Forest. In the case of personal property, Crown debtors could not be brought to account for many years after the money had got into their hands. For example, Miss Mills in her article on the Pipe Roll for 1295 Surrey Membrane (Surrey Records Society No. 21) points out that the arrears of Geoffrey de Cruce, Sheriff of Surrey and Sussex in 1256, were not settled until 1335. Similarly in the Compendium Roll of July 1324, the Sheriff of Surrey and Sussex puts in summons debts going back as far as the Surrey Eyre of 1229. Accordingly throughout the Middle Ages there was very good reason for the maintenance of the maxim that time does not run against the Crown. Those circumstances however are not valid today, when the Crown has an efficient accounting system, and become even less so with the advent of the computer.

In the case of a writ of right, the period of limitation was at first computed from the time of the death of Henry I, i.e. 1st December 1135. By the Statute of Merton (1235) 20 Hen. III C.8 it was provided that time should run from the time of Henry II and Not of Henry I, i.e. 25th October 1154; that assizes of Mort

d'Ancestor ran from the last return of King John from Ireland or to the twelfth year of his reign i.e. 1210; and assizes of novel disseisin ran from the first voyage of King Henry III into Normandy, which was in 1220. Ultimately by the Statute 4 Westminster I (1275) 3 Edw. I C.39 the limitation period ran generally from the Coronation of Richard I, i.e. 3rd September 1189, and there the period remained for the rest of the Middle Ages and it is still the time when "the memory of man runneth not to the contrary" today.

As this period receded further and further into the past so the doctrine of limitation in relation to real actions became more and more unworkable.

> Holdsworth says (History of English Law Volume IV page 484):
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> "The omission to pass any statutes of limitation since the reign of Edward I had ... seriously impaired the efficiency of the real actions. The result was to render the titles to property uncertain; and this uncertainty had aggravated the lawlessness of the fifteenth century."

Ultimately by the Statute (1540) 32 Hen. VIII c.2 different periods of limitation were fixed for different classes of real actions and these periods of limitations were extended to provide for the cases of persons under disability: infants, married women, persons in prison and persons out of the realm. This statute however, like most statutes of limitation since, only barred the remedy and not the right. The statute did not apply to the Crown. This was remedied in 1623 by 21 James I c.2 which enacted that the Crown's right to a real action should be barred in sixty years from the date of the statute. The Statute of

Henry VIII did not extend to dignities, nor did it extend to a corporation aggregate such as a Dean and Chapter of a Cathedral, nor to services such as scutage, homage and fealty. The Statute of Henry VIII was restricted by a statute of 1554: 1 Mary Sess. II chapter 5 section 4 which provided that the Statute 32 Henry VIII chapter 2 should not extend to writs relating to advowsons or to a number of other writs relating to patronage and wardship.

A special period of limitation was fixed for qui tam actions, namely two years, by the Statute (1589) 31 Eliz. I c.5 s.4. This statute was noteworthy in that it was the first time that Parliament had legislated with regard to limitation of actions referring to anything else but actions for the recovery of land.

In 1609, by 7 Jac. I c.12 a period of one year was fixed with relation to book debts in that a shop book kept by a tradesman or handicraftsman could not be given in evidence after the period of one year which imposed a practical, even if not a theoretical limitation upon such suits.

The first general statute of limitations covering both real and personal actions is the Statute (1623) 21 Jac. I c.16 which was in force in South Australia on 28th December 1836 and remained in force with amendments until the Limitation of Actions Act of this State No. 14 of 1866-7. The Statute 21 Jac. I c.16 dealt first with certain forms of real action and then dealt for the first time with rights of entry. It required entry into land to be made within twenty years, with the exception of infants, married women, lunatics, persons in prison and persons beyond

seas. It then turned its attention for the first time in a comprehensive way to civil actions. It provided a period of limitation for most personal actions of six years. In cases of assault and false imprisonment the period was four years and for actions on the case for slander the period was two years. However the statute was not comprehensive; it did not apply to specialty contracts; nor to actions of account between merchants, their servants or factors; to actions brought for a debt under a special statute; or to actions brought on a record: see Holdsworth (op. cit.) Volume IV page 533. Also if the words at the time of speaking were not actionable, but a subsequent loss ensued, the statute was not a bar. For example where a woman was called a whore by which she lost her marriage seven years afterwards, the statute was held to be not a bar because it was not the words but the special damage which was the cause of action in the case: see Tonson v. Springe 1 Rol. Abr. 35.

Neither this statute or any other statute covered proceedings in equity or proceedings in admiralty because they did not proceed according to the course of the common law and that is the position down to this present day.

In addition, the statute did not cover matters in the ecclesiastical courts as tithes, but a six year period for such actions was prescribed by the Statute (1812) 53 George III c.127 s.5.

As far as Crown suits were concerned the Limitation Act 1623 was not very effectual because it provided a period of sixty years precedent to the 19th of February 1623 (the date of assent

to the statute) as being the date of limitation and that limitation soon became ineffectual by the effluxion of time. Finally it was provided by the Nullum Tempus Act 1769: 9 Geo. III c.16, that the period should be a gross period of sixty years and that statute is still in force in South Australia: see South Australian Company v. The Corporation of the City of Port Adelaide (1914) S.A.L.R. 16.

The effect of the Statute of 1623 with regard to actions on simple contract was narrowed by the doctrine which held that a payment on account of principal or interest or a mere verbal acknowledgment (that the debt was due) made before action brought took the case out of the statute. The law on this point was amended by Lord Tenterden's Act, the Statute of Frauds Amendment Act 1828: 9 Geo IV c.14 ss.1 and 3, whereby in actions founded upon any simple contract no acknowledgment or promise should be deemed sufficient evidence of a new or continuing contract to take the case out of the operation of the Act of 1623 unless the acknowledgment or promise was in writing containing or amounting to a promise to pay and signed the party to be charged or his agent thereunto duly authorised and that where there were two or more joint contractors, no joint contractor should be chargeable in respect only of the written acknowledgment of another.

As far as actions in equity were concerned, it was gradually held that where the Statute of Limitations would have been a bar at law, as for example to an action for an account, then it was equally a bar in equity because equity follows the law. But in general equity still used its own defence of laches and except

where the case would have been within the Statute of Limitations at law, the only time bar in equity was a successful defence of laches.

The law with relation to the limitation of actions in real property was last simplified before the founding of South Australia by the Statute (1833), 3 & 4 Will. IV c.27 which provided that no land or rent was to be recovered except within twenty years after the right of action accrued to the claimant or person through whom he claimed or in the case of persons under disability or beyond seas forty years. By Section 24 no suit in equity was to be brought after the time when the plaintiff if entitled at law might have brought an action except in the case of express trust, or fraud, and the rules of equity as to laches were expressly excluded from the operation of the Act. In similar fashion a mortgagor was barred at the end of twenty years from the time when the mortgage took possession or from the time of the last written acknowledgment by the mortgagee of the title of the mortgagor. Real and mixed actions were abolished. The most important part from the point of view of our consideration of prescription later is Section 34 of that Act which provided that "at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit, or other action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such entry distress action or suit respectively might have been made or brought within such a period, shall be extinguished." Periods of six years were fixed for arrears of

dower and arrears of rent or interest. In the same year Parliament turned its attention to limitation of actions in personalty by the Act (1832) 3 & 4 Will. IV c.42. This enabled executors to bring claims for trespass or trespass on the case which would have been maintainable by the person if he had not died provided the injury was committed within six calendar months before the death of the person and the action was brought within one year after the death. It dealt also with actions for specialties and on recognizances or awards and provided a limitation period of twenty years with certain exceptions. It excepted, as previous Acts did, infants, married women, lunatics, and persons beyond seas, but did not refer to person in prison. It then went on to extend the doctrine of acknowledgments to prevent time running in claims on indentures, specialties and recognizances.

The law as to limitation of actions was amended in various respects in this State by the Ordinance No. 6 of 1843, the Ordinance No. 9 of 1848 and the Act No. 13 of 1861. Finally, general Acts on limitation of actions except those relating to the Crown and those relating to equity and admiralty suits were passed by the Acts 14 of 1866-7 and 586 of 1893. All previous legislation in South Australia was repealed by the Limitation of Actions Act 1936 which, as amended from time to time, is the present source of law on this topic in this State. This Act was passed in 1936, only three years before the general reconsideration of the whole law of limitation of actions in England in 1939 by the Act 2 & 3 Geo. VI c.21.

The Act of 1936 is clearly only a collection of all the previous legislation with the marks of all the various centuries on it from Henry VIII's time down to that of William IV and all centuries in between. Sections 4 - 30 deal with proceedings for recovery in land and are more redolent of the ancient real actions and of the actions for ejectment which took their place, than of any modern law on the subject. Basically they are a reprint for South Australia of the law as it was in the Statute 3 & 4 Will. IV c.27, as amended by subsequent English Acts. It did provide one prescriptive section by Section 28, which is in the same terms as 3 & 4 Will. IV c.27 s.24 extinguishing the right and title of a person at the same time as his right to make an entry or distress or bring an action for realty came to an end. Sections 31 and 32 of the Limitation of Actions Act put into statutory form what had long been the practice, referred to previously of equity following the law where the action in equity was similar to an action at law and provided that no breach of an express trust should, except with regard to sums of money or legacies charged upon or payable out of land or rent and secured by an express trust or arrears thereof, be barred by any statute of limitations. By section 33 the Act provides for a fifteen year time bar for money charged upon lands and legacies and by section 34 a similar time bar is provided in relation to actions on leases by deed, actions of covenant or debt upon bonds or specialties or upon any judgment or recognisance. In the case of actions under Sections 33 and 34, the pre-existing law as to acknowledgments which prevented the running of the statute is

preserved.

Section 35 provided a general period of six years for most actions on simple contract and in tort, but actions for slander have to be commenced within two years by section 37. By section 36 all actions in which the damages claimed consist of or include damages for personal injury have to be commenced within three years. If the person is absent beyond seas, the time within which proceedings must be brought is extended by Section 39 following the Imperial Act 4 & 5 Anne c.16 s.19. Section 40 provides that absence from the State does not prevent time running in the case of a joint debtor within the State. This section follows the Imperial Mercantile Law Amendment Act 1861, 19 & 20 Vict. c.97 s.11. Similarly section 41 follows the Imperial Act of 1861 s.14 in relation to payment by one of several co-contractors. Section 42 dealing with acknowledgments is a copy of Lord Tenterden's Act, 9 Geo. IV c.14 s.1, which has been referred to above. Section 43 provides that an endorsement or memorandum of payments on promissory notes, bills of exchange, or other writing is not sufficient proof of payment to stop the statute running and that follows Section 3 of Lord Tenterden's Act. Section 44 provides for set-offs and similarly this follows Section 4 of Lord Tenterden's Act.

Section 45 as it now stands after the amendment in 1972, extends the time bar for persons under legal disability not only to the Limitation of Actions Act to which alone it previously applied, but now to time bars under any Act or law, and provides an ultimate period of limitation of thirty years. It further

provides by section 46 that imprisonment or absence beyond seas does not extend the time for taking action.

Section 46a provides that where a cause of action survives for the benefit of the estate of a deceased person, the time limited for the commencement of the action is extended by a period equal to the period between the death of the deceased and the grant of probate or letters of administration to his executor or administrator, or a period of twelve months whichever is the less. Section 47 mitigates to a certain extent the scandal which previously applied in South Australia, of very short periods of limitation, in the case of actions against public authorities, being in some cases as short as two months for notice and for action: see, e.g. Section 150 of the Police Act 1936. The period is now a period of twelve months in each case with certain limited exceptions, mainly in relation to criminal actions and actions in relation to local government. A dispensing power is given by Section 48 of the Act as it now stands as amended in 1972 and 1975. Subject to certain limitations, a court may extend the times for instituting an action, taking any step in an action, or taking any step with a view to instituting an action, except in relation to criminal proceedings.

Accordingly the present Act is as we have said a congeries of provisions, many of which are of little consequence today, and many others of which provide a whole series of different times within which litigants may take legal proceedings. All of this we feel ought to be swept away and a uniform system of law prescribed for South Australia.

Any system of law governing limitation for present day needs should comply with the basic conditions laid down in the Edmund Davies Committee. They stated the true purpose of limitation as being (a) to protect defendants from stale claims, (b) to encourage plaintiffs to institute proceedings without unreasonable delay, and thus enable actions to be tried at a time when the recollection of witnesses was still clear, and (c) to enable a person to feel confident after the lapse of a given period of time that an incident which might have led to a claim against him is finally closed. This third point has already been blown upon to a certain extent in this State by our section 48 as it now stands. King C.J. said in Van Vliet v. Griffiths (1979) 20 S.A.S.R. 524 at 530:

> "After the commencement of the amending Act in 1972, no action can ever become finally barred by expiration of time. There is always the power in the Court to extend the time after the expiration of the limitation period. A potential defendant cannot now acquire an absolute immunity to action."

However, the granting of discretions to the Court, particularly exercisable in relation to the three year limitation period for actions arising out of personal injury, has caused its own problems and its own uncertainties. A good discussion of the problem is contained in an article by P.J. Davies on the analogous English legislation called "Limitations of the Law of Limitation" in (1982) 98 L.Q.R. 249. However the problems in this area are not confined to personal injury cases. There is a discussion of the problems inherent in negligent advice cases under the Hedley Byrne rule, in the judgment of the Chairman of

this Committee in Johnson v. The State of South Australia (1980) 87 L.S.J.S. 415 at 439-446. Unfortunately when this matter ultimately came on appeal to the High Court of Australia the limitation point did not fall to be discussed by that Court.

It is our opinion that, with certain exceptions which will be listed later in this Report, it would be better to abolish the system of the present law of limitation of actions altogether and to provide in its place a system of prescription on the Scottish and Continental model which would bring to an end both the right and the remedy.

REASONS FOR RECOMMENDING PRESCRIPTION

We should shortly give our reasons for preferring prescription over limitation of actions. There is of course one major improvement which results and that is, apart from infancy and mental deficiency, the books can be ruled off at the end of the prescribed period and there are no more claims. In addition it gets over much law which it is logically hard to justify today. For example, if a debtor pays a creditor and the creditor has a statute barred debt owing by the debtor, the creditor can appropriate the payment, in the absence of any appropriation by the debtor, towards the statute barred debt. Similarly balance sheets are manipulated in the hope of providing something which might amount to an acknowledgment to prevent time running on a debt. So too, an executor may pay a statute-barred debt out of the estate of his testator. There are always problems in pleading with statutes of limitation which do not exist with

prescription: see e.g. Official Assignee v. Fuller 1982 1 N.Z.L.R. 671. Then there are all sorts of difficult problems which arise when payments or acknowledgements are made by one out of several co-debtors, or one co-mortgagee out of several co-mortgagees. There would be no place in our scheme for acknowledgments once the prescribed period had expired. The right as well as the remedy has gone and cannot be revived by any acknowledgment extending the time.

Part payment on the other hand is in a different position. Time should always run from the last of a series of payments, because until then the creditor has no reason to think that time is running against his debt.

We would also abolish the artificial distinction which exists between simple contract debts, specialty debts, debts of record and debts by statute, all of which add needless complications to this branch of the law.

Support for the approach we are recommending is provided by the fact that there has been a general, though admittedly slow trend towards prescription over the years.

The distinction between right and remedy has often been criticized. Dean Falconbridge in his article The Disorder of the Statutes of Limitation 21 Can. B.R. 670 at p.788 said:

> "It may also be observed generally that "right" and "remedy" are ambiguous and misleading terms. A "right" is not something which has an objective existence independently of a "remedy"...."

Franks in Limitation of Actions when referring to a statute barring the remedy but leaving the right said at page 30:

> "This state of affairs is very settled by authority but is, it is suggested, unsatisfactory since it fails to eliminate uncertainty (the prime benefit of the Statute)...."

The Ontario Law Reform Commission in its 1969 Report on Limitation of Actions recommended that there should be an extinguishment of right in all causes of action where the time for bringing action had lapsed. The Commission said at pages 126-127:

> "...the purpose of a limitation statute is to prevent persons from suing after the lapse of a particular time. The Commission believes that it is both more realistic and theoretically sound for the legislation to state that the claimant's right no longer exists once time has expired, rather than to merely bar the remedy."

In more recent times the Ministry of the Attorney-General of Ontario has published a Discussion Paper on a Proposed Limitations Act for Ontario. The proposals are largely based upon the recommendations made in the Commission's 1969 Report. One of the proposals contained in the draft statute is that subject to exceptions where the limitation period is extended on application, the statute would provide that when a prescribed limitation period expires and the right to bring an action is barred, the cause of action upon which the action was based and any title involved are ipso facto extinguished.

In 1967 the New South Wales Law Reform Commission had likewise recommended that rights and titles be extinguished on the expiration of the relevant limitation periods. In their report on the Limitation of Actions the Commission said atp.9:

> "We think, however, that the extinction of the claim or title should be made the general rule. Leaving the claim or title in existence without the support of a remdy by action is to leave settled expectations open for ever afterwards to disturbance by accident or by contrivance."

The Commission then said at p. 136:

> "The proposal is that it be made a general rule that, on the expiration of the limitation period for a cause of action, the personal right to a debt, damages or other money, or the right of property, which the cause of action would enforce is to be extinguished."

These proposals have been implemented in Part IV Division I of the New South Wales Limitation Act 1969 (see Appendix A.)

In general under the Roman civil law there was no period of limitation and a right of action once accrued was not lost by lapse of time. There were exceptions to the rule where time was fixed by a specific law or by the XII Tables. All praetorian actions which were brought purely for compensation were perpetual and only penal actions were temporary. The difference between those two forms is however not always easy to apply. Thus the actio doli was regarded as a penal action though it was restitutionary. On the other hand the actio ex testamento was perpetual even though it involved double liability.

Ultimately in the fifth century A.D. Theodosius II provided that thereafter the erstwhile actiones perpetuae should be limited to thirty years except where the actor (i.e. plaintiff) was a young person under puberty. Justinian altered the rule to say that where an action lay for a period of less than thirty years that period did not apply against a minor, i.e. someone

under twenty-five years of age (see c.2.40.5.1).

The law relating to prescription in this negative sense o destroying a title to an action has been taken over by Scotlan and the continental civil law countries. The long negativ prescription period in modern continental systems o jurisprudence is quite frequently thirty years. In Scotland th period is twenty years. We would propose that the period o prescription in South Australia be ten years. In order to compl with the first two of the three general principles in the Edmun Davies Committee Report we think that at the same time it shoul be enacted that, except where the plaintiff is an infant o mentally deficient, it is a defence to any claim taken within th ten year prescription period if action be not taken within thre years that because the plaintiff has delayed taking action for s long, the defendant has been materially prejudiced. Such defence would, we think, make plaintiffs take proceedings as soc as they can and in any event within three years, quite apart frc the fact that plaintiffs are normally out of their money ar whether it be for recovering a debt or obligation or i recovering damages for an accident, are naturally anxious fc their proceedings to be taken to Court as soon as possibl Davies in the article referred to in 98 L.Q.R. 249 at 27 suggests an alternative scheme in somewhat different form with provision leaving limitation as an issue for the discretion c the Court and that is in effect what our proposal would do.

This changeover from limitation of action to prescription has been going on in relation to some causes of action for quite a number of years now in other Australian States and Territories.

As has already been mentioned Part IV Division I of the New South Wales Limitation Act 1969 provides, in effect, that upon the expiration of the limitation period for a cause of action, the personal right to a debt, damages or other money, or the right of property, which the cause of action would enforce is extinguished.

All the States, so far as we can see, have, like South Australia, adopted 3 & 4 Will. IV c.27 s.34 which provides extinctive prescription of the right and title to land and rent at the end of the period limited for making an entry or distress or bringing any action or suit in relation to that land or rent.

Tasmania in its Limitation Act 98 of 1974 Section 21 has adopted section 16 of the English Limitation of Actions Act 1939 and has provided for extinctive prescription in relation to an action to compel discharge of a mortgage, in addition to the matters referred to in the older Act of William IV.

New South Wales in its Limitation Act 1969 Section 65(2), Queensland in section 12 of their Limitation of Actions Act 1974 No. 75 and Victoria in section 6 of their Act of 1958 also provide for extinctive prescription in the case of conversion or wrongful detention of a chattel. The Northern Territory by its Limitation Act 1981 section 19 goes on to provide for extinctive prescription in the case of successive conversions. That section is based on the English Limitation Act 1980 (1980 c.58 s.3). The

English section however is subject to a special section i relation to theft, section 4, (see Appendix B). Accordingly th idea of extinctive prescription as distinct from limitation ha over the past fifteen years been gradually gaining ground in th States, commencing with New South Wales and since then extendin through the other States and to the Northern Territory. W propose to make general what they have been tentatively doing i particular instances. There should however be one genera exception to prescriptive extinction based on fraud, conceale fraud, mistake or error.

We suggest in addition to the usual cases of frau concealed fraud or mistake, error should also be included a recommended by the Scottish Law Commission in their Repor because that equally may not be discovered until many years ha passed. A typical example is the man who orders delivery fruit trees of a given type which will not fruit for eight or t years but which have a leaf similar to other more valuable fru bearing species of the same kind so that the error cannot easily detected, as in the well known Purple Pershore case Ly v. Bamber (1930) 2 K.B. 72 where the wrong type of plum tree w supplied.

We should add that where in this report there is a referen to an action, it is considered that the same time limits shou apply to arbitrations as to actions. If it is necessary to p in a special section to this effect, section 34 of the Engli Limitation Act 1980 (see Appendix C) would appear to be adequate precedent.

There is no magic in the ten year period we have proposed and it may be that some other figure may be thought by Parliament to be more appropriate. We have in effect taken a period which appears to be reasonable and which lies between the longer periods allowed in the present Act for actions relating to land and specialities or judgments, and the shorter periods allowed for other causes of action.

A problem which arises is in relation to the three years' limitation for claims arising out of personal injury. Scotland in its report No. 74 on Prescription and the Limitation of Actions excepted the three year limitation on personal injury claims from the general prescriptive extinction period. We do not recommend that exception here. We have already proposed that after the expiration of three years from the accrual of the cause of action except in the case of infants or mental defectives any defendant can prove as a defence that he has been materially prejudiced by the failure to issue a writ within three years and that we think provides sufficient protection. Practically all the applications for extension in our Courts brought under section 48 of the present Limitation of Actions Act are in relation to personal injury actions. The prospective plaintiff is usually very seriously injured, physically or mentally, and particularly the latter, and cannot give instructions within the required time, or he leaves it to his solicitor or his trade union who do not notice the three year period run out and then there is an application to the Court which may or may not come within the terms of section 48 on some fairly fine lines of

distinction. We think that the protection we have given by wa of a defence is sufficient and that there should be no exceptic as was recommended by Scotland for personal injury actions.

Accordingly, with three exceptions we recommend a ten yea period of extinctive prescription for all obligations howeve arising, subject to the defence to which we have just allude The three exceptions are as follows:

(1) The period of extinctive prescription should not run duri infancy, or mental deficiency. In the case of menta deficiency we would amend the present law to say that t period should not run whether the mental deficiency existing at the beginning of the cause of action as is t present law, or, we would add, in the case of menta deficiency occurring during the running of the period. mental deficiency in this context we mean not only luna but such physical or mental disability as would preclude plaintiff from giving proper and sufficient instructions his solicitor to commence prosecute, carry on, or settle a action.

(2) Time should not run while payments are being made reduction of a debt or other obligation.

(3) The reform recommended by this report should not in any w affect the operation of the equitable doctrine of laches relation to causes in equity.

We would however qualify the first exception. In instanc where the plaintiff is under a disability, it would seem fa that a person against whom an action might lie would be able

give notice to proceed to the person or people in charge of the disabled person's affairs.

Some precedent for this is provided by section 29a(2) of the Trustee Act 1936 which provides that a representative or trustee can serve a notice requiring a claimant to either withdraw a claim or to institute proceedings to enforce it within six months of service of the notice.

Recently the Ministry of the Attorney-General of Ontario has prepared a draft limitations statute which among other things provided that a person against whom an action might lie would be able to give notice to proceed to the parent or guardian of a minor, or to the committee of a person otherwise under a disability.

The New South Wales Limitation Act of 1969 in fact contains provisions allowing a notice to proceed to be given to the curator of a person under a disability (see Appendix D).

We would therefore qualify exception (1) to the extent that it would be possible for a person against whom an action might lie to start time running against a person under disability by giving a notice to proceed to the person or people in charge of the disabled person's affairs.

We think that the prescriptive period should bind the Crown in ordinary litigation to the same extent as it would apply in the case of an action between subject and subject, but that it should not apply to the recovery of taxes, fees, and other dues (c.f. Land Tax Act 1936 s.67).

RUNNING OF TIME

We should next deal with the question of from when tim should run. In general time should run from the accrual of th cause of action. However there should be three exceptions t this rule. The first applies so as to overrule the decision o the House of Lords in Cartledge v. E. Jopling & Sons Limite (1963) A.C. 758 and the decision of the House of Lords in Pirel General Cable Works Ltd. v. Oscar Faber & Partners (a firm (1983) 1 All E.R. 65. In our opinion, in any action in which th damage is of the gist of the action, time should not run until the plaintiff is aware that he has suffered damage. The Engli amendment which makes time run from the time when the plainti could by reasonable enquiries have discovered the damage do not, it seems to us, go far enough. The enquiry is always ma with hindsight and it is quite unfair to most plaintiffs, who not have the specified medical or building or other knowledge find out the answer. They only go to consult a solicitor wh they have actual knowledge of their asbestosis or their defecti foundations or whatever and nothing should be allowed to suffi except actual knowledge.

The second amendment is that time should never run in t case of fraud, concealed fraud, concealment, mistake or erro With the exception of error, England's Limitation Act 19 contains a good section in relation to this namely section (see Appendix E). The case of error we have taken from consideration of the matter in the Scottish Law Commission Repo No. 74 to which we have already referred. Error as we have s

would be a very useful category in such cases as the Purple Pershore case to which we referred above, where one has to wait for a longer period than the period of limitation to see what sort of plums the plum tree actually produces.

The third exception relates to the special problems arising from injuries which do not manifest themselves for very many years after the injury is originally sustained. Those include uranium and allied radiation effects, the effects of herbicides such as Agent Orange and slow acting asbestosis and pneumoconiosis claims. We have already reported to you in our Eighty-seventh Report on this specialised topic.

In our Eighty-seventh Report we recommended that there be a "long stop" period of thirty years, so that proceedings could not be instituted after thirty years had elapsed from the date of the last exposure for which the defendant was responsible.

We believe that such a "long stop" period may also serve a useful purpose in cases involving defective buildings - defects in buildings may not come to the knowledge of owners for decades. It would cause a considerable amount of hardship to those in the building industry if it was possible to sue with regard to defective building work indefinitely.

The problem of insurance in this regard was averted to by the English Law Reform Commission in its Twenty-first Report relating to Limitation of Actions when they said at p. 15:

> "A further factor to which the majority attach importance is the difficulty (and expense) of insuring against claims to which such professional persons as architects, engineers, surveyors, accountants and solicitors are particularly likely to become

> vulnerable if either the date of knowledge becomes the general terminus a quo or the court is given a wide discretion. The cost of insuring against professional negligence claims is already high and the evidence of the underwriter's representatives was to the effect that any substantial increase in the number of potential claims would make it very difficult to obtain cover."

This is indeed an important consideration if builders architects and councils are to be liable for a long time for any defects.

Although a limitation period which expires six years (o under our proposals) 10 years after the building was constructe is really too short a time in the case of latent buildin defects, it seems desirable to have a cut-off point at son stage. Thirty years would appear to be a reasonable time, ar should provide a good opportunity for defects to show themselves

Apart from providing exceptions to the general rule, in sor instances it may be beneficial for the statute to provide whe the cause of action in fact arises.

For example, presently there appears to be some uncertain as to when a co-surety's right to contribution accrues, and hen when time begins to run. Franks in Limitation of Actions says page 94:

> "At common law a surety's right to contribution accrued only when he actually paid more than his share. In equity, however, certain relief was available to him as soon as he became liable to pay the creditor. The surety's rights against his co-surety therefore probably accrue as soon as his own liability is ascertained. It may be mentioned that the position of a trustee who has committed a breach of trust and seeks contribution from a co-trustee is the same."

Rowlatt on the Law of Principal and Surety 4th ed. disputes that a co-surety's claim could be barred due to this right to sue in equity, he says at page 198:

> "Whether statute can ever run against surety before payment:
>
> It is submitted that the existence of a right in the surety before payment to take equitable proceedings to compel the principal or a co-surety to pay, as the case may be, the whole or the proper proportion of the debt, can have no affect on the time when the statute begins to run against him. The statute would seem to have no direct application to a claim in that form; and if the surety pays and immediately afterwards sues principal or co-surety for money paid, it is hard to see how a defence founded on the statute could be supported by evidence that more than six years before proceedings might have been taken quia timet in equity."

Aside from the question of whether an equitable right of action begins time running there has been some uncertainty as to whether a common law right of action accrued once the liability of the surety is ascertained, or alternatively not until the debt had been paid by the surety.

In early cases such as Wolmershausen v. Gullick (1893) 2 Ch. 514 and Robinson v. Harkin (1896) 2 Ch. 415 it was held that the Statute of Limitations begins to run against a surety suing a co-surety for contribution, once the liability of the surety is ascertained.

However in more recent cases the courts have held that time does not begin to run until the debt had been paid by the surety. For example in both Walker v. Bowry 35 C.L.R. 48 and Hawrish v. Peters 137 D.L.R. (3d.) 709 the Court distinguished the facts from those in Wolmershausen v. Gullick (supra) and on the facts

of the former case held that the appellant's right of action for contribution did not arise until he had paid the debt, and in the latter case held that a surety's cause of action against a co-surety does not arise when his own liability was determined, but rather when he made a payment beyond the extent of his own share.

As there is some uncertainty in this area of the law, it would appear to be a sensible move to provide by statute when time begins to run. We envisage that such a provision could largely follow the approach of the Supreme Court of Canada in Hawrish's case, namely that time begins to run once the surety has made a payment beyond the extent of his own share (of what is unpaid by the debtor).

Proceedings where prescriptive extinction should not apply

Certain actions should be excepted from the report as actions to which prescriptive extinction does not apply at all namely:

1 any action directly concerning a charitable trust

2 any action for breach of trust, construction of a will o testamentary instrument, or general administration of a estate, or any order in lieu of an order for genera administration

3 any action to enforce an easement, profit a prendre c restrictive covenant

4 any action by a remainderman or reversioner or a beneficiary in remainder or reversion

5 any action under the Encroachments Act 1944

6 any action relating to the enforcement of an injunction

other mandatory order

7 any action for a declaration as to personal status

8 any action to enforce a possessory lien or any action to redeem property held under such a lien

9 any action to enforce or redeem a mortgage charge or encumbrance

10 any action for breach of a condition on which any estate in land freehold or leasehold is held

11 any action by the Crown to recover unalienated waste lands of the Crown

12 any action in the Industrial Jurisdiction for which no time limit is prescribed.

We think that certain special types of action should have limitation and not prescription as at present because they deal with specialised topics where special times have been fixed by Parliament for that specialised topic. They are as follows:

1 any action in admiralty

2 any action for testator's family maintenance within the Inheritance (Family Provision Act) 1972. We think it necessary to keep to the present times in this case because estates must be wound up as soon as possible and a long extinctive prescription period would materially hinder the winding up and distribution of deceased estates

3 any action for a lien or charge within the provisions of the Workmen's Liens Act 1893. This we understand is being looked at in any event by a working party within your own

Department

4 any action for a wool lien or a fruit lien under thei
respective Acts

5 any action to enforce a warehouseman's lien under th
Warehouseman's Liens Act 1941

6 any action to redeem a pawn under the Pawnbrokers Act 1888

7 any action for workmen's compensation under the Worker
Compensation Act 1971

8 any action or prosecution for a penalty under section 54 c
the Constitution Act 1934

9 any action to be taken under section 86 of the Constitutic
Act

10 any action in the Industrial jurisdiction where a limitati
period is prescribed

11 any action against the Guarantee Fund established under t
Legal Practitioners Act 1981.

Private International Law

We turn then to a matter which is consequential on o
principal recommendation which is in relation to the enforceme
of judgments in private international law.

An examination of this area of the law was recent
undertaken by the English Law Reform Commission who in 1
issued Report No. 114 entitled Classification of Limitation
Private International Law (for a summary of their recommendati
and the resulting legislation see Appendices F and G).

The distinction between prescription, which extinguishes
right, and limitation of action, whereby the lapse of time mer

bars the remedy, has particular significance in private international law. The common law courts have long since classified extinctive prescription as a matter of substance, and limitation of actions as a matter of procedure.

There will of course still be some matters of procedure left because of the various items which we have said should stay outside our general recommendation as to prescription, but in general in future our Courts will be tending to think in terms of prescription rather than in terms of limitation of actions if our proposals are accepted. If the foreign law, properly so construed, is a law relating to limitation of actions then our Courts will construe the foreign law as procedural in which case the plaintiff will fail if the South Australian period of limitation or our period of prescriptive extinction has expired and he will succeed if our period has not expired even though the cause of action is barred in the country of the foreign lex causae: see Harris v. Quine (1869) L.R. 4 Q.B. 653. There will however be a real problem if the foreign law has extinctive prescription, in that our law on the topic will in general hereafter be substantive and generally speaking the foreign law will also be classified as substantive. In that case the position should be that if the cause is barred under the lex causae that should end the matter both in South Australia and in the foreign court: see Huber v. Steiner (1835) 2 Bingham New Cases 202 at 210-211; 132 E.R. 80 at 83. Thirdly, in the cases where statutes of limitation remain in South Australia and the foreign law is substantive, then it would appear from dicta in

Harris v. Quine and Huber v. Steiner that there is no longer a enforceable right if the foreign period of limitation has r out. The last permutation is one on which we have been unable find any authority but it is one which is going to happen fr time to time once we adopt extinctive prescription and that where the South Australian provision will be treated substantive and the foreign one in a proper case as procedura We would agree with the English Law Commission Report No. 1 that in that case it is probable that both periods prescription and limitation are inapplicable and there is limitation of the action at all.

The problem is compounded in tort due to the confusi surrounding the private international rules relating to torts.

The general rule was enunciated by Willes J. in Phillips Eyre (1870) L.R. 6 Q.B. 1 and was restated by the High Court ir Koop v. Bebb (1951) 84 C.L.R. 629 to be:

> "... an action in tort will lie in one State for a wrong alleged to have been committed in another State, if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in the State in which the action is brought; and secondly, it must not have been justifiable by the law of the State where it was done."

The interpretation of this rule has been the subject of m debate, particularly the second requirement.

In Machado v. Fontes (1897) 2 Q.B. 231 the Court held t an act would be "not justifiable" within the second requirem if it gave rise to criminal liability, even if no civil sanct attached. This was rejected by the majority of their Lordsh

in Chaplin v. Boys (1971) A.C. 356.

Lord Wilberforce in that case said at page 389:

> "I would, therefore, restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done.
> It remains for me to consider (and this is the crux of the present case) whether some qualification to this rule is required in certain individual cases. There are two conflicting pressures: the first in favour of certainty and simplicity in the law, the second in favour of flexibility in the interest of individual justice. Developments in the United States of America have reflected this conflict: I now consider them."

Lord Wilberforce went on to consider those developments at some length. He then considered the question whether there should be introduced into English law a concept of the proper law of the tort and said at pages 391-392:

> "... I am not willing to go so far as the more extreme version of the respondent's argument would have us do and to adopt, in place of the existing rule, one based solely on "contacts" or "centre of gravity" which has not been adopted even in the more favourable climate of the United States. There must remain great virtue in a general well-understood rule covering the majority of normal cases provided that it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present.
> Given the general rule, as stated above, as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained from that principle which represents at least a common denominator of the United States decisions, namely, through segregation of the relevant issue and

consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet. This technique appears well adapted to meet cases where the lex delicti either limits or excludes damages for personal injury: it appears even necessary and inevitable. No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred. If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice. Even within these limits this procedure may in some instances require a more searching analysis than is needed under the general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical."

He then applied the approach to the instant case, saying at page 392:

"I find in this approach the solution to the present case. The tort here was committed in Malta; it is actionable in this country. But the law of Malta denies recovery of damages for pain and suffering. Prima facie English law should do the same: if the parties were both Maltese residents it ought surely to do so; if the defendant were a Maltese resident the same result might follow. But in a case such as the present, where neither party is a Maltese resident or citizen, further inquiry is needed rather than an automatic application of the rule. The issue, whether this head of damage should be allowed, requires to be segregated from

> the rest of the case, negligence or otherwise, related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties so circumstanced.
>
> .....
>
> .....
>
> The rule limiting damages is the creation of the law of Malta, a place where both plaintiff and defendant were temporarily stationed. Nothing suggests that the Maltese state has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties."

Lord Hodson likewise held that although, in general, in an action for a personal injury the lex loci delicti determined the rights and liabilities of the parties, if some other state had a more significant relationship with the occurence and the parties the local law of that state would be applied.

This approach was followed by the High Court in Pozniak v. Smith 56 A.L.J.R. 707. In that case Mason J. said at page 714:

> "All that I have said induces me to conclude that it would be a mistake to say that in every case of the class now under consideration we should apply an inflexible approach. We should preserve the width of the discretion, the object of which is to do justice between the parties. That will be done if, generally speaking, we select in personal injury cases, if not in all tort cases, the courts of the State where the injury occurred, so that the law of that State, the lex loci delicti, will determine the rights and liabilities of the parties, unless, with respect to the particular issue, some other State has a more significant relationship with the occurrence and the parties, in which event the case will be remitted to that State and its law will be applied."

Various jurisdictions have come to the conclusion that the confusion surrounding this private international law issue,

should be cleared up by statute.

The Ontario Law Reform Commission in their 1969 Report (Limitation of Actions proposed that the statute contain provision that Ontario limitations laws and the analogous law (any other province, or of any state or country, be classified (substantive law for the purposes of private international la whether or not the particular law bans the remedy or extinguish the right. The result being that the statute of limitation (the lex causae would always apply.

This proposal has not yet been implemented however it h received approval in a Discussion Paper on Proposed Limitatio Act (1977) published by the Ministry of the Attorney-General Ontario.

A different approach was proposed by the Law Refo Commission of British Columbia in its Report on Limitatio (1974). This proposal is now reflected in section 13 of t Limitation Act 1975. Section 13 provides that, where the Briti Columbia court determines that the limitation law of anoth jurisdiction is applicable but that law is classified procedural for the purposes of private international law "t court may apply British Columbia limitation law or may apply t limitation law of the other jurisdiction if a more just result produced."

The English Law Commission in its 1982 Report Classification of Limitation in Private International L recommended inter alia:

"(1) Our principal recommendation. The English rule whereby statutes of limitation, as opposed to rules of prescription, are classed as procedural should be abandoned, and where under our rules of private international law a foreign law falls to be applied in proceedings in this country, the rule of that foreign law relating to limitation should also be applied, to the exclusion of the law of limitation in force in England and Wales.

(2) By way of qualification to our principal recommendation, the rules of limitation in force in England and Wales should not be excluded in cases where both a foreign law and the law of England and Wales fall to be taken into account under the rules of private international law in the determination of any issue by the court.

(3) The domestic law of England and Wales should be applied for the purpose of determining the terminus ad quem of a limitation period prescribed by a foreign lex causae."

(for a complete summary of the Commission's recommendations see Appendix F)

In the following year the Scottish Law Commission in its Report Prescription and the Limitation of Actions made the following recommendation with respect to the private internation law issue:

"The rules of prescription or limitation of the lex causae, including any relevant rules of suspension and interruption, should be applied by a Scottish court, however they may be classified for choice of law purposes under the lex causae, to the exclusion of any corresponding rule of Scots law."

The approach which this Committee recommends differs to some extent from the recommendations set out above. In our opinion there should be a general rule that where the proper law is a

foreign lex causae the rule of limitation or prescription of tha foreign law should apply. If, however, the obligation or th tort was partly entered into or done as the case may be, in thi State, then our law should apply. Thirdly, there should be th exception which has always applied, namely that of public polic which is that our Courts refuse to apply foreign law whic "outrages its sense of justice or decency": see the judgment c Scarman J. (as he then was) in In the Estate of Fuld (No. 3) 196 p.675 at 698.

We should add that if the rules of prescription c limitation of the lex causae include any relevant rules c suspension and interruption then the relevant rules of suspensic and interruption form part of the rules of the lex causae to k applied by a Court in South Australia.

The only other point which remains to be considered i whether in order to be enforced in a South Australian Court foreign judgment must be conclusive on the merits. That is th result of the decision in Harris v. Quine referred to above. Th decision was called in question by some of their Lordships : Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. (1975) A.C. 591. Harris's case has howeve even though it is an isolated decision as Lord Diplock point out at p.635, been treated in all the textbooks on internationa law as stating the law and we see no reason to change that la The only problem which then arises is what is a judgment on th merits? Unfortunately much of what is said by their Lordships the Black-Clawson point is coloured by the terms of the Engli

Foreign Judgments (Reciprocal Enforcement) Act 1933 and in particular section 8. However we think the distinction which ought properly to be drawn in such a case is that drawn by Lord Diplock, albeit in a dissenting judgment, at p.636. If the decision of the foreign court is based solely on the limitation point, then it is not a judgment on the merits. If on the other hand, it has decided other matters of fact or law essential to the plaintiff's claim to be entitled to his remedy, or to the defendant's answer to that claim, then issue estoppel ought to apply in the Courts of South Australia in regard to those issues so decided, as distinct from the decision on the mere question of limitation or prescription.

We should add that a very small portion of this area is covered by our Foreign Judgments Act 1971. This Act only applies to proclaimed countries and with some exceptions in Western Europe those countries are parts of the former Empire where the common law still presumably applies. Nothing that we have said in this report affects the operation of the Foreign Judgments Act.

However as the discussion in the Black-Clawson case of the English Act of 1933 shows, some of the matters discussed by us in this report could affect a claim to register a judgment under our Foreign Judgments Act so that, when the recommendations of this report are translated into statute it would be worth considering the amendment of the 1971 Act to make the relevant provisions uniform for the enforcement of all foreign judgments.

Acquisition of Title to Land by Prescription

We turn now to the acquisition of title to land by means of prescription. Before 1833 the effect of the statutes of limitation in their application to land was merely to bar rights of action and rights were not extinguished by them, only remedies: see Hunter v. Burn (1703) 2 Salk. 422.

The common law had its own rules with regard to acquisitio of title to land. In general a successful disseisor got title b virtue of his disseison but that was not a title by prescription it was a title by adverse action. Later, with the coming of th writs for ejectment the present law of adverse possession cam into existence. The present Limitation of Actions Act 1936 ha provisions in relation to the recovery of possession for recove of land or rent in Sections 6 to 30.

Our proposed prescriptive statute will likewise need provide for adverse possession to land. The statute will al need to deal with land under the provisions of the Real Proper Act 1886 because section 80a of that Act provides:

> "A person who would have obtained a title by possession to any land which is subject to this Act, if that land had not been subject to this Act, may apply to the Registrar-General for the issue to him of a Certificate of Title to that land."

The application may of course be defeated by a caveat lod under s.80 f.

Accordingly one has to go back to the law prior to the enactment of Part VIIA of the Real Property Act, which was inserted by Act No. 39 of 1945, in order to ascertain how a person becomes entitled to make a Part VIIA application.

We do not propose in this report to discuss the problems attendant upon the doctrine of adverse possession. In general it can be defined as possession inconsistent with the title of the true owner. Anyone wishing to follow the problems which the doctrine of adverse possession raises will find them in The Law of Real Property by Megarry and Wade (4th Edn. 1975) pages 1013-1027.

Whatever difficulties exist regarding the doctrine of adverse possession, substantially greater difficulties exist regarding acquisition by prescription of easements and other incorporal rights in property.

In the United Kingdom there are three methods by which prescriptive easements may be acquired, namely:

1. Prescription at common law
2. The doctrine of lost modern grant
3. Under the Prescription Act 1832, 2 & 3 Will. IV c.71

Under the first method of acquisition, a prescriptive easement will arise if user of the right over the alleged servient tenement dates from the time when the memory of man ran not to the contrary. This was fixed by the Statute of Westminster 1275 as 1189, which in practice meant that if it

could be proved that the right had not been enjoyed by the use or his predecessors in title at any time since 3rd September 118 he failed. This doctrine is as a result inapplicable in Sout Australia (see the judgment of Clark J. in Richardson v. Brownir (1936) 31 Tas. R. 78 at 141).

The doctrine of lost modern grant was developed by tl courts in order to allow claims based on long enjoyment witho the necessity of proving user since 1189. The development of t doctrine was explained by Cockburn C.J. in Bryant v. Foot (186 L.R. 2 Q.B. 161 at 181:

> "Juries were first told that from user, during living memory, or even during 20 years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed."

It is probable, though not certain, that the presumption cann be rebutted by evidence that no such grant was ever made, but t Court will not presume lost grants which would be contrary statute or custom or if during the entire period when the gr could have been made there was nobody who lawfully could h made it: for example if the land was in strict settlement dur the whole of the period. The doctrine of lost modern grant held by the High Court of Australia to be in force in New So Wales in Delohery v. Permanent Trustee Company of New Sou Wales (1904) 1 C.L.R. 283 and without doubt also applies in Sc Australia.

It was in this state of affairs that the Prescription Act of 1832 was passed. The Act was passed for the purpose of shortening the time of prescription in certain cases and to avoid the inconvenience arising from the meaning which the common law attached to the expression "time whereof the memory of man runneth not to the contrary". The Act fixed certain statutory periods for enjoyment up to the time of litigation and if that continuous enjoyment could be proved up to the time of litigation then the plaintiff succeeded and he could not be defeated by proof that the user began after 1189. In the case of an easement enjoyed for twenty years as of right nec vi nec clam nec precario it was enforceable in the action, and if it was enjoyed for forty years under the same terms it was deemed by the Act to be absolute and indefeasible unless it was enjoyed by written consent. The same rules applied to profits a prendre except that the periods were thirty years and sixty years respectively.

It was held by Boucaut J. in White and Others v. McLean (1890) 24 S.A.L.R. 97 that the Imperial Prescription Act applied in South Australia. Doubts as to the correctness of that decision were referred to but not commented upon by Walsh J. in Anthony v. The Commonwealth (1973) 47 A.L.J.R. 83 at 91. However the decision in White v. McLean has stood in South Australia since 1890 and in addition the High Court of Australia in Delohery's case (supra) held that the doctrine of lost modern grant was in force in New South Wales and if that is so it seems that no distinction can be drawn between that doctrine and the applicability in South Australia of the Imperial Prescription Act

1832.

We propose to proceed on the basis that the doubts expressed, which were not followed up by Walsh J. in his judgment, are unfounded and that in fact the 1832 Act is a public general Act of the Imperial Parliament which was in force in England on the 28th day of December 1836 and was capable of being applied in this State, if not immediately, then after the necessary period of time had elapsed in South Australia for the operation of the doctrine: see the decision of the Privy Council in Cooper v. Stuart (1889) 14 App. Cas. 286 at 292.

There are two, possibly three, amendments to the Prescription Act in force in South Australia. The first is in relation to ancient lights by the Ancient Lights Act No. 1043 of 1911 which is now Section 22 of the Law of Property Act 1936 which prevents any acquisition of an ancient light after 26th October 1911. There are however still many ancient lights in existence in South Australia which were in existence on 26th October 1891. The second is in section 6 of the Water Resources Act 1976 which reads:

> "The right to the use and flow and to the control of all waters in the State shall, subject to this Act, be vested in the Crown and shall be exercised by the Minister in the name of and on behalf of the Crown."

The third, which is more arguable, is in relation to leases of land under the Crown Lands Act 1929. Section 227(1) of that Act provides (inter alia) that every form of alienation or attempted alienation of land comprised in a lease or agreement without the consent of the Minister shall have no effect. The problem o

course is as to whether the words "every form of alienation, or attempted alienation", include an involuntary alienation by prescription. Certainly a Court trying to give effect to the general declared policy of the Crown Lands Act would be inclined to hold that an involuntary alienation was so caught.

The Prescription Act 1832 was described by the English Law Reform Committee in its Fourteenth Report (1966) as "one of the worst drafted Acts on the Statute Book". In that Report a majority of the Committee were in favour of total abolition of prescriptive rights. The arguments advanced to justify the abolition of prescriptive easements were:

1. the tendency of modern legislation is for people's rights and liabilities to be defined in writing
2. before long the title to all land will be registered, and as the easement is an overriding interest binding a purchaser for value of the land, even though he may be without notice of the easement because no mention of it need appear on the register, it ought to be abolished
3. if the servient owner is to be burdened with prescriptive easements, he ought to have a simple and cheap method of obstructing the running to time; the existing methods were said to be unsatisfactory.

The majority were against abolition and argued:

(a) many of the unsatisfactory characteristics of prescription can be remedied without abolishing prescription

(b) prescription involves open enjoyment, it is not

"easement stealing"

(c) the dominant owner may believe that he has an easemen already and may have paid an enhanced price for th land because of his belief

(d) if a status quo of long-standing ought to be give legal recognition, prescription has not outlined it usefulness

(e) an easement, apparently based on prescription may i fact have had a legal grant, now lost, as its root

(f) universal registration of title to land is a long tim ahead.

While in disagreement over whether easements by prescriptio ought to be abolished the Committee was unanimously agreed tha if prescription was to be retained, that the period o acquisition should be assimilated so far as possible to tha governing the limitation of actions to recover land under th Limitation Act 1939. They recommended repealing th Prescription Act 1832 and substituting a period of twelve year enjoyment (in gross, not limited to a period next before actic brought) as a means of acquiring an easement by prescription.

In view of the proposal to reduce the prescription period t twelve years, it was suggested that enjoyment should only cour if the servient owner knows or ought reasonably to have known (it. Also, after considering various methods of interruption, was recommended that registration of an objection against th quasi-dominant land in the local land charges register b available.

The recommendations of the Committee have at this stage not been acted upon.

The question of whether the law relating to the acquisition of easements or profits a prendre by prescription should be improved upon or abolished was in 1969 considered by the Ontario Law Reform Commission in their Report on Limitation of Actions.

The Commission concluded that it should no longer be possible apart from a transitional period to create prescriptive easements and profits a prendre in Ontario. The transitional period recommended was ten years. In the Commission's view one of the main reasons for abolishing the right to acquire easements and profits a prendre by prescription is to ensure that the land registration reflects to the greatest extent possible the title position of any given parcel of land. As a result it was recommended that either a judgment or notice of claim be required to be filed in the appropriate registry or land titles office within two years after the end of the ten year transitional period. Notification of the registration of any such notice of claim would be given to the owner of the servient land. If such a judgment or notice was not filed by that time, the prescriptive right would lapse. An extension of time would be available on grounds of hardship, provided the applicant had been unaware of the registration requirement during the registration period.

While these recommendations have not been acted upon, they have recently been endorsed in a Discussion Paper on a Proposed Limitations Act prepared by the Ministry of the Attorney-General of Ontario.

Subsequently Law Reform Agencies in other Canadian provinces have made similar recommendations. In 1970 the Law Reform Commission of British Columbia in a Report entitled Limitations Part 1: Abolition of Prescription recommended that all existing methods of acquiring prescriptive rights should be abolished. The Commission also recommended that prescriptive rights in existence five years after the time of abolition should cease to exist at that date, unless in the meantime the persons entitled to their benefit have registered a judgment or filed a notice of claim, setting forth the particulars of the prescriptive rights, in the appropriate Land Registry Office.

More recently the Law Reform Commission of Manitoba has published its 48th Report entitled Prescriptive Easements and Profits a Prendre. The Commission was of the view that the most important reason for abolishing the right to acquire easements by prescription is the benefit that would flow to the Torrens system, but that this objective must be balanced by the need to protect individuals who had already acquired rights under the existing law.

The Commission recommended abolition of all existing methods of acquiring easements by prescription and that easements in existence at the time of abolition would cease to exist five years later unless a person asserting the right had prior to that date had his right registered as either a judgment, certificate of lis pendens or caveat setting forth the particulars of the prescriptive easement.

Where the right had not been registered within that time, it

would be possible to apply to a judge for an extension of time on grounds of substantial hardship in instances where the applicant had been unaware of the registration requirement. The judge would be empowered to grant such an extension of time on the condition that the applicant pay to the servient owner such compensation as the court may determine.

The Commission recommended that these recommendations apply to profits a prendre also.

Some jurisdictions have in fact already statutorily abolished prescriptive easements. In Queensland the Imperial Prescription Act 1832 has never applied and rights to light and air have been abolished for some time. In 1975 in an amendment to the Property Law Act 1974 the legislature also abolished the acquisition of easements by way of lost modern grant. The amendment provides:

> " Part XIA - Rights of Way
> 198A. Prescriptive right of way not acquired by user.
> (1) User after the commencement of this Act of a way over land shall not of itself be sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of a lost grant.
> (2) If at any time it is established that an easement of way or right of way over land existed at the commencement of this Act the existence and continuance thereof shall not be affected by subsection (1).
> (3) For the purpose of establishing the existence at the commencement of this Act of an easement of way or right of way over land user after such commencement of a way over that land shall be disregarded."

Alberta's The Limitation of Actions Act (R.S.A. 1955 c.177, s.49) provides:

> "No right to the access and use of light or any other easement right in gross or profit a prendre shall be required by a person by prescription, and it shall be deemed that no such right has ever been so acquired."

An almost identical statutory provision is contained in the Lands Titles Act of Saskatchewan C.R.S. 1965, c.115, s.74.

Before commenting upon the desirability or otherwise of abolishing easement by prescription in this state, we will quickly examine the effect on the Real Property Act 1886 on prescriptive rights. Two major questions arise with respect to that Act.

The first is as to the effect of section 69 iv of the Real Property Act on the principle of indefeasibility. By section 69 iv of the Act it is provided:

> "The title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the original certificate of such land, be absolute and indefeasible, subject only to the following qualifications:.....
>
> > (iv) where a right-of-way or other easement not barred or avoided by the provisions of the 'Rights-of-Way Act 1881', or of this Act has been omitted or mis-described in any certificate, or other instrument of title: in which case such righ-of-way or other easement shall prevail, but subject to the provisions of the said Rights-of-Way Act 1881, and of this Act."

The difficulty with section 69 is that sub-clauses (i), (ii), (iii), and (vii) all provide that the exception shall not apply in the case of a registered proprietor who has taken bona fide for valuable consideration. It would appear that that provision does not apply to the exception under sub-clause (iv) and that

indefeasibility in section 69 iv has only limited application, the Committee is of the view that it is desirable that the exception be abolished altogether. In our view easements should be required to be noted on the Certificate of Title whether in existence before or after the land was brought under the Act.

We recommend that section 69 iv be abolished. A transition period would naturally need to be provided, in order to allow people time to have their easements registered.

We suggest that a time for repeal for example the year 2000, be decided upon, and in the meantime the necessity for registration of easements be publicised.

The second important question is whether prescriptive easements may be created over land registered pursuant to the provisions of the Real Property Act. This depends largely upon the meaning of the wording of Part VIIA of the Act, where section 80a provides:

> "Any person who would have obtained a title by possession to any land which is subject to this Act, if that land had not been subject to this Act, may apply to the Registrar-General for the issue to him of a certificate of title to that land."

The question is whether easements come within the definition of the term "land" in that section. Land is defined in section 3 as follows:

> " 'land' shall extend to and include all tenements and hereditaments corporeal and incorporeal of every kind and description and every estate and interest in land."

That on the face of it is wide enough to encompass an easement. Doubts were expressed on the matter by Windeyer J. in Gartner v.

Sidman (1962) 108 C.L.R. 12 at 31, but he did not have to consider this, as at the trial the claim to a prescriptive easement was abandoned.

The issue came up again for consideration in Anthony v. The Commonwealth (1973) 47 A.L.J.R. 83:

> "This case involved an action brought by a landowner to determine the amount of compensation payable for the compulsory acquisition of land in the Northern Territory bordering the Stuart Highway for the purposes of roadway realignment. At the time the land was acquired it had over it, inter alia, two water pipelines and their supports. The Commonwealth argued that it had acquired a right by prescription to have the pipelines on the plaintiff's land as the value of the fee simple estate would be less and less compensation would be required if the owner could insist on the removal of the pipelines. Walsh J. held, inter alia, that easements could not be acquired over Torrens land by prescription, basing his conclusion on a consideration of the provisions of the Real Property Act 1886-1980 (S.A.) ss 84, 86 and 88. He stated (at 90-1):
>
> > "Although I think it may be difficult to contend that these later sections contain provisions by which in express terms easements by prescription are 'barred or avoided' within the meaning of s 69(IV), I think that they do indicate a legislative intention inconsistent with the acquisition by prescription of easements adverse to a registered proprietor. It appears that in s 84 it is assumed that an easement created by express grant but not entered on the certificate of title is binding upon the registered proprietor who grants it. But the fact that this provision is made in relation to easements created by express grant or transfer and that no similar provision is found in relation to easements claimed to have arisen by prescription is, in my opinion,

> significant. Section 88 provides for the entry by the Registrar-General of a memorial of an easement 'granted or created', upon the original certificates of the dominant and servient lands and their duplicates. An easement based upon prescription does not satisfy, in my opinion, the description of an easement 'granted or created'....The special provisions made in s 86 to ensure the effectiveness of any easement acquired or enjoyed by the public gives support, in my opinion, to the view that a private easement not based on any actual grant and not notified on the certificate of title is not effective against the registered proprietor."

As Walsh J. was only able to reach the conclusion that easements may not be acquired by prescription over Torrens system land in this state, after examining a number of sections which in his view indicated a legislative intention inconsistent with acquisition by prescription, it is in our view desirable that the matter be cleared up by statute.

This then leads to the point when we must decide whether easements by prescription should or should not be allowed to be created.

On the whole the Committee is of the view that it would be best to repeal the Prescription Act, abolish the doctrine of lost modern grant, and provide that easements may no longer be created by prescription.

There is in our view no reason why a person who wishes to acquire an easement over someone else's land should not adopt the straightforward course of asking for it, and having it registered pursuant to section 88 of the Real Property Act if granted.

We agree with the observations of the Ontario Law Reform Commission, that modern planning requirements should make it less likely that there will be instances in which people will be disadvantaged by the abolition of prescription. These days there are more extensive planning requirements as to access in new subdivisions, and as to setback in the construction of new buildings making it less likely that prescriptive rights regarding overhanging projections, support, and rights of way would arise in the future.

Also, assuming that Anthony v. The Commonwealth (supra) is followed in the future it is not possible for prescriptive easements to be acquired over Torrens Title land. The majority of land in this state is registered pursuant to the provisions of the Real Property Act, there is very little likelihood that new prescriptive easements would be created.

A further reason for the abolition of prescription is that the law in this area is far from straightforward, and is capable of leading to a great deal of confusion, should a claim of prescriptive easement in fact arise.

Although not recommending that prescriptive rights which already exist should be extinguished, we are of the view that it is desirable that people claiming entitlement to prescriptive rights should be required to have that claim determined and registered. This would mean that the law of prescription could be completely eliminated as a possible complicating factor in future dealing with land.

We have already recommended that section 69 iv of the Real

Property Act be repealed and that persons claiming to have an unregistered easement pursuant to that section be required to register it by the year 2000. We likewise recommend that any other easement be required to be registered by that time. These recommendations do not apply to public rights of way, most of which tend to become public roads under s.303 of the Local Government Act 1934.

The Law Reform Commission of British Columbia has recommended the following procedures regarding registration of prescriptive rights:

> "(1) Prescriptive rights in existence five years after the time of abolition should cease to exist at that date, unless in the meantime the persons entitled to their benefits have registered a judgment or filed a notice of claim, setting forth the particulars of the prescriptive rights, in the appropriate Land Registry Office.
>
> (2) No such judgment shall be registered or notice of claim filed unless it contains
>
> > (a) an adequate description of both the dominant and servient lands; and
> >
> > (b) the names and addresses of the owners of the dominant and servient lands.
>
> (3) Registration or filing shall be effected by entry on the records relating to both the dominant and servient lands.
>
> (4) Where such a judgment or notice of claim has been entered, the Registrar shall forward a notification of such entry to the owner of the servient lands.
>
> (5) The owner of the servient lands may apply to cancel the entry of a notice of claim on the register and the Registrar shall cancel the entry, if the owner of the dominant lands has not commenced an action to establish his claim within 60 days of filing the notice of claim.
>
> (6) A judgment pursuant to an action commenced in

accordance with paragraph (5) above may be registered on the application of any part to the action."

The Committee believes that this would provide a suitable model for legislation in this State.

If you do not feel that it is appropriate that the acquisition of prescriptive easements be abolished, we recommend that the present law governing prescriptive easements be simplified.

In our view the Prescription Act 1832 is unsatisfactory and ought to be repealed.

The primary weakness in the Prescription Act is section 4 which provides that all periods of enjoyment under the Act are those periods next before some suit or action in which the claim is brought into question. In other words the plaintiff does not get a right until he has embarked on litigation and has proved his claim in litigation. All other periods of prescription and limitation known to the law are periods in gross.

If therefore the Prescription Act were to be replaced, the new enactment ought to provide a period in gross, rather than being a period next before the action is brought.

This was likewise the second option recommended by the English Law Reform Committee, which recommended the period of twelve years. This period was chosen as it is the time provided in England for limitation of actions to recover land. This is a sensible approach and we suggest that if easements by prescription are to be available that the period laid down ought to be identical to that applicable to adverse possession.

We also recommend that the fiction of lost modern grant be

abolished.

We make one further suggestion. Easements and other incorporeal interests the subject of prescription are ephemeral things and do not necessarily survive from generation to generation. In our opinion there ought to be a section placed in the Real Property Act to provide a statutory procedure for the discharge or modification of obsolete or obstructive easements, and this should apply to all easements whether by grant or transfer or by prescription (see Megarry & Wade op. cit. at p.867).

The problem of obsolete easements has already been partially dealt with by section 90a of the Real Property Act. This section allows the Registrar-General to remove an easement from the Register book in instances where it is not reasonably practicable to ascertain the identity or whereabouts of the proprietor of an easement and the proprietor of the easement has ceased to exercise rights conferred by the easements.

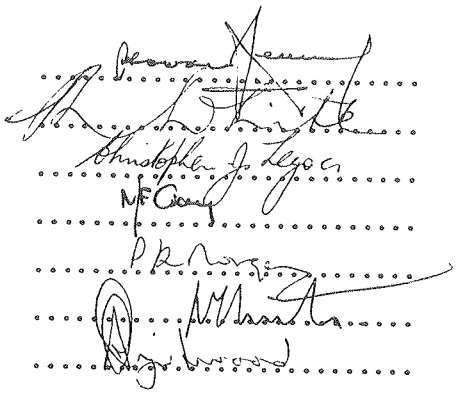
In addition to this, it should also be possible for the holder of an easement to abandon it, by serving a notice of disclaimer on the Registrar-General. This would however not affect any contractual duties which the owner of the dominant tenement may have, for example to repair the road.

We envisage that this provision allowing an easement to be abandoned would be added to the Real Property Act as section 90b.

We have not in this report dealt with the problem of whether or not there should today be some method of obtaining a right to light. We did provide a preliminary report on this subject some

years ago and we feel that any such matter should be dealt with in a final report subsequent to that interim report rather than in the more generalised way in which we have dealt with easements in this report to you.

We have the honour to be:



Law Reform Committee of South Australia.

NEW SOUTH WALES LIMITATION ACT 1969

Part IV DIVISION 1.—*Extinction of right and title.*

Debt, damages, etc.

63. (1) Subject to subsection (2), on the expiration of a limitation period fixed by or under this Act for a cause of action to recover any debt damages or other money, the right and title of the person formerly having the cause of action to the debt damages or other money is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

(2) Where, before the expiration of a limitation period fixed by or under this Act for a cause of action to recover any debt damages or other money, an action is brought on the cause of action, the expiration of the limitation period does not affect the right or title of the plaintiff to the debt damages or other money—

(a) for the purposes of the action; or

(b) so far as the right or title is established in the action.

(3) This section does not apply to a cause of action to which section 64 or section 65 applies.

Account.

64. (1) Subject to subsection (2), on the expiration of a limitation period fixed by or under this Act for a cause of action for an account founded on a liability at law to account in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through him in respect of that matter is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

(2) Where, before the expiration of a limitation period fixed by or under this Act for a cause of action for an account founded on a liability at law to account in respect of any matter, an action is brought on the cause of action, the expiration of the limitation period does not affect the right or title of the plaintiff in respect of that matter—

(a) for the purposes of the action; or

(b) so far as the right or title is established in the action.

(3) This section does not apply to a cause of action to which section 65 applies.

Property.

65. (1) Subject to subsection (2), on the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of Schedule 4, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of that Schedule is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

(2) Where, before the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of that Schedule, an action is brought on the cause of action, the expiration of the limitation period does not affect the right or title of the plaintiff to property specified in column 2 of that Schedule in respect of which the action is brought—

(a) for the purposes of the action; or

(b) so far as the right or title is established in the action.

(3) This section does not apply where the cause of action is for conversion or detention of goods and, before the expiration of the limitation period fixed by or under this Act for the cause of action, the person having the cause of action recovers possession of the goods.

Instrument under Real Property Act.

66. (1) Where—

(a) an instrument is executed which, if registered, would take effect as a deed;

(b) a cause of action founded on the instrument accrues; and

(c) before the material date, the instrument is registered,

a right or title which would, apart from this section, be extinguished by this Act on the expiration of the limitation period fixed by or under this Act for the cause of action is extinguished on the material date and not before.

(2) For the purposes of this section—

(a) the "material date" is the date of the expiration of the limitation period which would be fixed by or under this Act for the cause of action if the instrument were a deed; and

(b) "registered" means registered under the Real Property Act, 1900.

Future interest in land.

67. (1) Where—

(a) the title of a person to land for an estate or interest in possession is extinguished by this Act;

(b) at any time while he has that title he is also entitled to the same land for an estate or interest in remainder or reversion or any other future estate or interest; and

(c) the land is not, before the estate or interest mentioned in paragraph (b) becomes a present estate or interest, recovered by virtue of an intermediate estate or interest,

the estate or interest mentioned in paragraph (b) is, on the date on which it becomes a present estate or interest, extinguished.

(2) For the purposes of this section, a person contingently entitled to an estate or interest in reversion or remainder or any other future estate or interest, or having such an estate or interest vested in him subject to divesting in any event, is entitled to the estate or interest.

Possessory lien.

68. Notwithstanding this Division, where—

(a) a person is in possession of goods; and

(b) he has a lien on the goods for a debt or other money claim payable by a second person,

the right and title of the first person to the debt or other money claim is, as against the second person and his successors, saved from extinction under this Division for so long as a cause of action of the second person or of a person claiming through the second person for the conversion or detention of the goods or to recover the proceeds of sale of the goods has not accrued or is not barred by this Act, but only so far as is necessary to support and give effect to the lien.

Extinction of right or title must be alleged in proceedings.

68A. (1) Where in proceedings before a judicial tribunal a question arises as to extinction under this Division of a right or title, a party to the proceedings shall not have the benefit in those proceedings of any such extinction of that right or title unless, as part of the proceedings, he has pleaded or otherwise appropriately claimed in accordance with the procedures of the tribunal that the right or title has been so extinguished.

(2) In subsection (1), a reference to proceedings before a judicial tribunal is a reference to proceedings before a court or person authorised by law or by agreement to bind the parties to the proceedings by a decision on a question arising in the proceedings as to whether or not a right or title has been extinguished under this Division.

English Limitation Act 1980

Special time limit in case of theft.

4.—(1) The right of any person from whom a chattel is stolen to bring an action in respect of the theft shall not be subject to the time limits under sections 2 and 3(1) of this Act, but if his title to the chattel is extinguished under section 3(2) of this Act he may not bring an action in respect of a theft preceding the loss of his title, unless the theft in question preceded the conversion from which time began to run for the purposes of section 3(2).

(2) Subsection (1) above shall apply to any conversion related to the theft of a chattel as it applies to the theft of a chattel; and, except as provided below, every conversion following the theft of a chattel before the person from whom it is stolen recovers possession of it shall be regarded for the purposes of this section as related to the theft.

If anyone purchases the stolen chattel in good faith neither the purchase nor any conversion following it shall be regarded as related to the theft.

(3) Any cause of action accruing in respect of the theft or any conversion related to the theft of a chattel to any person from whom the chattel is stolen shall be disregarded for the purpose of applying section 3(1) or (2) of this Act to his case.

(4) Where in any action brought in respect of the conversion of a chattel it is proved that the chattel was stolen from the plaintiff or anyone through whom he claims it shall be presumed that any conversion following the theft is related to the theft unless the contrary is shown.

(5) In this section "theft," includes—

(*a*) any conduct outside England and Wales which would be theft if committed in England and Wales; and

(*b*) obtaining any chattel (in England and Wales or elsewhere) in the circumstances described in section 15(1) of the Theft Act 1968 (obtaining by deception) or by blackmail within the meaning of section 21 of that Act;

1968 c. 60.

and references in this section to a chattel being "stolen" shall be construed accordingly.

APPENDIX C

ENGLISH LIMITATION ACT 1980

34. (1) This Act and any other limitation enactment shall apply to arbitrations as they apply to actions in the High Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, the cause of action shall, for the purposes of this Act and any other limitation enactment (whether in their application to arbitrations or to other proceedings), be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this Act and for any other limitation enactment an arbitration shall be treated as being commenced -

(a) when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator; or

(b) where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, when one party to the arbitration serves on the other party or parties a notice requiring him or them to submit the dispute to the person so named or designated.

(4) Any such notice may be served either -

(a) by delivering it to the person on whom it is to be served or

(b) by leaving it at the usual or last-known place of abode in England and Wales of that person; or

(c) by sending it by post in a registered letter addressed to that person at his usual or last-known place of abode in England and Wales;

as well as in any other manner provided in the arbitration agreement.

(5) Where the High Court -

(a) orders that an award be set aside; or

(b) orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the dispute referred;

the court may further order that the period between the commencement of the arbitration and the date of the order or the court shall be excluded in computing the time prescribed by this Act or by any other limitation enactment for the commencement of proceedings (including arbitration) with respect to the dispute referred.

(6) This section shall apply to an arbitration under an Act of Parliament as well as to an arbitration pursuant to an arbitration agreement.

Subsections (3) and (4) above shall have effect, in relation to an arbitration under an Act, as if for the references to the arbitration agreement there were substituted references to such of the provisions of the Act or of any order, scheme, rules, regulations or byelaws made under the Act as relate to the arbitration.

(7) In this section -

(a) "arbitration", "arbitration agreement" and "award" have the same meanings as in Part I of the Arbitration Act 1950; and

(b) references to any other limitation enactment are references to any other enactment relating to the limitation of actions, whether passed before or after the passing of this Act.

NEW SOUTH WALES LIMITATION ACT 1969

Disability.

52. (1) Subject to subsections (2) and (3) and subject to section 53, where—

(a) a person has a cause of action;

(b) the limitation period fixed by this Act for the cause of action has commenced to run; and

(c) the person is under a disability,

in that case—

(d) the running of the limitation period is suspended for the duration of the disability; and

(e) if, but for this paragraph, the limitation period would expire before the lapse of three years after—

(i) the date on which he last (before the expiration of the limitation period) ceases to be under a disability; or

(ii) the date of his death,

(whichever date is the earlier), the limitation period is extended so as to expire three years after the earlier of those dates.

(2) This section applies whenever a person is under a disability, whether or not he is under the same or another disability at any time during the limitation period.

(3) This section does not apply to a cause of action to recover a penalty or forfeiture or sum by way of penalty or forfeiture, except where the person having the cause of action is an aggrieved party.

Notice to proceed.

53. (1) In this section, "curator" means—

(a) in respect of a person—

(i) who is a patient within the meaning of the Mental Health Act, 1958, including a person detained in a mental hospital under Part VII of that Act;

(ii) who is a voluntary patient within the meaning of that Act whose property has been taken in charge under section 22 of that Act by the master assigned to the Protective Division of the Supreme Court; or

(iii) to whose property section 101 of that Act applies—

the master assigned to the Protective Division of the Supreme Court;

(b) in respect of a protected person within the meaning of that Act, where a committee of his estate is appointed under section 38 of that Act—the committee;

(c) in respect of an incapable person within the meaning of that Act, where a manager of his property is appointed under section 39 of that Act—the manager; and

(d) in respect of a person of whose estate a committee is appointed under section 48 of that Act—the committee.

(1A) In this section "the master assigned to the Protective Division of the Supreme Court" means, where two or more masters are so assigned, the senior master so assigned.

(2) Where a person having a cause of action is under a disability but has a curator, a person against whom the cause of action lies may give to the curator a notice to proceed in accordance with this section.

(3) Where, after a notice to proceed is given under this section, an action is brought—

(a) by the person under a disability or by his curator or by a person claiming under the person under a disability;

(b) on a cause of action to which the notice to proceed relates; and

(c) against the person giving the notice to proceed or against his successor under a devolution happening after the notice to proceed is given,

subsection (1) of section 52 has effect as if—

(d) the person under a disability ceases, on the date of the giving of the notice, to be under any disability under which he is immediately before the giving of the notice; and

(e) he does not, after the giving of the notice, come under that disability.

(4) A notice to proceed under subsection (2) must—

(a) be in writing;

(b) be addressed to the curator;

(c) show the name of the person under a disability;

(d) state the circumstances out of which the cause of action may arise or may be claimed to arise with such particularity as is necessary to enable the curator to investigate the question whether the person under a disability has the cause of action;

(e) give warning that a cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act; and

(f) be signed by the person giving the notice.

(5) Minor deviations from the requirements of subsection (4), not affecting the substance nor likely to mislead, do not invalidate a notice to proceed.

(6) A notice to proceed to be given to the master assigned to the Protective Division of the Supreme Court shall be given by leaving it at the office of the master.

(7) A notice to proceed to be given to a curator, other than the master assigned to the Protective Division of the Supreme Court, may be given by—

(a) delivering the notice to proceed to the curator;

(b) leaving the notice to proceed at the usual or last-known place of business or of abode of the curator; or

(c) posting the notice to proceed by the certified mail service to the curator at his usual or last-known place of business or of abode.

(8) A notice to proceed given in accordance with subsection (6) or subsection (7) is, for the purposes of this section, given on the date of leaving delivering or posting as the case may be.

(9) Subsections (7) and (8) do not prevent the giving of a notice to proceed to a curator, other than the master assigned to the Protective Division of the Supreme Court, by any other means.

(10) A notice to proceed under this section is not a confirmation for the purposes of section 54 and is not an admission for any purpose by the person giving the notice.

ENGLISH LIMITATION ACT 1980

Fraud, concealment and mistake

32. (1) Subject to subsection (3) below, where in the case of any action for which a period of limitation is prescribed by this Act, either -

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3) Nothing in this section shall enable any action -

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(4) A purchaser is an innocent third party for the purposes of this section -

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

RECOMMENDATIONS OF THE ENGLISH LAW REFORM COMMISSION IN REPORT ON CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW

(1) ***Our principal recommendation.*** The English rule whereby statutes of limitation, as opposed to rules of prescription, are classed as procedural should be abandoned, and where under our rules of private international law a foreign law falls to be applied in proceedings in this country, the rule of that foreign law relating to limitation should also be applied, to the exclusion of the law of limitation in force in England and Wales.

(2) By way of qualification to our principal recommendation, the rules of limitation in force in England and Wales should not be excluded in cases where both a foreign law and the law of England and Wales fall to be taken into account under the rules of private international law in the determination of any issue by the court.

(3) The domestic law of England and Wales should be applied for the purpose of determining the *terminus ad quem* of a limitation period prescribed by a foreign *lex causae*.

(4) Section 34 of the Limitation Act 1980 should extend to arbitrations whose subject-matter involves the application of a period of limitation prescribed by a foreign *lex causae*, in accordance with our principal recommendation.

(5) In its application of a foreign rule as to limitation the court or, as the case may be, an arbitrator should have regard to the whole body of the law of limitation of the *lex causae*, including (i) any provisions (other than those mentioned in subparagraph (6) below) which might operate to suspend the running of the appropriate period and (ii) any discretion conferred by that law, which shall so far as is practicable be exercised in the manner in which it is exercised in comparable cases by the courts of the relevant foreign country.

(6) Where the period of limitation prescribed by a foreign *lex causae* may be extended or interrupted by reason of the absence of a party to the proceedings from any specified jurisdiction or country, such part of the *lex causae* as relates to such extension or interruption should be disregarded.

(7) Where, in a particular case, the court or, as the case may be, an arbitrator determines that the application of the period of limitation prescribed under a foreign law would be contrary to public policy, the court (or an arbitrator) may refrain from applying it.

(8) Our principal recommendation does not apply to a claim for equitable relief; but if a period of limitation prescribed under a foreign law would otherwise be applicable in accordance with that recommendation, and such period has not expired, the court shall take that fact into account in determining whether or not to grant the relief sought.

(9) The Limitation (Enemies and War Prisoners) Act 1945 should extend to cases where the period of limitation prescribed by a foreign *lex causae* is applied in accordance with our principal recommendation.

(10) Where a foreign court has given a judgment in any matter by reference to the law of limitation of its own or of any other country (including that of England and Wales) that judgment should be regarded as conclusive "on the merits" for the purposes of its recognition or enforcement in England and Wales.

THE FOREIGN LIMITATION PERIODS ACT 1984

1. Application of foreign limitation law

(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings, and

(b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether, and the time at which, proceedings have been commenced in respect of any matter; and, accordingly, section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act.

(4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act.

2. Exceptions to s 1

(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

(3) Where, under a law applicable by virtue of section 1(1)(a) above for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes.

(4) In section 2(1) of the Limitation (Enemies and War Prisoners) Act 1945 (which in relation to cases involving enemy aliens and war prisoners extends certain limitation periods), in the definition of "statute of limitation", at the end, there shall be inserted the words—

"and, in a case to which section 1(1) of the Foreign Limitation Periods Act 1984 applies, so much of the law of any country outside England and Wales as applies by virtue of that Act.".

3. Foreign judgments on limitation points

Where a court in any country outside England and Wales has determined any matter wholly or partly by reference to the law of that or any other country (including England and Wales) relating to limitation, then, for the purposes of the law relating to the effect to be given in England and Wales to that determination, that court shall, to the extent that it has so determined the matter, be deemed to have determined it on its merits.

4. Meaning of law relating to limitation

(1) Subject to subsection (3) below, references in this Act to the law of any country (including England and Wales) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include—

(a) references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period; and

(b) a reference, where under that law there is no limitation period which is so applicable, to the rule that such proceedings may be brought within an indefinite period.

(2) In subsection (1) above "relevant law", in relation to any country, means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country.

(3) References in this Act to the law of England and Wales relating to limitation shall not include the rules by virtue of which a court may, in the exercise of any discretion, refuse equitable relief on the grounds of acquiescence or otherwise; but, in applying those rules to a case in relation to which the law of any country outside England and Wales is applicable by virtue of section 1(1)(a) above (not being a law that provides for a limitation period that has expired), a court in England and Wales shall have regard, in particular, to the provisions of the law that is so applicable.

5. Application of Act to arbitrations

The references to any other limitation enactment in section 34 of the Limitation Act 1980 (application of limitation enactments to arbitration) include references to sections 1, 2 and 4 of this Act; and, accordingly, in subsection (5) of the said section 34, the reference to the time prescribed by a limitation enactment has effect for the purposes of any case to which section 1 above applies as a reference to the limitation period (if any) applicable by virtue of section 1 above.

6. Application to Crown

(1) This Act applies in relation to any action or proceedings by or against the Crown as it applies in relation to actions and proceedings to which the Crown is not a party.

(2) For the purposes of this section references to an action or proceedings by or against the Crown include references to—

(a) any action or proceedings by or against Her Majesty in right of the Duchy of Lancaster;

(b) any action or proceedings by or against any Government department or any officer of the Crown as such or any person acting on behalf of the Crown;

(c) any action or proceedings by or against the Duke of Cornwall.

7. Short title, commencement, transitional provision and extent

(1) This Act may be cited as the Foreign Limitation Periods Act 1984.

(2) This Act shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint.

(3) Nothing in this Act shall—

(a) affect any action, proceedings or arbitration commenced in England and Wales before the day appointed under subsection (2) above; or

(b) apply in relation to any matter if the limitation period which, apart from this Act, would have been applied in respect of that matter in England and Wales expired before that day.

(4) This Act extends to England and Wales only.

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