

DAVIDSON A JAMES

THE TASMANIAN STATUTES OF LIMITATION

A THESIS SUBMITTED FOR THE
DEGREE OF MASTER OF LAWS

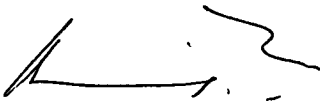
THE FACULTY OF LAW
UNIVERSITY OF TASMANIA

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DECLARATION

This thesis contains no material which has been accepted for the award of any other higher degree or graduate diploma in any tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except when due reference is made in the text of the thesis.

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Davidson A James

PREFACE

When I originally began to research on the Statute of Limitation in Tasmania, my main object was to examine the need for such a legislation in Tasmania, the reasons leading to the passing of the Limitation Act, 1974, and how the courts have interpreted various provisions of the Act, relating to extension of time.

However, I found that such a study would be incomplete without looking at the development of the Statute of Limitation in the United Kingdom as Tasmania and indeed the other states of Australia all received the English law. As such, quite a fair proportion of my thesis is historical in that it traces the development of the Statutes of Limitation in the United Kingdom and in the various states of Australia.

Since, equitable principles are preserved by the Limitation Act, 1974, (Tas), I have also had to trace the historical development of equity, so that the whole topic could be viewed in its proper perspective. This again has made my thesis more historical than I originally intended.

In the final chapter I have suggested reforms to the Tasmanian Act which should be either by passing a completely new Act using the foundation of modern limitation Acts like those of British Columbia and Alberta or alternatively to introduce immediate changes in the areas of discretion and the abolition of the "Custody of a Parent" rule.

I would like to thank Professor DRC Chalmers who has given me invaluable help, advice and encouragement all along and my wife, Belinda, for her patience and understanding in typing this manuscript.

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Davidson A James

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1911	<u>Copyright Act</u> 1 & 2 Geo 5 c 46	8
1911	<u>Maritime Conventions Act</u> 1 & 2 Geo 5 c 57	8,66,67
1914	<u>Bankruptcy Act</u> 4 & 5 c 59	165
1922	<u>Imperial Acts Application Act</u>	31
1924	<u>Carriage of Goods by Sea Act</u> 14 & 15 Geo 5 c 22	8
1925	<u>Workmen's Compensation Act</u> 15 & 16 Geo 5 c 84	8
1927	<u>Moneylender's Act</u> 17 & 18 Geo 5 c 21	8
1933	<u>Administration of Trustee</u> <u>(Miscellaneous Provisions) Act</u> 23 & 24 Geo. 5 c 36	8,254
1934	<u>Local Government Act</u> 23 & 34 Geo 5 c 51	8
1934	<u>Law Reform (Miscellaneous Provisions) Act</u> 24 & 25 Geo 5 c 41	8,11

1936	<u>Housing Act</u> 26 Geo 5 & 1 Edw 8 c 51	8
1939	<u>Limitation Act</u> 2 & 3 Geo 6 c 21 6,9,18,26,32,100,106,154,165,197,205,231,233,234	
1940	<u>Defence (Evacuated Areas) Regulation</u>	154
1945	<u>Limitation (Enemies & War Prisoners) Act</u> 8 & 9 Geo 6 c16	10
1948	<u>Criminal Justice Act</u> 11 & 12 Geo 6 c 58	185
1948	<u>Summary Jurisdiction Act</u> 11 & 12 Geo 6 c 29	8
1954	<u>Law Reform (Limitation of Actions) Act</u> 2 & 3 Eliz 2 c 36	10,197
1963	<u>Limitation Act</u> c 47	11,18,21,26,29
1971	<u>Law Reform (Miscellaneous Provisions) Act</u> c 43	12
1975	<u>Limitation Act</u> ch 54	15,19,204,253,257
1980	<u>The Limitation Act</u> ch 58	19,238

COMMONWEALTH OF AUSTRALIA

1912-1953	<u>Navigation Act</u> No 4 of 1913	66
1924-1965	<u>Bankruptcy Act</u> No 37 of 1924	167

NEW SOUTH WALES

1841	<u>Supreme Court Act</u> 5 Vict No 9	22
1862	<u>Trust Property Act</u> 26 Vict No 12	22
1884	<u>Limitation of Actions for Trespass Act</u> 47 Vict No	7
		22
1897-1953	<u>Compensation to Relative Act</u> 61 Vict No 31	149
1912	<u>District Courts Act</u> No 23	22
1926	<u>Workers Compensation Act</u> No 15	71
1961	<u>Companies Act</u> No 71	166
1969	<u>Limitation Act</u> No 31	22,26,249

VICTORIA

1903	<u>Local Government Act</u> 3 Ed VII No 1893	75
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1928	<u>Property Law Act</u> No 3754 19 Geo V	31,69
1928	<u>Supreme Court Act</u> No 3783 19 Geo V	31,69
1955	<u>Limitation of Actions Act</u> No 5914 4 Eliz II	31,149,202
1958	<u>Wrongs Act</u> No 6420 7 Eliz II	31
1958	<u>Limitation of Actions Act</u> No 6295 7 Eliz 11	31,198,201,202,205

QUEENSLAND

1867	<u>Distress Replevin & Ejectment Act</u> 31 Vict No 16	32,171
1956	<u>Law Reform (Limitation of Actions) Act</u> 5 Eliz 11 No 1	32
1960	<u>Limitation Act</u> 9 Eliz 2 No 7	32
1974	<u>Limitation of Actions Act</u> No 75	32

WESTERN AUSTRALIA

1878	<u>The Real Property Limitation of Actions & Suits Act</u> 42 Vict No 6	28,158
1931	<u>Mortgagees Rights Restriction Act</u> 22 Geo v No XIX	155
1935	<u>Limitation Act</u> 26 Geo v No XXXV	28,155

SOUTH AUSTRALIA

1866	<u>Limitation of Suits & Actions Act</u> No 14	29
1918-1943	<u>Testators Family Maintenance Act</u>	29
1936	<u>Limitation of Actions Act</u> No 2268	29,30,97

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1836	<u>Limitation of Actions Act</u> 6 WM IV No 16	23
1862	<u>Real Property Act</u> 25 Vict No 16	60
1875	<u>Limitation of Actions Act</u> 39 Vict No 1	24
1927	<u>Workers Compensation Act</u> 18 Geo V No 82	70,94,190
1934	<u>Fatal Accidents Act</u> 25 Geo V No 30	25,57,187

1935	<u>Administration & Probate Act</u> 26 Geo v No 38	25
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1935	<u>Married Women's Property Act</u> 26 Geo v No 90	182
1963	<u>Mental Health Act</u> No 63	184
1965	<u>Limitation of Actions Act</u> No 51	25,76,192,195,236
1965	<u>Fatal Accidents Act</u> No 52	56
1973	<u>Workers Compensation (Alternative Remedies)</u> <u>Act</u> No 93	70
1974	<u>Limitation Act</u> No 9	3,4,27,39,41,56,57,58,59,60,61, 65,66,67,95,96,97,105,107,108, 109,114,119,120,122,123,124, 125,126,127,135,138,139,140, 170,180,182,183,186,189,190, 196,213,215,216,220,221,222, 225,226,229,230,232,234,235, 247

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INTRODUCTION

The Courts are always flooded with a multitude of civil actions. When a civil action is instituted by a party the law allows the defendant to raise the defence of limitation of action, where the party instituted proceedings outside the given time period.

This thesis examines the defence of limitation of action. A person who has a good cause of action against another is given a certain period of time to institute legal proceedings. His claim should not be barred by statute. This time constraint for instituting proceedings is referred to as limitation of action. The need for a time constraint for instituting proceedings is justified on the grounds that there must be a limit on the level of litigation. More importantly, time constraints may be justified as otherwise there would be no end to stale claims being resurrected against unfortunate defendants, who would continue to remain under the constant threat of legal proceedings. Therefore, from a very early period in time in the development of the common law, statutes were enacted to stipulate time periods within which actions had to be instituted. The effect of these statutory time periods was to prevent any plaintiff, who did not institute proceedings within the stipulated time period, from pursuing his right in a court of law. Originally, the early statutes of limitation were established with reference to real actions such as distress, entry and proceedings for recovery of realty. The periods of limitation were limited from the occurrence of some recent or fixed era as from the death of a particular king or the coronation of another. Some such event set the beginning of the general limitation period. As for example by the Statute of Merton, 1236¹ which was the earliest of such statutes, a claimant in a writ could not claim any seisin earlier than the reign of Henry the second and likewise by the Statute of Westminster, no

claim could be made earlier than that of Richard the First. These dates were unaltered and allowed to continue for such long periods that with the passage of time they became in effect no limitation at all.

Later, the modern concept of a time period commencing on the accrual of a cause of action was established by the Act of Limitation with Proviso, 1540. This statute was the first English Statute to adopt general limitation period based on the commencement of a cause of action. In other words, real actions were limited not from any fixed date or event but according to a fixed interval of antecedent time. From this time, the basic policy of statutes of limitation have remained the same namely to preclude the right of an action after the lapse of the prescribed time.

The reason underlying the introduction of limitation periods remains valid that it may often be harsher to allow a dormant claim to be revived than to prevent it being enforced. So in A Court v Cross², Best C.J. said "...it has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have often more of cruelty than justice in them".

The need and justification for limitation periods have been recognised on many occasions by judges, for instance in Board of Trade v Cayzer, Irving & Co³, Lord Atkinson stated "...the whole purpose of this Limitation Act, is to apply to persons who have good causes of action which they could, if so disposed, enforce and to deprive them of the power of enforcing them after they

have lain by for the number of years respectively and omitted to use". Lord Goddard C.J. in Jones v Bellgrove Properties Ltd⁴ stressed the problem of evidence which arises if a dormant action is revived. The learned Chief Justice stated "...if a claim is made for payment of a debt many years after it has been incurred, there may be difficulty in proving that the debt ever was in fact incurred or that it was not already paid and so forth. That is why the law bars the right of action after a certain period has elapsed from the accrual of the cause of action....". Finally, in R.B. Polices at Lloyds v Butler⁵ Streatfield J., highlighted the need for finality in litigation and stated that, "....it is a policy of the Limitation Act that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands".

From the several reasons of practicality, justice and finality of litigation which are proposed from time to time to explain the existence of the statutes of limitation, it would be apparent that an attempt is made to protect the defendant as well as the plaintiff. A plaintiff is encouraged not to sleep on his right but to institute proceedings as soon as he possibly could, as delay in prosecuting a claim by him could affect the accurate recollection of facts by him and his witnesses which inevitably could prove fatal to the plaintiff.

Defendants on the other hand, are protected from being vexed by stale claims, as after the lapse of time, they could with certainty treat the matter as closed once and for all, and destroy all documentary evidence, which they might have to preserve otherwise.

The general law relating to limitation of actions is not exhaustively found in the Limitation Act, 1974 as besides this Act there are various other legislation which provide for time periods for instituting proceedings in various specific cases.

This undoubtedly would give rise to conflict between the time provisions provided in the Limitations Act and those provided in the other legislation.

Limitation of Actions may not be viewed upon as something worthy of academic consideration, however it is very practical and of immense value to legal practitioners, who view it as a potential time bomb. Further there are a whole body of case law which has evolved around the various aspects of limitation and certainly these are worthy of consideration. Then there is the question of balancing the policies of the Statute of Limitations, namely that of resurrecting stale claims against the undue injustice to a litigant which may result if he is barred from pursuing his claim. For these reasons, a discussion on the Statute of Limitation is justified.

In this thesis, I have outlined the historical developments of the Statute of Limitation both in England and in Australia and then examined in detail the scheme and provisions of the Tasmanian Limitation Act.

In particular I have looked at the provisions relating to extension of time where in certain instances like in an action for damages for negligence, nuisance, breach of duty, including damages in respect of personal injuries, a judge is given a general discretion to extend the period of limitation for bringing an action. Although a general discretion is granted by the Limitation Act, 1974, to judges, decided cases show that this discretion would be exercised only on certain established criteria and these criteria are examined in this thesis.

Besides the general discretion, the Act also contains provisions for specific extension of time in cases where there has been an acknowledgment or part-payment by the defendant.

Finally, I have included a chapter on some proposals for reform to the Tasmanian Limitation Act.

NOTES

1. 20 Hen III C.8
2. (1825) 3 Bing. 329
3. |1927| AC 610
4. |1949| 2KB 700
5. |1950| 1KB 76

CHAPTER 1. HISTORICAL DEVELOPMENT OF LIMITATIONS

1.1 THE ENGLISH POSITION

Although the focus of this thesis is on the Tasmanian Statutes of Limitation, a discussion of the history of the Law of Limitation in the United Kingdom is directly relevant to a study of limitation in Australia generally and Tasmania in particular. First, by the process of reception, English law was introduced into each of the new colonies in Australia, as and when it was established. When Captain Cook and the early British Settlers occupied Australia, the laws and practices of Britain were adopted as the foundation for the Australian legal system¹. In fact the British treated the whole continent of Australia as territorium nullius under International law and applied the principles of law on settled colonies. Secondly, the states of Australia, including Tasmania, later enacted their own laws relating to limitation, all of which were modelled on the English Limitation Acts. Accordingly, in this section, I propose to trace briefly the Law of Limitation in the United Kingdom and in the next section examine how the law of limitation developed in the various states of Australia. A discussion on the law of limitation of the various states of Australia is included merely for comparative purposes with the Tasmanian Act.

Again for comparative purposes, a discussion of the modern law of limitation in England is included as it would enable us to see what problems were encountered in the administration of the earlier Limitation Acts in England and how the legislature sought to overcome such problems. Some of the states of Australia have already changed their legislation to reflect the progressive changes in England whilst others including Tasmania have yet to make any changes.

Prior to the passing of the Limitation Act, 1939, which came into force on 1st July, 1940, the general law relating to limitation of civil actions was embodied in a series of statutes. The most important of those statutes were the Limitation Act, 1623² The

Civil Procedure Act, 1833³, and the Real Property Limitation Acts, 1833⁴ and 1874⁵.

1.1.1. Scope of the Early Acts

The Limitation Act, 1623 provided a 6 year limitation period for actions on contract or tort, 4 years for actions of trespass to the person and 2 years for actions of slander, where the words were actionable per se⁶. Subsequently, the operation of the Act was extended so as to apply to simple contract debts alleged by way of set-off.⁷

The Civil Procedure Act, 1833 prescribed inter alia a period of 20 years within which actions of debt on a bond or other speciality, or on a recognisance had to be instituted.⁸

The operation of the Real Property Limitation Acts 1833, 1874 were confined to proceedings relating to land.

The 1833 Act abolished real actions with three exceptions⁹ thus leaving ejectment as the only action for recovery of interests in land. This Act also reformed the law as to the period within which owners could bring their actions to recover their interests in land and did away with the limitations arising from the operation of the doctrines of descents cast and discontinuance¹⁰. This Act further repealed the Limitation Act 1623 so far as it related to land and enacted a more complete body of rules in its place.

The 1874 Act amended the 1833 Act and inter alia reduced the time period for instituting proceedings in actions relating to land from 20 to 12 years. Whilst the Real Property Limitation Acts were confined to proceedings relating to land, the Limitation Act, 1623 and the Civil Procedure Act 1833 dealt with common law actions. The term "common law actions" was intended¹¹ to cover all civil actions other than those dealt with by the Real Property Limitations Acts, 1833 and 1874 and matters of trusts

or those matters where equitable remedies were available. Actions for recovery of land or rent (not being reserved by a lease), the recovery of money charged on land, cases of advowson and mortgages were governed also by the Real Property Limitation Acts 1833 and 1874.

1.1.2. Other Statutory Provisions

These preceding acts were not a comprehensive statement of the law relating to limitation as besides these general statutes, there were other enactments dealing with limitation for special classes of people, such as a claim by the Crown¹², an action against any person for an act done in pursuance of a public duty¹³ compensation claims by workmen,¹⁴ claims where deaths occur¹⁵ carriers liability,¹⁶ actions in respect of infringement of copyright,¹⁷ recovery of money lent by money-lenders¹⁸ civil proceedings for recovery of debt¹⁹ actions by the Crown or private informers for the recovery of penalties under statutes,²⁰ actions challenging the right of a person to hold a local government office²¹, challenging the validity of statutory orders²² actions to enforce maritime liens²³, and claims against trustees²⁴.

1.1.3. The 1939 Act

(i) Major Law Provision

The term "Statutes of Limitation" was a collective term referring not only to the general Acts dealing with the main classes of action, but also to a great number of enactments prescribing special periods of limitation to special classes of people or special classes of action²⁵. With such a great multitude of statutes, relating to limitation all of which were passed on an ad hoc basis to meet a specific need, as and when they arose, there was bound to be anomalies.

To remove these anomalies and with a view to unification of the existing statutes and generally to secure greater simplicity and

uniformity, a Law Revision Committee was set up on 10th January, 1934.

Following a comprehensive review of the whole field of limitation by the Law Revision Committee, it presented its report in December, 1934²⁶.

The committee generally favoured having a single period for the various causes of action rather than a multiplicity of different periods for different causes of action. Besides this, they were of the opinion that the rule that limitation period should run from the accrual of the cause of the action should be maintained and that a system barring the remedy rather than extinguishing the right by lapse of time should be preferred.

The recommendations of the committee were substantially, accepted and implemented by the Limitation Act, 1939 which came into force on 1st July, 1940²⁷.

(ii) 1939 Act

Although the Limitation Act, 1939 replaced the earlier enactments like the Limitation Act, 1623, the Civil Procedure Act, 1833, the Real Property Limitations Acts, 1833 and 1874 and the Public Authorities Protection Act, 1893, some of the statutes dealing with limitations in special cases are still preserved by a saving provision in the Act²⁸.

The 1939 Act for the first time arguably introduced a general law relating to limitation. The general object of the 1939 Act was to introduce as much uniformity in the law of limitation as possible. However, since the law of limitation deals with so many different classes of actions, it was not practical for the same period of limitations to apply to all cases. Thus the effect of the Act was that no longer or different periods of limitation applied to different actions unless there were good reasons for making a distinction²⁶.

The Limitation Act, was modified to a limited extent by the Limitation (Enemies and War Prisoners) Act, 1945, the operation of which was retrospective.

(iii) Developments after the 1939 Act; Personal Injuries

In 1946, the Monckton Committee on Alternative Remedies recommended that in personal injury cases, the length of limitation period should be reduced to three years and that the special protection given to public authorities under the 1939 Act be abolished.³⁰ This recommendation was accepted by Parliament and the Law Reform (Limitation of Actions) Act, 1954 was passed which came into force on 4th January, 1954. Since that date, a claim for damages for personal injuries was barred, unless it was instituted within three years of the date on which the cause of action arose. There was no provision for extension of time by the court.

Arising out of a decision of the Court of Appeal in Cartledge & others v E Jopling & Sons Ltd,³¹ the Edmund Davies Committee was set up to consider whether the law of limitation should be changed for personal injury claims "where the injury or disease giving rise to the claim has not become apparent in sufficient time" to enable proceedings to be commenced within the three year limitation period. In Cartledge's case it was held that the plaintiff could not claim damages for lung injuries caused as a result of breaches of statutory duty by the defendants after the expiry of the statutory period although they had no reasonable opportunity to discover this fact until more than six years after the damage had been done, by which time it was statute-barred. It was the view of the Edmund Davies Committee³² that in cases of personal injuries the plaintiff should not be out of time if he started proceedings within twelve months from his "date of knowledge". In other words a plaintiff should be allowed to institute proceedings within twelve months from the time he could reasonably have been expected to discover the existence and cause of his injury. This recommendation was given statutory effect

with the passing of the Limitation Act, 1963³³. The 1963 Act provided for the plaintiff to obtain leave of the court and catered for claims brought after the death of the injured person, either on behalf of his estate under the Law Reform (Miscellaneous Provisions) Act, 1934 or on behalf of his dependents under the Fatal Accidents Acts. Thus, it was now possible for an action to be commenced with leave of the court within twelve months from the date of the death of the deceased, where the deceased had been in a state of "justifiable ignorance" until he died, or the "date of knowledge" of the deceased had been less than 12 months before his death and that proceedings had been commenced, with leave of the court within twelve months of that date.

(iv) The Problem Unresolved; The Dicta in Lucy

Unfortunately, this was not the end of the problem, as was manifested by the decision of the Court of Appeal in Lucy v W T Henley's Telegraph Works Co Ltd & others³⁴. In this case the Plaintiff, a widow was claiming damages under the Fatal Accidents Act in respect of death of her husband from cancer alleged to have contracted while in the employment of the defendant some years earlier, by exposure to a chemical manufactured by ICI Ltd. Her application for leave to add ICI Ltd as defendants to the action was rejected and in dismissing her appeal the court held that since more than 12 months had elapsed from the date of death of the deceased, to allow the writ to be amended to include ICI Ltd as defendants would deprive them of the defence under s.3(4) of the Limitation Act, 1963.

Yet another problem posed by the 1963 Act was that the 12 month period from the plaintiff's date of knowledge did not allow sufficient time for the plaintiff to instruct solicitors and for the solicitors to obtain leave and institute proceedings³⁵.

(v) Law Commission - Inadequate Time in Certain personal Injury Cases

These problems were referred to the Law Commission, which in November, 1970³⁶, recommended that the one year period be extended to three years. This recommendation was implemented by the Law Reform (Miscellaneous Provisions) Act, 1971. The effect of the 1971 Act was to give a plaintiff in any personal injury claim a period of three years from the date of his own knowledge, or in the event where the Plaintiff dies, three years from the date of knowledge of his dependents to institute proceedings.

1.1.4. Recommendation of the Law Reform Committee 1971

The Law Commission dealt with certain difficulties over personal injuries. However there were general moves to reconsider the whole area of personal injuries. This was referred to a special Law Reform Committee.

In April, 1971, the Law Reform Committee was asked to consider "what changes in the law relating to the limitation of actions are in the opinion of the committee, desirable".

This wide reference was further extended by the Lord Chancellor in 1972.

Whilst the Law Reform Committee was reviewing the law of limitation, the Lord Chancellor in December, asked the Law Reform Committee to consider as a matter of priority the question of limitation in personal injury claims³⁷.

The committee accordingly presented two reports, the first being a report on the limitation of actions in cases of personal injury³⁸. In this report, the Committee recommended, inter alia³⁹,

- (1) that three years should be retained as the normal period of limitation in personal injury actions.

- (2) the principle underlying the Limitation Act 1963, whereby the injured person is entitled to sue outside the normal three-year limitation period provided he starts proceedings within three years of "his date of knowledge" should be retained.
- (3) an injured person's date of knowledge should be the date on which he first knew (or could reasonably have ascertained) the nature of his injury and its attributability to an act or omission on the part of the defendant.
- (4) ignorance of matters of law should not postpone the running of time.
- (5) the court should have a discretion to override a defence of limitation notwithstanding that the plaintiff has not sued within three years of his date of knowledge.
- (6) a plaintiff should not be required to obtain the leave of court as a condition of suing outside the normal limitation period.
- (7) no effect should be given to supervening disability save to the extent that it should be a factor relevant to the exercise of the courts' discretion where the plaintiff sues more than three years after his date of knowledge.
- (8) the rule whereby time runs against a person under a disability who is in the custody of a parent should be abolished.

In their final report, the committee made certain recommendations on the law of limitation, outside the field of personal injury⁴⁰.

The committee inter alia concluded that⁴¹:

- (1) there should be no change in the law relating to supervening disability.
- (2) the freedom of parties to abridge and to extend the limitation period by contract should be retained.
- (3) the 12 year limitation period for an instrument under seal should be retained.
- (4) it should be the law that an acknowledgment must be written and signed.
- (5) no acknowledgment or part payment made after expiration of the limitation period should be capable of reviving a remedy which has already been barred.
- (6) the rule that limitation has to be retained and, accordingly, limitation should continue to be procedural rather than a substantive rule.
- (7) the rights of an owner of goods in respect of them should not be barred by lapse of time as against a thief or receiver as against a bona fide purchaser of the stolen property, or a person claiming through him. The owner's title should be extinguished after six years from the purchase.
- (8) there should be no limitation period in favour of a gratuitous transferee of stolen goods even if he is himself honest unless he can claim through a bona fide purchaser.
- (9) where money is lent, and no date is specified for repayment, time should not begin to run in favour of the borrower until a written demand for repayment is

made.

- (10) there should be no change in the various limitation periods relating to actions to recover land.
- (11) there should be no change in the law relating to the running of time against persons entitled to future interests in land.
- (12) the law of limitation as it applies to mortgages should not be altered.
- (13) there should be no change in the law relating to acquiescence or laches.
- (14) a trustee who is a beneficiary and who has acted prudently and honestly in distributing trust property should be able to rely on a defence of limitation except in respect of the share which he would have had to pay to the late-comer had all the beneficiaries (including himself) been sued in time.

This report was substantially accepted and implemented by the Limitation Act, 1975.

1.1.5. The Limitation Act, 1975; The Discretionary Power

The 1975 Act simplified the notion of knowledge and provided that an injured person who discovers that he has a cause of action only after the three year limitation period has run would not be out of time as the three year period would commence from the "date of knowledge" and that a subjective test would be adopted to determine the "date of knowledge". Importantly, the courts were given a significant discretion not to apply the three year limitation period if it appeared to them that it would be 'equitable' to allow the action to proceed.

The committee was of the view that the purpose of the discretion should be to enable the court to take into account in suitable cases the plaintiff's lack of knowledge of the law as a justification for not suing in time⁴². However, there has been a tendency to interpret the discretion provision in the widest term. This important discretionary power was commented on by Lord Denning M.R. in Fireman v Ellis⁴³ where he said it "... gives a wide discretion to the court which is not limited to a 'residual class of case' at all. It is not limited to 'exceptional cases'. It gives the court a discretion to extend the time to all cases where the three year limitation has expired before the issue of the writ. It retains three years as the normal period of limitation... but it confers on the court an unfettered discretion to extend the three year period in any case in which it considers it equitable to do so".

Again, Ormrod L.J, observed as follows⁴⁴: "The language of the section, in my judgment, is quite clear. Having laid down the norm, it then gives the court the widest discretion to adapt the norm to the circumstances of any case in which it would work equitably. This is, in fact, a statutory analogy of the old tradition by which equity was called in to mitigate the rigidity of the common law in the interests of individual justice".

(i) Comment on Discretion.

It is submitted that a period of three years from the plaintiff's 'date of knowledge' would be wide enough to cover every foreseeable situation, as time only commences to run from the date of knowledge and not earlier. If a plaintiff fails to commence an action within three years of his 'date of knowledge' surely, he should not be given a second chance at the expense of the defendant. Ignorance of the law is certainly not an excuse in all other cases and it is difficult to see why there should be a departure for this well established principle in cases of limitation. That being so, it is submitted that there is no need for an additional discretion to be vested in the court to

override a defence of limitation should the plaintiff fail to institute proceedings within three years of his date of knowledge. This discretionary power would cause undue hardship to defendants, who would not be able to organise their affairs accordingly, once the three year period from the plaintiff's date of knowledge has expired.

If it is at all necessary to grant discretionary powers to the court to extend time, then it is submitted that the commencement of the three year period should run from the date of injury as a plaintiff who discovers that he has a good cause of action after the three years has expired, could apply to the court to exercise its discretion in his favour.

One notable recommendation of the committee, namely, that an acknowledgment or part payment made after the expiration of the limitation period should not revive the remedy, is consistent with the attitude of limitation in respect of real property. In the case of real property, it was recognised that where the expiration of the limitation period had extinguished title to real property, no subsequent acknowledgment or part-payment could revive that title. This approach taken by the committee is commendable, as not only would there be consistency between real property and all other cases, but more importantly it recognises the fact that at the expiration of the time period the defendant gets a right, which is recognised at law.

(ii) Recommendation on Money Lent

Another notable recommendation of the committee was that relating to money lent with no specified period of repayment. The committee recommended in such cases that time should run in favour of the borrower only from the time of a written demand for repayment. The tendency of the Courts was to treat the cause of action in such cases to accrue from the date of the loan, as that would be the time when he could have first taken steps to claim the money. However, it is submitted that this method of

calculating time could cause considerable injustice to lenders, as time starts to run against them from the date of the loan and through an omission or oversight on the lender's part, he could stand to lose the whole amount of the loan. Since, no time for repayment is stated, time should only be allowed to run from the moment the lender indicates to the borrower that he needs the money back. As such the committees' recommendation that time runs from the date of the demand is the only reasonable alternative.

1.1.6. The Limitation Act, 1980

The current Act on Limitation is the Limitation Act, 1980 which came into force on 1st May, 1981. This Act is a consolidating act which repealed the whole of the Limitation Act, 1939, the Limitation Act, 1975, and parts of the Limitation Act, 1963, and the Limitation Amendment Act, 1980.

The Act is divided into three parts. The first part⁴⁵ sets out the ordinary periods of limitation which is three years for actions for libel and slander, negligence, nuisance or breach of duty where the damages claimed by the plaintiff include damages in respect of personal injuries; six years for actions on simple tort or contract, actions to recover arrears of rent, actions to enforce a judgment or mortgage and twelve years for actions on specialties and in general for actions to recover land. Part II⁴⁶ of the Act provides for extension of time where the plaintiff is under disability at the time the cause of action accrues or in cases of acknowledgment in writing or part payment by the defendant or his predecessor or agent and in cases where action is based on fraud or mistake. Part III⁴⁷, deals with general provisions and inter alia makes the Act applicable to arbitrations except where a limitation period is prescribed by another statute.

The recommendations of the United Kingdom Law Reform Committee, 1974, chaired by Lord Justice Orr suggested the introduction of

a two-tiered scheme for the extension of personal injury actions, namely the retention of the discovery rule with a primary limitation period of three years to run either from the date of injury or date of knowledge, whichever is the later and the granting of a residual discretion to the court to extend the limitation period where the strict application of the discovery rule would cause injustice. The recommendations are retained in the consolidated 1980 Act.

Section 33 of the Limitation Act 1980, which is the former Section 2D of the Limitation Act, 1975, gives the court a discretion to extend the period of limitation in a case where it was equitable to do so if there was no prejudice to any party.

So in England, the Discovery rule extension formula operates to allow a plaintiff to commence an action as of right on satisfaction of the criteria. Furthermore the plaintiffs receive the benefit of the ordinary limitation period which then runs from the date of knowledge. Thus the position of victims of latent injury and diseases have been considerably improved and fully integrated with that of ordinary personal injury claimants.

1.2. THE AUSTRALIAN POSITION

As far as Australia is concerned, the States of Australia began originally as colonies of the British Empire. The British had by the beginning of the eighteenth century developed rules for determining the laws which should apply to their newly acquired territories.

Basically, where the territory was obtained by conquest or cession, the general rule was that if there was already a system of law prevailing, that system would continue in operation until changed by the conquering power. However, where the acquired territory was settled by peaceful colonisation, and where at the time of settlement by the British, it was uninhabited or inhabited by a primitive people whose laws and customs were

considered by the British to be unacceptable to them, then the general rule was that the British settlers carried with them the common law and the Statutes of England, so far as they are applicable to conditions in the new colony.⁴⁸ The British adopted the latter rule for the States of Australia and treated them as 'settled colonies' despite the existence of complex Aboriginal customs and practices which were administered by the Aboriginal chiefs of the various tribes.

Thus, part of the English law received into Australia related to limitation of actions before the courts.

1.2.1. New South Wales

In the case of New South Wales, although Captain Cook took possession of the eastern coast of Australia on August 23rd, 1770, settlement did not take place till January, 26th, 1788. The original territory of New South Wales included Queensland, Tasmania, Victoria and part of South Australia.

For more than 30 years after its settlement in 1788, New South Wales did not have its own legislature and the Colonial Governors legislated by General Orders and Proclamations. English law was formally received into New South Wales on July, 25th, 1828.⁴⁹

By virtue of its original settlement as a British colony and by virtue of the Australian Courts Act, 1828, s.24, the Limitation Act,⁵⁰ 1623, came into force in New South Wales.

In time to come, the New South Wales legislature adopted the Imperial Statutes dealing with limitation as regards real property⁵¹ and personal property.⁵² As such the law of limitation that was applied in New South Wales were the Imperial Acts passed before the first settlement of New South Wales, together with later English legislation which were adopted, or copied by colonial legislation, passed over a century ago. There was an urgent need for reforming the law relating to limitation of

actions as the prevailing law in New South Wales in this area was the same as that in England when Queen Victoria came to the throne in 1837.

The New South Wales Law Reform Commission was appointed on 1st January, 1966 and asked to review the law relating to limitation of actions. The Commission presented the first of its three reports on 27th October, 1967⁵³ and recommended a new Limitation Bill.

The Commission's recommendation inter alia included the following:-

- (i) that in actions for recovery of land the time period be reduced from 20 years to 12 years and in the case of the Crown it be reduced to 30 years instead of 60 years.
- (ii) at the expiration of the limitation period, the extinction of the claim or title should be made the general rule.
- (iii) that the law that an acknowledgment and part payment of a debt gives a fresh start to the running of the limitation period be extended to all causes of action and not limited to liquidated amounts.

The New South Wales Commission had the benefit of the English Limitation Act, 1963 and the views and recommendation of the Edmund Davies Committee which led to the 1963 Act. In fact the New South Wales Law Reform Commission in their recommendation noted that the substance of the English Act of 1963 be adopted, and one of the consequences of which would be to allow an extension of time to injured persons to claim damages for personal injuries where the injured person was not aware of it. Furthermore a plaintiff who contracted a certain disease arising out of a breach of a statutory duty of his employers and does not discover it until the limitation period had expired would be

given an extension. Another notable recommendation of the commission was a proposal to enable a person who apprehends that a mentally ill person has a claim against him could give notice to the master, committee or manager of the mentally ill person and such person would have three years to institute proceedings.

A defendant in such circumstances would not have a potential claim hanging over his head and once the three years is up, he could organise his affairs accordingly.

The recommendations of the Law Reform Committee were implemented by the Limitation Act, 1969, which commenced on 1st January, 1971. This Act amended and consolidated the law relating to the limitation of actions and repealed certain Imperial Acts⁵⁴ as well as New South Wales legislation.⁵⁵

In 1971, the Law Reform Commission again reviewed inter alia the following areas of the Limitation Act, 1969,⁵⁶ namely:-

- (i) failure to plead extinction of right and title.
- (ii) adequacy of the provisions as to extinction of right and title.
- (iii) recovery of possession of goods before expiration of the limitation period.

The Law Reform Committee proposed a bill to amend the Limitation Act, 1969, and the District Courts Act, 1912, which was never passed. In its third report,⁵⁷ the Commission recommended that it should no longer be necessary that special notice of action be given to public authorities or public officers; that private litigants and public authorities should in general be placed on an equal footing, so far as concerns the operation of the Limitation Act, 1969; and in cases involving actions for damages for deaths or personal injury, six years was too long and that a period of three years for public authorities be sufficient with

an extension of one year if sufficient cause be shown.

The Act is divided into four parts. Part I⁵⁸ contains the interpretation provisions and other general matters. Part II⁵⁹ spells out the various limitation periods which is six years for actions on contract, tort, enforcement of recognisance, actions to recover money by virtue of an enactment, actions to recover arrears of income and enforcement of an arbitral award. Where the arbitral award is by deed the period is twelve years as also is an action to recover land and actions to redeem mortgaged property. Part III⁶⁰ deals with postponement of time and in the case of disability, confirmation, fraud and mistake time will be postponed. The final part⁶¹ deals with some miscellaneous matters.

1.2.2. Tasmania

Tasmania which was earlier known as Van Dieman's land, separated from New South Wales on June, 14th, 1825.

The substantive law relating to Limitation was contained in several statutes as follows:-

(i) Limitation of Actions Act, 1836

This Act extended to Tasmania provisions contained in three Imperial Statutes which are contained in three parts of a schedule to the Act as follows:-

PART I: Civil Procedure Act, 1833. This Act provided:-

(a) a limitation period of 20 years for:-

(i) actions for debt upon any indenture of demise.

(ii) actions for debt upon any bond or other speciality.

(iii) actions of debt upon any recognisance.

(b) a limitation of 6 years for:-

(i) actions for debt upon an award where the submission is not by speciality.

(ii) actions to enforce recognisance or for money levied on any fieri facias.

(c) a limitation period of 2 years for:-

"actions for penalties damages or sums of money given to the party grieved".

PART II: Real Property Limitation Act, 1833. Most of the provisions of the Act were incorporated into the Limitation of Actions Act, 1875 but the remaining parts was a residue after the repeal and re-enactment or amendment of its basic sections by the Limitation of Actions Act, 1875. The only provision setting up limitation periods was section 24, which provided that a suit in equity for the recovery of land or rent is barred after the period when a right of entry or distress, or an action at law for recovery of land would have been barred.

PART III: Real Property Limitation Act, 1837. This Act provided a limitation period of 12 years after the last payment of capital or interest, during which a mortgagee of land may make an entry or bring an action to recover land.

(ii) Limitation of Actions Act, 1875

This Act provided a uniform limitation period of 12 years for recovery of land or interests in land. It had to be read in conjunction with the Real Property Limitation Act, 1833 (Imp) which was contained in Part II of the Schedule to the Limitation of Actions Act, 1836 to determine at what date a right of action

accrued. The limitation period was capable of being extended in favour of a remainderman; a person under disability; and the owner of a base fee who is in possession of the land.

(iii) Mercantile Law Act, 1935

This Act provided a 6 year limitation period for action in contract and tort, and for arrears of rent under an agreement for a lease. Subsequently, this Act was modified by:-

- (i) Limitation of Actions Act, 1965, which provided for substitution of a limitation period of two years and six months in actions for damages for negligence, nuisance or breach of duty, with power in a judge to extend the time period to a date not exceeding six years from the time when the cause of action arose.
- (ii) Fatal Accidents Act, 1934, as amended by the Fatal Accidents Act no. 52 of 1965 which provided for a limitation period of two years and six months from the date of death with powers for a judge to extend the period to six years from the date of death.
- (iii) Administration and Probate Act, 1935 Sec. 27 which provided for rights of action to subsist against or for the benefit of the estate of the deceased persons provided that in the case of tort no action could be maintained against the estate unless proceedings were pending at the date of death or the cause of action arose not earlier than 12 months before the date of his death and proceedings are taken not later than 6 months after probate or letters of administration are granted with powers of extension of the six month period.

(iv) Crown Suits Act, 1769

This Act prevented the Crown from recovering ungranted land which had been in the possession of a subject or subjects who have held the land in succession for a period of 60 years. The provisions of this Act were subsequently modified by section 114A of the Crown Lands Acts, 1935 which provided that any Crown land reserved for road, public purpose or land forming part of foreshore fronting of the sea, lake or river shall not be the subject of adverse possession.

1.2.3. Limitation Act, 1974

A Law Reform Committee was set up,⁶² which, when presenting its draft report⁶³ on limitations recommended that a Tasmanian Act be enacted based on 4 different statutes examined in detail by them.⁶⁴

One of the reasons for proposing a consolidated act on limitation by the Law Reform Committee was convenience of reference as the substantive law on limitation was contained in eleven different statutes, one of which was sub-divided into three parts, causing great difficulty of reference to the legal profession. Furthermore, in nearly all matters arising, two or more different statutes had to be read in conjunction. Another reason noted by the committee was the archaism of expression.

The committee also noted that injustice could arise to land holders as the rights of a person who deals with land under one system would differ from that of a person dealing with land under the other system.

Although the statutes of limitation have been held to apply to Real Property Act, land, the early Tasmanian cases like Re Bartlett and Burke v Lock⁶⁵ also developed the doctrine of "wiping the slate" whereby the period during which a "squatter" has been in possession is destroyed by the registration of a

dealing, as the latter provides conclusive evidence of the ownership of a legal estate by the registered proprietor. This doctrine did not create any injustice to the "squatter" as the practice was for him to enter a caveat which could not be discharged after the relevant limitation period had run, even if challenged by the legal owner in a court of law. However since 1932,⁶⁶ a "squatter" had to lodge an application for a vesting order in respect of the land claimed. In the meantime the squatter could not protect his interest by lodging a caveat as he would no longer have an "interest in land" to found his caveat.

So where a "squatter" who is in possession of a land under the general law would have obtained an indefeasible fee simple after the lapse of the relevant period, a person in similar circumstances, who may have been squatting on Real Property Act land for even 100 years would still be at the mercy of the registered proprietor, unless, the committee recommended that the doctrine of 'wiping the slate' be abrogated.

The recommendation of the Law Reform Committee were given effect to with the passing of the Limitation Act, 1974 which came into operation on 1st January, 1975, and still remains the basis of the law of limitation in Tasmania. This Act is discussed in detail in Chapter 2 of this thesis.

This Act is divided into four parts, the first of which contains the interpretation provisions.⁶⁷ Part II⁶⁸ sets out the limitation periods for various causes of actions. A 6 year period is allowed for actions on simple contracts, tort including actions for damages for breach of statutory duty, actions to enforce a recognisance, actions to enforce an award and actions for an account. For actions upon a speciality and actions on judgments a time period of 12 years is prescribed. Similarly, an action to recover land including actions to recover money secured by mortgage or charge or to recover proceeds of the sale of land is limited to a period of 12 years. For actions in respect of

personal injuries the time period is 3 years.

Part III⁶⁹ deals with extension of limitation periods and in the event of disability, fraud and mistake or where there has been an acknowledgment or part payment by the defendant, the time period is extended.

Part IV⁷⁰ contains certain miscellaneous provisions and inter alia extends the provisions of the Act to arbitrations.

1.2.4. Western Australia

Western Australia was founded in 1829. The legislative power was vested in a Legislative Council (pursuant to Order in Council of November 1st 1830). The Legislative Council met for the first time in 1831. Western Australia adopted several Imperial Acts relating to limitation.⁷¹

In 1878 an act was passed for the further limitation of actions and suits relating to Real Property⁷² which was followed by the Limitation Act, of 1935. This later Act consolidated and amended the law relating to the limitation of periods for commencing actions and suits.

Some of the earlier acts,⁷³ were repealed by the Limitation Act, 1935⁷⁴ which came into operation on 14th April, 1936. The present Act in Western Australia is the Limitation Act 1935-1978.

This Act prescribes a period of 12 years for recovery of land⁷⁵ and actions of debt for rent upon a covenant in an indenture of demise; 6 years⁷⁶ for actions on contract, tort, actions for account and actions of debt upon any award where the submission is not by speciality; 4 years⁷⁷ for actions for trespass to the person, menace, assault, battery, wounding or imprisonment and 2 years⁷⁸ for actions for penalties, damages or sum given by any enactment to the party grieved and action for slander where the words are actionable per se.

Extension of time⁷⁹ is allowed for disabilities, in cases of acknowledgment or fraud; or where the person against whom the action accrued is absent beyond the seas. In cases of disabilities, a maximum period of 30 years is the utmost allowance given for disabilities.

The Act also provides that the limitation provision is applicable to set-off and counter-claim⁸⁰ but the Act is not applicable to the Crown except where expressly provided and furthermore protection is afforded to persons acting in execution of statutory or other public duty.⁸¹

1.2.5. South Australia

South Australia was proclaimed a British Colony on December 29, 1836. The earliest Act passed in South Australia on limitation was the Limitation of Suits and Actions Act⁸² in 1866. This Act was later repealed when the law of limitation was consolidated with the passing of the Limitation Actions Act, 1936. This latter Act was assented to on 13th August, 1936 and has been amended on several occasions.⁸³

In September, 1968, the Law Reform Committee of South Australia was set up to review various statutes of South Australia. This committee reviewed the law relating to limitation of actions and presented two reports,⁸⁴ relating to limitations. Firstly, in its third report, the committee recommended that the application for extension of time be made before the final distribution of estate under the Testator's Family Maintenance Act, 1918-1943, instead of the existing provision which required extension to be made before the expiration of 12 months after the grant of probate.

Secondly, the committee in presenting its Twelfth Report noted that in South Australia there was no provision relating to the extension of time for bringing action. The committee felt that the power to grant extension given to the courts in England by

virtue of the Limitation Act, 1963, was too restrictive and therefore recommended that power to extend time be given in relation to any cause of action arising in any jurisdiction of the court, other than conferred jurisdiction.

These recommendation of the Law Reform Committee were accepted and the Limitation Actions Act, 1936 was accordingly amended.⁸⁵

The Act provides a period of 15 years⁸⁶ for actions to recover land or rent or actions for entry or distress. A period of 15 years is also provided for any action to recover money secured by any mortgage, judgment or lien on land or rent or any legacy⁸⁷ and an action based on speciality.⁸⁸ A period of six years⁸⁹ is allowed for commencing actions on simple contracts, actions of account, tort, recovery of seamen's wages, damages in respect of arrears of rent and actions to recover arrears of rent where letting is not by deed. In actions for damages⁹⁰ in respect of personal injuries, a period of three years is allowed and two years for actions for slander.

The Act vests in the courts a general power to extend the periods of limitation.⁹¹ Persons under disability can have the time period extended and the maximum extension is limited to 30 years from the time at which the right to bring the action or proceedings arose.

1.2.6. Victoria

Victoria separated from New South Wales and constituted a separate colony on 1st July, 1851. The laws then in force in New South Wales continued to be in force in Victoria. A Legislative Council, with powers to legislate for the colony was constituted and the Victorian Parliament came into existence in 1856.

The law in force in Victoria included the following:-

- (i) Imperial legislation introduced in 1828⁹² into New

South Wales (which included Victoria).

- (ii) New South Wales legislation passed between 1828 and 1851.
- (iii) Victorian legislation from 1851 onwards.
- (iv) certain acts of the Imperial Parliament before and since 1828 in its capacity as the supreme legislature.

The Imperial Statutes that were in force in Victoria included the Limitation Act, 1623.⁹³ Certain sections of this Act were subsequently repealed in 1915.⁹⁴ In 1922, the Imperial Acts Application Act, inter alia repealed the Limitation Act 1623. Limitation provisions for commencement of Actions and suits regarding property were contained in part IX of the Property Law Act 1928.⁹⁵ Limitation of time for commencing other actions appeared in the Supreme Court Act, 1928⁹⁶ and the Trustee Act, 1958⁹⁷ dealt with the Limitation of actions against trustees. Besides the above, there were other acts dealing with limitation, including The Wrongs Act, 1958⁹⁸ which deals with actions in respect of wrongful acts or neglect causing death.

On the 6th December, 1955 the Limitation of Actions Act, 1955 was passed which came into operation on 1st January, 1956.

This was an Act to consolidate and amend the law relating to limitation of time for commencing actions and arbitration. This Act repealed many of the other existing provisions relating to limitation.

Further consolidation in the area of limitation saw the passing of the Limitation of Actions Act, 1958 which inter alia repealed the 1955 Act.

The 1958 Act is divided into three parts, the first of which⁹⁹ states the periods of limitation for various causes of action.

Actions founded on simple contracts and torts have to be instituted within a period of six years but for certain torts like negligence, nuisance or breach of duty the time period is three years. In cases of speciality contracts, actions to recover land and actions on judgment, a time period of 15 years is allowed.

The second part¹⁰⁰ of the Act deals with extension of limitation periods and in cases of disability or where there is an acknowledgment or part payment by the debtor or in cases of fraud and mistake the limitation period is extended.

The final part¹⁰¹ contains general provisions and inter alia extends the operation of the Limitation Act to arbitration, foreclosure and the Crown.

1.2.7. Queensland

Queensland separated from New South Wales in 1859 and the laws in force in New South Wales were declared to continue in force in the colony. Therefore all the limitation statutes which were in force in 1859 were extended and thus applicable in Queensland.

In 1956, the Law Reform (Limitation of Actions) Act was passed which provided a limitation period in cases of negligence, nuisance and breach of duty involving personal injury. This Act repealed certain limitation sections found in earlier¹⁰² legislation which were applicable in Queensland. Later a Limitation Act modelled on the United Kingdom Limitation Act of 1939 was passed subsequently known as the Limitation Act 1960. This Act was later repealed as from 1st July, 1975 by the Limitation of Actions Act 1974. The 1974 Act repealed¹⁰³ the earlier limitation provisions and consolidated and amended the law relating to limitation of action and was assented to on 1st November, 1974. The Act is divided into four parts. Part 1¹⁰⁴ contains an interpretation section and deals with other preliminary matters. The second part¹⁰⁵ deals with the periods

of limitation for different classes of actions and is normally 6 years for actions founded on simple contracts, tort, and account; 12 years for actions based on speciality contracts, on judgments and actions to recover land and in certain torts like negligence, trespass, nuisance and breach of duty where personal injury results, the time allowed is 3 years. The third part¹⁰⁶ deals with extension of the periods of limitation in cases of disability or cases where there is acknowledgment or part payment or where there is fraud or mistake. The fourth part¹⁰⁷ contains general provisions and inter alia extends the provisions of this Act to cases of Arbitration.

1.3 THE ATTITUDE OF EQUITY TO TIME

In tracing the development of the Statutes of Limitation in England,¹⁰⁸ we have seen that from a very early period there were time limitations applicable to the institution of proceedings under common law.

Due to the deficiencies of the common law courts, petitions for redress were often directed to the king or his council. The practice was for these petitions to be referred to the chancellor and a separate Court of Chancery eventually arose out of this practice, during the reigns of Edward II and Edward III. Equity was administered by the Court of Chancery,¹⁰⁹ which had jurisdiction in three broad categories¹¹⁰ of cases.

Firstly in certain cases it had exclusive jurisdiction, as in cases of trusts, married women's settled property and equities of redemption. In this category were also cases where no relief was available at common law, for example relief against penalties and forfeitures. Some of these rights were not recognised at law.

Secondly, the Court of Chancery also had concurrent jurisdiction. In other words they enforced rights which were also recognised at law, for example as in contract, mistake, partition, partnership and fraud. The Court of Chancery was ready to grant

a remedy, which was lost at law, for example where because of an accident, a plaintiff had lost the means of asserting his remedy at law.

Finally, the Court of Chancery also had auxiliary jurisdiction which it exercised by affording the benefits of its special procedure as follows:-

- (i) by compelling discovery of facts or documents.
- (ii) by protecting property pending litigation, by the appointment of a receiver or by granting injunction and
- (iii) by means of interpleader to prevent injury to third parties.

The Courts of Equity existed side by side with the common law courts until the passing of the Supreme Court of Judicature Act, 1893 and 1875. The effect of the Judicature Acts is frequently referred to as "the fusion of law and equity"¹¹¹ but Sir George Jessel MR in Salt v Cooper¹¹² said,

"It was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action or dispute which should come before that tribunal".

1.3.1. Nature and Practice of Equity

Although equity was established to mitigate the harshness of the common law, there had always been a tendency by the Court of Chancery to follow the common law by analogy. In fact, one of the maxims that the Court of Chancery acted on was that "equity follows the law", which simply meant that equity would not depart unnecessarily from legal principles.¹¹³ This maxim was clearly stated by Lord Westbury in Knox v Gye¹¹⁴ where he said,

"where the remedy in equity is correspondent to the remedy at law and the latter is subject to a limit in point of time by the statute of limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase that a court of equity acts by analogy to the Statute of Limitations, the meaning being that, where the suit in equity corresponds with an action at law which is included in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure."

Although equity did not have stipulated time periods for commencing proceedings, as did the common law, a person wanting a remedy at equity would be required to prosecute his claim without undue delay as a person approaching the Court of Equity having "slept" upon his right and acquiesced for a long time may find that his claim has been barred by his laches. In this respect the maxim applied that "equity aids the vigilant, not the indolent",¹¹⁵ Laches is simply the inordinate delay that disqualifies the claimant from seeking equitable relief or enforcing an equitable cause of action.¹¹⁶

So a delay which prevents a party from obtaining an equitable remedy is technically called 'laches'.¹¹⁷ In other words, laches is a defence which a defendant could use to resist an equitable claim by the plaintiff.

The practice of the Court of Chancery was to deny a remedy where such remedy was barred in law. This is clearly shown by the dicta of Lord Camden in Smith v Clay¹¹⁸ where he said

"a Court of Equity... has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the

court is always passive and does nothing.

Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court.... Expedient republica ut sit finis litium is a maxim that has prevailed in this court in all time without the help of an Act of Parliament. But as the court has no legislative authority, it could not properly define the time of bar by a positive rule to an hour, a minute, or a year; it was governed by circumstances. But as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by parliament. And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

1.3.2. Distinction between Acquiescence and Laches

Acquiescence¹¹⁹ is a term used to describe a situation where a person stands by and does nothing, whilst to his knowledge, his rights are violated. In such a case where a person stands by and allows his right to be violated, without seeking redress he could lose his remedy, as Lord Cranworth, L C, made it clear in Ramsden v Dyson¹²⁰ that acquiescence could prevent an owner of land establishing his legal title after having stood by while a stranger was building on that land.

Acquiescence would also arise in a situation where the party subsequently learned of a violation after it had taken place and fails to take any action. So, where a plaintiff whose rights are violated fails to institute proceedings promptly, the defendant

would be in a position to raise the defence of laches. Laches is lapse of time and acquiescence is confirmation of the transaction, but the two cannot always be separated.¹²¹

The Court of Equity in determining whether there had been a delay amounting to laches took into consideration the plaintiff's delay in bringing an action, for example the defendant may have lost all evidence needed to meet the plaintiff's claim.

The Privy Council in Lindsay Petroleum Co v Hurd¹²² described laches as follows:-

"the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases are, the length of the delay and the nature of the acts done during the interval."

So where the conduct of the Plaintiff shows that he has either waived his right or given an impression to the other party that he is not pursuing his claim, he would not be allowed to pursue it at a later date because of his laches.

1.3.3. The Operation of Equity

Although equity does not fix a time period as do Limitation Statutes, generally it will not grant a remedy if there could be said to be acquiescence on the part of the plaintiff. In other words, equity considers the circumstance of each case that comes before it and if it can be established that the plaintiff by his conduct and neglect has lost his right, no remedy will be given by the Courts of Equity. This is clearly shown in the case of Allcard v Skinner¹²³ where the plaintiff in 1968 joined a protestant sisterhood which was introduced to her by her spiritual adviser. She gifted a number of property to the defendant, who was the lady superior of the sisterhood. In 1879 the plaintiff left the sisterhood and six years later in 1885 instituted proceedings to recover her property on the grounds of undue influence. The court held that she was not entitled to recover her property because of the undue delay i.e. laches. Furthermore, during the period of delay, the court found that the plaintiff had acquiesced. Acquiescence was only significant after the undue influence had ceased as was observed by Bowen L.J.,¹²⁴ when she was "surrounded by person perfectly competent to give her proper advice"

Although equity does not stipulate a fixed time period, the tendency of the courts has been to look at the Statute of Limitation as a guide.

As Lindley L.J. observed in Allcard's case,¹²⁵ "The action is not one of those to which the Statute of Limitations in terms applies, nor is that statute pleaded. But this action very closely resembles an action for money had and received where laches and acquiescence are relied upon as a defence: and the question is whether that defence ought to prevail. In my opinion it ought. Taking the statute as a guide and proceeding on the principles laid down by Lord Camden in Smith v Clay, and by Lord Redesdale in Hovenden v Lord Annesley the lapse of six years becomes a very material element for consideration."

1.4 LIMITATION ACTS - PROCEDURAL OR SUBSTANTIVE

Before embarking on a detailed discussion of the Tasmanian Limitation Act, 1974, in Chapter 2, this section deals with the nature and effect of Limitation Acts generally.

Although in some instances Limitation Acts may confer a right on a party as in the instance of a party who obtains a good title to property by adverse possession, in most cases, the Act whilst preserving the substantive rights of a party, under which his cause of action arose, be it a contract, tort, etc, denies him the remedy, once the stipulated time has passed.

1.4.1. Conferring Rights

Are Statutes of Limitation procedural pieces of legislation or are they substantive? In other words do these statutes confer a right on the defendant or do they merely state that a plaintiff cannot successfully prosecute a claim outside the relevant limitation period.

Unfortunately, the early law on this matter in the United Kingdom was not clear as there appeared to be conflicting views. Lord Denning MR in Mitchell v Harris Engineering Co Ltd¹²⁶ expressed the view that Statutes of Limitation do not confer any rights and are merely procedural. "The Statute of Limitation", he said, "does not confer any right on the defendant. It only imposes a time limit on the plaintiff."

However, in Yew Boon Tew v Kenderaan Bas Mara¹²⁷ the Privy Council rejected the view propounded by Lord Denning and said that Statutes of Limitation do confer rights and such statutes could well be regarded as both procedural as well as substantive, depending on the fact situation. Their Lordship's were of the view that,

"an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a 'right' as any other statutory or contractual protection against a future suit."

Although Yew Boon Tew v Kenderaan Bas Mara, was a Malaysian case, involving the Malaysian Limitation Statute, it is submitted that the view of the Privy Council is preferable to that of Lord Denning. This is so because the limitation act does give a legal right to a person who is in adverse possession of land. The Act furthermore recognises that title to chattels can be extinguished after the lapse of the relevant limitation period. In such cases it would be wrong to say that the Limitation Acts do not confer any right, as the right to title is expressly conferred by the Act.

If Lord Denning's view is accepted, the consequences could have far reaching effects on defendants, as any amendments to Statutes of Limitations enlarging time for a plaintiff to institute proceedings after the initial period has expired and the plaintiff is out of time, would leave the defendant with no defence. This state of affairs would be quite contrary to one of the basic reasons for imposing time limitation, namely to protect a defendant from a stale claim.

The courts have for a long time recognised this principle of protecting defendants from stale claims. They have given effect to this principle by holding that where amendments to Statutes of Limitation result in enlargement of time, a plaintiff whose claim was out of time prior to the amendment, will not be allowed to have his stale claim revived.

This attitude of the courts in not granting amendments where to do so would revive a stale claim is borne out in both Maxwell v Murphy¹²⁸ and Yew Boon Tew v Kenderaan Bas Mara. In the former case the family of a person killed in a fatal motor accident had

12 months from the date of death to bring an action. Subsequently under an amending Act which came into force 21 months after the 12 month period had expired, the period was extended to six years. The appellant brought an action about three and a half years after the deceased died.

The question before the High Court of Australia was whether the amending Act revived the Appellant's right of action, which was statute-barred before the passing of the amending Act.

It was held by Dixon C J, Williams, Kitto & Taylor J J, that it did not revive the right of action, as when the time expired, the right of action was terminated or defeated and accordingly the plaintiff had lost her right of action before the amendment was passed and was without remedy and thus a bar had been imposed on the remedy. The judgment of Williams J perhaps sets out this principle most succinctly, when he said,¹²⁹

"statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with the time within which to institute a cause of action the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse

of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights."

The Federal Court of Malaysia followed the reasoning of Williams J in Maxwell v Murphy in Yew Boon Tew v Kenderaan Bas Mara held that a subsequent amendment to a limitation statute enlarging the time, did not operate retrospectively to revive a cause of action which was already statute-barred. This latter case involved an appeal from the Federal Court of Malaysia in which a motor-bus belonging to the respondents collided with a motorcycle driven by the first appellant. The respondents being a statutory body, a limitation period of 12 months was prescribed for bringing any action for negligence done in the exercise of public duty. An amendment in 1974 extended the 12 month period to 36 months. Before the amendment came into force the appellant's cause of action had been statute-barred for 14 months. Nine months after, the appellants issued a writ against the respondents claiming damages for injuries caused by the negligence of the respondents' servants. The Federal Court of Malaysia in allowing the appeal held that the 1974 Act was not retrospective and that accordingly the claim was statute-barred. The Federal Court accepted the reasoning of Williams J in Maxwell v Murphy and said,

"on the failure of the respondents to commence action within the specified period the appellants had acquired an 'accrued right' which was designed to give them immunity for acts done in the discharge of their public duties... It therefore seems to us that in the circumstances of this case, the time for the claim was not enlarged by (the 1974 Act). The Act is not retroactive in operation and has no application to a cause of action which was barred before the Act came into operation."

This matter subsequently went to the Privy Council who dismissed

the appeal, and agreed with the decision of the Federal Court. In their judgment the Privy Council made the following observations¹³⁰

"Their Lordships consider that the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations..... A Limitation Act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts. In their Lordship's view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable... The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not at 13 June, 1974, possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained, and order his affairs on the basis that his potential liability is gone, that is the whole purpose of the limitation defence."

It is submitted that the view of the Privy Council that a

limitation Act could be procedural in the content of one set of facts and substantive in the content of another set of facts is correct. Although, generally, limitation statutes are classed as procedural in that it gives a defendant a defence to a claim not brought within an applicable limitation period, the defence does not allow him to challenge the claim on its merits. In other words it affords a successful defendant complete immunity from any liability under that particular claim regardless of the merits of the claim. The claimant's alleged right will however remain intact and should there be another remedy available to the claimant, apart from the right which is time barred, he will be free to pursue that course of action against the defendant.

More often than not, the claimant's right will be a one-time right, as for instance where the defendant is required to perform a contract. Should the defendant breach the contract but is able to successfully obtain a limitation defence against any remedies available to the claimant under law to enforce the contract, the claimant is left with a sterile right.

Their lordship's in Yew Boon Tew v. Kenderaan Bas Mara rightly point out that a defendant's accrued right to plead a time bar, which is acquired after the lapse of the statutory period is indeed a right.

The test adopted by their lordship's was to ascertain whether a statute would impair existing rights and obligations of the defendant if applied retrospectively.

If it indeed impairs existing rights and obligations, it would be classed substantive. In Yew Boon Tew's case their lordship's held that after the lapse of the statutory limitation period the defendant acquired a right to plead a time bar which indeed is a substantive right although arising out of an Act which is procedural.

Although extinguishing the rights of a claimant is not an

objective of the limitation system, there are specific instances in the limitation Act of Tasmania where the claimants rights are extinguished and a right is bestowed on the defendant, as in the case of an adverse possessor who has been in continuous possession of the land for a period of 12 years. In this instance the Act¹³¹ stipulates clearly that no action shall be brought to recover such land. In other words that Act gives the adverse possessor a right to that land as against the true owner,¹³² whose right is extinguished. Similarly, title to chattels is also extinguished as soon as the right of action for wrongful conversion or detention is extinguished.¹³³ It follows that if title to chattels is extinguished, the true owner would not be able to obtain the chattels and the person who obtained possession of the chattels by wrongful conversion or by detention would have a good title or right conferred by the Limitation Act. Again the Act bestows a legal title on a bona fide purchaser for value of a legal estate without notice.¹³⁴

So, the view of the High Court and the Privy Council that the Limitation Acts are both procedural and substantive is preferable to that of Lord Denning who is in minority in holding that such statutes are merely procedural and do not confer any rights.

1.5 The Tasmanian Act compared to the other Australian States and the modern English Law

Having examined briefly the law of limitation in England and traced the development of the law of limitation in the various states of Australia, it is noted that the English Act forms the basis on which the limitation law of the various Australian states are modelled on.

The Limitation Act of Tasmania is very similar both in substance and in form to that of the Limitation Act of New South Wales and Queensland. In each of these states the Act is divided into four parts - the first part dealing with interpretation; the second part dealing with the time periods for various causes of action;

the third part dealing with extension of the limitation periods and the final part dealing with general provisions.

The time periods for various causes of action are also identical in these three states eg. a period of six years is prescribed for actions on simple contracts; twelve years on speciality contracts and three years for personal injury cases.

Both the states of Victoria and South Australia have provided for a longer time period for bringing actions on speciality contracts namely fifteen years as opposed to twelve years in Tasmania, New South Wales and Queensland.

Although all the states of Australia have provided for an extension of time in cases where the person entitled to bring an action or proceedings is under a legal disability, South Australia and Western Australia limits the period of such extension in all cases to a maximum of thirty years from the time at which the right to bring the action or proceedings arose.

In Tasmania however, the thirty year maximum extension to a person suffering a legal disability is only limited to an action to recover land or money charged on land and not to all actions¹³⁵ which is similar to the provisions in Victoria¹³⁶ and Queensland¹³⁷.

The term "disability" is defined in all the various limitation acts to include infants and persons of unsound mind. However, in Tasmania the term disability is defined to include a convict within the meaning of S.435 of the Criminal Code, in addition to infants and persons of unsound mind. The Queensland Act is similar to the Tasmanian Act in that it also includes a convict in its definition of "disability".

The Tasmanian Act restricts the application of the extension provision for disability to persons under the custody of a parent, whereas the Courts in Victoria have given a liberal interpretation to the word "knowledge" as that of the claimant

and not of his servant, agent or parent.¹³⁸

In so far as extension of time is concerned, the Tasmanian Act provides for a judge to extend time for the commencement of an action if it is just and reasonable to do so. However, there is a stipulation that the maximum period of extension is limited to six years from the date on which the cause of action accrued.

The current position in England is that the court now has an unfettered discretion to extend the three year period in any case in which it considers it equitable to do so and if there is no prejudice to any party. This provision does not impose any judicial fetters on the discretion by restricting it to exceptional cases. Even though the discretion is unfettered it still remains for the plaintiff to convince the court that it is an appropriate case in all the circumstances for the exercise of the discretion and for an extension to be granted.

Victoria introduced a similar scheme in 1983 which not only extended the primary limitation period to six years but included the "discovery rule" which was the date on which the Plaintiff first knows;

- (a) that he has suffered those personal injuries; and
- (b) that those personal injuries were caused by the act or omission of some person.

The 1983 Act also conferred on the court a general discretion to extend the limitation period if it considered it just and reasonable to do so and sets out guidelines for the assistance of the Court in exercising its discretion.

In New South Wales, however, the "discovery rule" extension was rejected and instead an unlimited extension of the limitation period can now be granted by the Court in its discretion having considered all circumstances of the case and by applying certain statutory guidelines.

Although the problems encountered in England have not arisen directly in Tasmania, rather than await for the problems in the future it would be prudent to incorporate similar changes to the Tasmanian Act and thus prevent injustice arising in the future.

NOTES

1. Castles, A C, An Australian Legal History, Law Book Co., 1982 pages 1 & 20.
2. 21 Jac 1, c.16.
3. 3 & 4 Will 4, c.42.
4. 3 & 4 Will 4, c.27.
5. 37 & 38 Vict c.57.
6. s.3 as amended by 4 & 5 Ann C.3 and the Mercantile Law Amendment Act, 1856.
7. Statute of Frauds Amendment Act, 1828 s.4.
8. Ibid s.3.
9. The 3 exceptions are Writ of Right of Dower, Writ of Dower unde nihil habet, and a quare impedit; See William Holdsworth, A History of English Law, vol III p 20-21, 25; vol VII p 22-23.
10. 3 & 4 Will 4 c.27.
11. See Fifth Interim Report of the Law Reform Committee, 1936, Cmd 5334, p.6.
12. The Crown Suits Act, 1769.
13. Public Authorities Protection Act, 1893.
14. Workmen's Compensation Act 1925 and Employers Liability Act, 1880.
15. Fatal Accidents Act, 1846, Law Reform (Miscellaneous Provisions) Act, 1934 s. 1(3); Merchant Shipping Act, 1894, s. 178.
16. Carriage of Goods by Sea Act, 1924, Article III 6; Carriage of Air Act, 1932 Article 29 of 1st schedule.
17. Copyright Act, 1911 s.10.
18. Moneylender's Act, 1927 s.13.
19. Summary Jurisdiction Act, 1948 s.11.
20. 31 Eliz Cap 5 Section 5.
21. Local Government Act, 1933 s.84.
22. Housing Act, 1936 para 2 of second schedule.
23. Maritime Conventions Act, 1911 s.8.
24. Trustee Act, 1888 s.8.
25. Some of the more important Acts include the Maritime

Conventions Act, 1911 s.8; Public Authorities Protection Act, 1893, Copyright Act, 1911 s.11; Workmen's Compensation Act, 1925 s.14(1); Land Registration Act, 1925 s.83(11).

26. Fifth Interim Report, 1936 Cmnd 5334.
27. The Limitation Act, 1939 was modified to a limited extent by the Limitation (Enemies and War Prisoners) Act, 1945, the operation of which was retrospective.
28. S.32 Limitation Act, 1939.
29. See Shannon NP, The Modern Law Manual for Practitioners, Butterworths 2nd Edn, 1946 at p 316.
30. (1946) Cmnd 6860 para 107; See also HWE Wade, Law Reform Limitation of Actions Act, 1954 (1954) CLJ 149.
31. (1962) 1 QB 189; See also discussion of Cartledge v Jopling in a note titled "Pneumoconiosis: The Limitation Problem" p 106 Sol Jo. 209.
32. Report of the Committee on Limitation of Actions in cases of Personal Injury (1962) Cmnd 1829; See Note "Report on Limitation of Personal Injury Actions" p 106 Sol Jo. 867, where the author criticises the limitation period of 12 months as it would be difficult to discover when a person should have had his first positive proof of injury or claim and further that the 12 month rule would prevent pre action negotiations taking place.
33. See "The Limitation Act" 108 Sol Jo. 22; See also JA Jolowic "Limitation Act, 1963" (1964) Camb.L.J. 47.
34. (1970) 1 QB 393.
35. This problem was recognised by the Law Reform Committee established 1971 in its Twentieth Report (Interim Report on Limitation of Actions in Personal Injury Claims); (1974) Cmnd 5360p.6.
36. Law Commission No. 35 Cmnd 4532.
37. See Twentieth Report.
The Committee comprised the following members:
The Right Hon. Lord Justice Orr - Chairman
The Hon. Mr Justice Griffiths
The Hon. Mr Justice Walton

His Honor Judge Wingate
T H Bingham, Esq
Prof A G Guest
C A Hinks, Esq
D C H Hirst, Esq
The Lord Lloyd of Hampstead
A Martin, Esq

38. Twentieth Report (Interim Report on Limitation of Actions Personal Injury Claims) (1974) Cmnd 5630.
39. Ibid p. 50, 51.
40. Final Report on Limitation of Actions (1977) Cmnd 6923.
41. Ibid pp 74-77.
42. Ibid pp 56-57.
43. (1978) Q.B.D. 886 & 905.
44. Ibid at p 910.
45. Limitation Act, 1980 ss.1-27.
46. Ibid ss 28-33.
47. Ibid ss 34-41.
48. See G W Paton, Reception of the Common Law in The Commonwealth of Australia, The Development of its Laws & Constitution 1952; Blackstone, Commentaries on the Law of England, 1765 and Sir John Latham "The Migration of the common law - Australia" 76 LQR 54.
49. S. 24, 9 Geo IV, C.83 - an Act which was later called the Australian Courts Act 1828.
50. 21 Jac 1, c.16.
51. 3 & 4 Will 4, c.27 adopted on 13th July, 1837.
52. 9 Geo IV, c, 14 adopted on 9th May, 1828.
53. Report of the Law Reform Commission being the First Report on the Limitation of Actions (L R C 3); See "Limitation Reform" (1968) 41 ALJ 407.
54. The Imperial Acts repealed include:
 - (i) Common Informers Act, 1588 (31 Eliz 1. c) s.5 which fixes limitation period or "actions, suits, bills indictments or information: for any forfeiture upon any penal statute.
 - (ii) Limitation Act 1623 (21 Jac 1 c. 16) ss 3,4 & 7.

- (iii) Administration of Justice Act, 1705 (4 & 5 Anne c.3) ss 17, 18 & 19.
- (iv) Crown Suits Act, 1769 (9 Geo 3 c.16).
- 55. (i) Written Memorandum Act, 1705 (4 & 5 Anne c.3) ss 17, 18 & 19.
- (ii) Real Estate (Limitation of Actions) Act, 1837 (8 Wm 4, No 3) This Act adopted the Imperial Real Property Limitation Act 1833 (3 & 4 Wm 4.27).
- (iii) Supreme Court Act, 1841 (5 Vic, No.9).
- (iv) Trust Property Act, 1862.
- (v) Limitation of Actions for Trespass Act, 1884.
- 56. Second Report of the Law Reform Commission on the Limitation of Actions (L R C 12).
- 57. Third Report of the Law Reform Commission on the Limitation of Actions (L R C 21).
- 58. Limitation Act, 1969, ss 1-11.
- 59. Ibid ss 14-26.
- 60. Ibid ss 51-62.
- 61. Ibid ss 63-77.
- 62. The Committee comprised the following:
The Hon Mr Justice Neasey
Mr W D Craig
Mr R J Hoyle
Mr G H Thompsom
Mr P V Manser
Mr R M Webster
- 63. Tasmanian Law Reform Committee working papers and reports vol. 1.
- 64. The Statutes examined by the committee are:
Limitation Act, 1939 (Imp)
Limitation Act, 1963 (Imp)
Limitation of Actions Act, 1958 (Vic)
Limitation Act, 1969 (NSW)
- 65. [1907] Tas S.R. 26 & [1910] Tas S.R. 73.
- 66. See Real Property Act, 1862 ss. 146-156.
- 67. Limitation Act, 1974 ss. 1 & 2.
- 68. Ibid ss 3-25.

69. Ibid ss 26-32.
70. Ibid ss 33-40.
71. Lord Tenterdens Act, 2 & 3 WILL IV, C.71 as adopted by 6 Gul IV, 4 and Limitation of Actions (Real Property) Act 3 & 4 Gul IV, C.27 as adopted by 6 Gul IV 4.
72. The Real Property Limitation Act, 1878, 42 Vict. No. 6.
73. Limitations of Actions (Real Property) Act, 3 & 4 Gul IV C.27 and The Real Property Limitation Act, 1878, 42 Vict, No. 6.
74. 26 Geo V, XXXV.
75. Limitation Act 1935-1978 s. 38(1)(d).
76. Ibid s.38(1)(c)(i), (ii), (v) & (vi).
77. Ibid s.38(1)(b).
78. Ibid s.38 (1)(1)(c).
79. Ibid ss 40 & 41.
80. Ibid s.18.
81. Ibid s.46.
82. Ibid ss 47A & 48.
83. 30 Vic, 1866-7 No.14.
84. (i) Limitation of Actions (Amendment Act) 1948.
(ii) Limitation of Actions & Wrongs Act (Amendment) Act 1956.
(iii) Limitation of Actions Act (Amendment) Act, 1959.
(iv) Statutes Amendment (Miscellaneous Provisions) Act, 1972.
(v) Limitation of Actions Act (Amendment) Act, 1975.
85. Third and Twelfth Report of the Law Reform Commission of South Australia presented in 1969 and 1970 respectively.
86. Statutes Amendment (Miscellaneous Provisions) Act, 1972, No. 58 of 1972.
87. Limitation Act 1935 - 1975 s.4.
88. Ibid s.33.
89. Ibid s.34.
90. Ibid s.35.
91. Ibid ss 36 & 48.
92. 9 Geo IV C.83.
93. 21 James 1, Cap 16.

94. ss.3, 4, 6 & 7 repealed by Supreme Court Act 1915; ss 1 & 2 superseded by Real Property Act, 1915 pt II.
95. Ibid Division 7, ss 80-90.
96. Ibid Part VI, s.79.
97. This includes Pt IX of the Property Law Act, 1928; Division 7 of the Supreme Court Act, 1928 and Pt VI of the Trustee Act, 1953.
98. This Act can be traced back to 1910. Parts III & IV of the 1958 Act were amended by the Wrongs Act, 1972 which was passed on 5 Dec 1982.
99. Limitation of Actions Act, 1958 ss 4-22.
100. Ibid ss 23-27.
101. Ibid ss 28-35.
102. Includes Limitation Provisions in the Distress Replevin & Ejectment Act, 1867; and the Trustees and Executors Act, 1897-1924.
103. Included in the repeal are The Limitation (Persons under Disabilities) Act, 1962, The Limitation Act, 1960 and certain sections of the Law Reform (Limitation of Actions Act, 1956.
104. Limitation of Actions Act, 1974 ss 1-8.
105. Ibid ss 9-28.
106. Ibid ss.29-40.
107. Ibid ss.41-43.
108. See Para 1.1 (infra).
109. For a full discussion on Equity and Equitable jurisdiction see Halsbury's Laws of England, 4th Edn Vol 16 para 1201-1215; Meagher, Gummow & Lehane, Equity Doctrines & Remedies 2nd Edn Butterworths 1984.
110. These 3 categories are that of Professor Storey.
111. See for instance Halsbury's Law of England 4th Edn Vol 16 para 1201.
112. (1880) 16 Ch D 544 at 549.
113. See Burgess v Wheate; A G v Wheate (1759) 1 Eden 177 at 195, per Clarke M R; 28ER652 at 660;
114. (1872) L.R. 5HL 656; 42 LJ Ch 234.
115. See Smith v Clay 27ER 419; (1767) 3 Bro CC 639n, per Lord

Camden.

116. J S Williams, Limitation of Actions in Canada, 1972 pg, 30.
117. R E Megarry & P V Baker, Snell's Principles of Equity, (1973) p. 33.
118. 27ER 419; (1767) 3 Bro CC 639.
119. For a discussion on the distinction between acquiescence & Laches see Brunyates Limitation of Actions in Equity (1932) p. 188-190; Halsbury's Laws of England, 4th Edn para 1473-1474; 1476-1478.
120. (1886) L.R. 1HL 129 at p.140.
121. G W Keeton & L A Sheridan, Equity, (1976) at p.22.
122. (1874) L.R. 5PC 221 at p.239.
123. (1887) 36 Ch D 145.
124. at p.192.
125. at p.186.
126. (1967) 2 All E R 682 at 686.
127. (1982) 3 All E R 833.
128. (1957) 96 CLR 261.
129. at p. 277.
130. (1982) 3 All E R 833 at 840.
131. Limitation Act, 1974, s.10(2).
132. See para 3.2(b) *infra*.
133. Limitation Act, ss.6(1) & (2).
134. Ibid s.16A.
135. Limitation Act, 1974, s.26.
136. Limitation of Actions Act, 1936-1975 s.31(c).
137. Limitation of Actions Act, 1974-1978, s.29(2) (b).
138. See para 5.5 (*infra*).

CHAPTER 2. THE SCHEME OF THE TASMANIAN ACT

Each state in Australia has made statutory provision dealing with the Limitation of the rights of action.¹

In Tasmania, the Limitation Act, 1974² came into operation on 1st January, 1975³. The Limitation Act, 1974 applies, subject to certain exceptions⁴ to all actions begun within the jurisdiction of the Tasmanian Courts.

2.1 SCOPE OF THE ACT

The Limitation Act, 1974, is described in its long title as an Act "to consolidate with amendments certain enactments relating to the limitations of actions and arbitrations."

The Schedule to the Act gives a list of earlier general enactments dealing with limitation which were repealed. In some instances whole Acts have been repealed and in other cases the extent of repeal is limited only to certain sections, dealing with limitation provisions in those enactments.

The term 'action' is widely defined to include 'any proceedings in a Court of Law'⁵ and includes a set-off or counter-claim.⁶ Although the definition of 'action' under the Act is very wide, yet it does not apply to every single proceeding in a Court of Justice. For instance, a criminal prosecution will not be included as the term action is normally used only for civil proceedings.⁷

The Act is divided into four parts. The substantive provisions dealing with periods of limitation and extension of the limitation period which are allowed in certain circumstances are dealt with in Parts II and III. The general matters relating to the application of the Act are dealt with in Parts I and IV.

Generally the Act prescribes two periods of limitation - six

years and twelve years. The six year period is applicable to personal action which include actions founded in simple contract, quasi-contract; for and including actions for damages for breach of statutory duty; actions to enforce a recognisance or award not under Seal; actions for an account; actions to recover a sum recoverable under an enactment other than a penalty or forfeiture; actions to recover rent or damages; actions to recover arrears of interest.

The twelve year period applies to all actions to recover land; actions to recover money secured by mortgage or charge or to recover proceeds of sale of land; actions in respect of any claim to the personal estate of deceased persons; actions on speciality contracts and judgments.

There are five instances where a period shorter than six years is prescribed and two instances where a period greater than twelve years is prescribed by the Act.

In personal injury cases, where action is brought for damages for negligence, nuisance or breach of duty the Act prescribes a three year period and a two year period for actions to enforce a claim or lien in respect of salvage services; action to enforce a claim or lien against a vessel; and in an action to recover penalty or forfeiture.

The Act prescribes a one year period for actions under the Fatal Accidents Act, 1934.

In actions to recover land including actions to recover land in cases of adverse possession, where the claimant is the Crown the time period is thirty years and not twelve.

2.1.1. Proceeding to which Limitation Act Applies:

The Limitation Act, 1974, applies to all actions for which a

period of limitation has been provided by the Act. This would include personal actions based on contracts, torts, personal injuries, conversion as well as actions in respect of land, rent, money secured by charges and trust property. Besides these actions, the Limitation Act, also applies to various other specific cases.

(i) Estates of Deceased Persons

The Act applies to actions concerning the estates of deceased persons on their personal representatives other than actions for which a special period of limitation is prescribed by any other enactment.

Express provision is made in the Act limiting any claim to the personal estate of a deceased person or to a share or interest in such estate, whether under a will or on any intestacy to 12 years from the date when such interest accrued.⁸

(ii) Arbitration

Where a dispute is referred for determination in a judicial manner other than in a Court of Law, it is called an arbitration.⁹

Time may be relevant in arbitration cases at two stages, first in the commencement of the arbitration proceedings itself and secondly in the enforcement of the arbitration award. The Limitation Act applies to arbitration in the same manner as it applies to actions in the Supreme Court¹⁰ but does not apply to arbitration for which a period of limitation is prescribed by any other enactment.¹¹

In considering when the right to proceed to arbitration arises the same principle that determines when a cause of action arises in a court of law will be applied¹² even though there is a provision in the submission to say that no cause of action arises

until an award is made.¹³ The limitation period that would be applicable to the arbitration proceedings would be either those prescribed by the Limitation Act or other enactment applicable to the matter. As regards the commencement of the arbitration, the Act stipulates that where the submission is based on an arbitration agreement, the commencement date will be the date when one party serves on the other a notice requiring him to appoint, or to agree to the appointment of, an arbitrator, or where the arbitration agreement names or designates the arbitrator, to submit the dispute to the person named or designated.¹⁴

(iii) Proceedings by or Against the Crown¹⁵

The Limitation Act applies to actions by or against the Crown. Proceedings by or against the Crown are governed by the Act, in the same way as proceedings between subjects.¹⁶ However, proceedings by the Crown for the recovery of any tax or duty or any interest thereon are specifically excluded.

Proceedings by or against the Crown includes proceedings by or against any government department or any officer of the Crown.¹⁷ In respect of actions to recover land¹⁸ and in connection with leases¹⁹, the Crown receives more favourable treatment than others.

The position under early common law was that no proceedings were maintainable against the sovereign as the Courts being the king's own could have no jurisdiction over him.²⁰ However, since then the cloak of immunity has been removed and today the Crown is just as liable as any of its subjects although the Crown is still privileged in having a limitation period which is much greater than its subjects.

(iv) Foreclosure²¹

Foreclosure is the extinction of the mortgagor's equity of

redemption.²² Upon non-payment of a debt when due, and notwithstanding that the mortgagee may have a power of sale, the mortgagee may commence an action requesting the equity of redemption of the mortgagor be extinguished. In so doing the property will vest absolutely in the mortgagee.

Section 23 (5) of the Act reads:

"Nothing in this section applies to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action."

The provisions relating to actions to recover land²³ apply, to time period for instituting foreclosure. Any such action must be instituted before the expiration of twelve years from the date on which the right of actions accrued.²⁴ Buckley L J in Williams v Thomas²⁵ describing an action to recover land said,

"the expression....does not mean regain something which the plaintiff previously had and lost but means' obtain any land by judgment of the court' yet it is not limited to obtain possession of any land by judgment of the court."

Accordingly, foreclosure action (whereby a mortgagee obtains legal estate in the land thus destroying the mortgagor's equity of redemption) is classifiable as an action to recover land. A foreclosure action in respect of a mortgage of personalty, would be barred after twelve years from the date on which the right to foreclosure accrued²⁶, however where the mortgagee has been in possession of the mortgaged property after the right of action has accrued the right is deemed not to have accrued until the mortgagee has discontinued possession.²⁷

It is specifically provided that foreclosures under the Real Property Act, 1862²⁸ fall within the provisions of the Limitation Act, 1974.

2.1.2 Proceedings to Which the Limitation Act Does Not Apply

Generally the Limitation Act, 1974 does not apply to any action or arbitration for which a period of limitation is prescribed by any other statute, and more specifically the Act does not apply in the following instances:-

(i) Equitable Remedies

Although actions and proceedings on equitable right fall within the Act²⁹, claims for equitable relief like specific performance, injunction and so on do not come within the limitation period provided in the Act³⁰. So in other words the time limitation applicable under Division II to simple contracts³¹, awards on submissions not under seal³², specialties³³, actions to enforce judgments³⁴, sums recoverable under any enactment³⁵ and tort³⁶ will not be applicable to claims for equitable relief. However, the court may apply time limit by analogy, and normally equity did apply the Statute of Limitations by analogy as illustrated in the maxim that 'equity follows the law'. As there are no Tasmanian cases on point, I have included a number of English cases where the statute of limitation have been discussed in proceedings for equitable relief.

When the remedy in equity corresponds to a similar remedy at law, equity normally applies the corresponding common law limitation period by analogy. So in Friend v Young³⁷ where a manufacturer brought an action for account due against a commission agent after the death of one of the partners of the commission agent company, the court held that by the death of one of the partners the agency was determined and consequently no "debt or obligation" under the Partnership Act, 1890 had been incurred while the deceased was a partner and thus his estate was not liable.

Sterling J, in his judgment said³⁸

"in this case there is no question that the Courts of Law and those of equity have concurrent jurisdiction with reference to such a claim as this: indeed, as has already been stated, an action at law has been brought and judgment recovered for the very sum in question against the surviving partner.... A court of equity, therefore, ought to give effect to any bar created by statute which could be available at law."

In Knox v Gye³⁹, Lord Westbury said, "Where a court of Equity frames its remedy upon the basis of the common law, and supplements the common law by extending the remedy to parties who cannot have an action at common law, there the court of equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords. Where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation."

Although equity applies the relevant Statute of Limitation by analogy it need not always follow the law. In Holmes & another v Cowcher⁴⁰ at the date of the commencement of an action for redemption, interest due under a mortgage was in arrears for substantially more than six years. After commencement of the action, the property charged was sold by the mortgagee pursuant to his statutory power of sale, with the agreement of the mortgagors. The issue in this case was whether the mortgagee was entitled, out of the money realised from the sale of the property to keep interest which had accrued more than 6 years before the action was brought and thus barred by statute.

In his judgment Stamp J quoted with approval a passage from the judgment of Sir Richard Kindersley V-C in Edmunds v Waugh⁴¹.

"Moreover, it does not appear to me to come within the spirit of the Act, which, it must be remembered, is an Act

taking away existing rights and which must be construed with reasonable strictness. The intention of the legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then come to a Court of Justice to recover the interest, he should be entitled to recover six years' interest; but it does not follow that the legislature intended that a mortgagor who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed - although he has failed to pay the interest which he ought to have paid for more than six years - to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest which he ought to have paid less culpable than the omission of the mortgagee to demand and enforce payment of it."

In allowing the mortgagee to keep from the money realised from the sale, interest which had accrued more than six years before the action was brought, Stamp J, said⁴²,

"Plainly, if I am to follow what Sir Richard Kindersley V-C said, as I must clearly do, equity does not, in this respect, follow the law, and ought not to be held so to do."

So, whilst it is true that where the remedy in equity corresponds to a similar remedy at law, equity normally applies the common law remedy by analogy, it need not always do so, if it would be inequitable to do so.

(ii) Trustees

The Act stipulates a period of six years for actions by beneficiaries against trustees for recovery of trust property⁴³. If a beneficiary is able to prove fraud or fraudulent breach of trust against a trustee or where a trustee has trust property or

proceeds from trust property which he has converted to his own use no period of limitation applies.

Where fraud is intended to be charged, it must be distinctly charged, and its details specified. General allegations, however strong are insufficient to amount to an averment of fraud of which any court ought to take notice.⁴⁴

In such cases, where a beneficiary seeks to avoid the Limitation Act by pleading fraud, fraudulent breach of trust or converting trust property or proceeds to his own use, he must ensure that sufficient particulars are given in the Statement of Claims as otherwise the pleading could be struck out under Order 210 r.17(1)⁴⁵ or under the inherent jurisdiction of the courts.⁴⁶ This is clearly shown in an English case, Dow Hager Lawrence v Lord Norreys & Others⁴⁷ where the court held that a general averment of fraud is not sufficient; the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the deprivation and excluding other possible causes. As the appellant was unable to do so, the court by virtue of its inherent jurisdiction dismissed the action as an abuse of the procedure. Lord Watson in the course of judgment said,

"where a plaintiff in order to escape from the statute of limitations, brings charges of concealed fraud, for the first time, at a distance of seventy years, it appears to me that the duty of making a full and candid statement is specifically incumbent upon him. And unless the nature of the frauds alleged is in itself calculated to suggest the improbability to their being discovered by ordinary research, it is equally his duty to state the considerations to which he ascribes his ignorance of their existence."

It is submitted that the view of Lord Watson is sound, as a beneficiary, in pleading fraud, fraudulent breach of trust and

so on is actually saying that the Limitation Act does not apply in these circumstances and if in fact a beneficiary is to get the benefit of such a provision he should be in a position to give all relevant details which shows fraud or fraudulent breach of trust on the part of the trustee, as otherwise any beneficiary who is dissatisfied with the trustee could just plead fraud, or fraudulent breach of trust without giving sufficient particulars and thus obtain the benefit of this section and in so doing put the trustee into great inconvenience.

In fact Odgers, Principles of Pleading and Practice, state that

"Counsel must insist on being fully instructed before placing a plea of fraud on the record. Such a plea should never be drafted on insufficient material, nor without warning to the client, if appropriate, that by adopting such an aggressive line of defence he may double or treble the amount of damages which he may ultimately have to pay."⁴⁸

(iii) Claim for Tax, Duty by Crown

In any actions to recover any tax or duty or interest thereon by the crown, the Act expressly provides that the provisions of the Act will not be applicable.⁴⁹

(iv) Admiralty Actions in Rem

The general restrictions on time to institute proceedings founded on contract or on tort do not apply to actions in Admiralty which are enforceable in rem. An action in admiralty can be classified either as an action in rem or an action in personam. The former is an action on a res or 'against a thing'. The word 'res' when used in admiralty usually refer to such things as ships and their charges and freight. A writ of summons is normally served on the vessel, which is arrested and subsequently sold to meet the claims of the plaintiffs.⁵⁰ However, an action to recover

seamen's wages is an exception and falls within the Act.⁵¹ The relevant provisions in the Act are sections 8(2) to 8(4). These provisions are similar to section 8 of the Maritime Conventions Act, 1911⁵², which is an Imperial Act. Although this Imperial Act was extended to all Her Majesty's Dominions, it was expressly provided that its provisions do not extend to the Commonwealth of Australia.⁵³

The operation of s.8 (2) of the Limitation Act, 1974 is restricted to claims in respect of damage or loss to cargo or property or loss of life or personal injury where such loss or damage is occasioned - wholly or partly by the fault of another vessel. This was confirmed by an obiter remark of Taylor J in Burns Philip & Co Ltd v Nelso & Robertson Ltd⁵⁴. This case turned on a construction of s.396 (1), Navigation Act, 1912-1953 (Cwlth) which is in the same terms as s.8 of the Limitation Act, 1974 of Tasmania.

In the course of his judgment, His Honor Taylor J said,

"In approaching the construction of sub-section (1), it is, I think, of importance to bear in mind that it deals with distinct categories of claims, that is to say, it deals with claims in respect of loss or damage to vessels, their cargo and persons on board, and claims in respect of savage services. But it does not deal with all claims in respect of damage to vessels, their cargo and persons on board; its operation is restricted to cases where the damages occasioned, wholly or partly, by the fault of another vessel."

These obiter remarks were accepted as persuasive by Hewson J in the later case The Niceto De Larrinanga Navarro (Widow) v Larrinanga Steamship Co Ltd⁵⁶, where the court was faced with an interpretation on section 8 Maritime Conventions Act, 1911 (which is similar in terms to s.8 Limitation Act 1974 (Tas)).

His Lordship stated;

"This section imposes an entirely new period of limitation in respect of the actions enumerated, subject to the proviso. It should be noted that the words of this section only apply to claims in respect of damage or loss to cargo or property or loss of life or personal injury which lie against the other vessel. Claims of this nature which is against the vessel carrying the person, cargo or property in question do not appear to be affected by this period of limitation."

Since section 8(2) of the Tasmanian Limitation Act, 1974 is similar to s.8 of the Maritime Conventions Act, 1911, it is submitted that s.8(2) of the Tasmanian Act will likewise be invoked only if there are two vessels involved and the claim relates to damage to vessels, their cargo and persons on board or in respect of salvage services. The time period for proceeding under s.8(2) or s.8(3)⁵⁶ is 2 years from the date of damage, loss or injury or in a salvage claim 2 years from the date of such service, with powers in the court to extend this period⁵⁷ notwithstanding that the time has expired.⁵⁸

(v) Alienation of Crown Land

Although the Act provides that the Crown would not be able to bring an action to recover land after 30 years and any other person after 13 years, it expressly provides that this provision does not apply to land which has been reserved or set out as road in any Act or in connection with alienation of crown land, dedicated under any Act for any public purpose or reserved in any Crown grant, or land which forms part of the foreshore or bed of the sea.⁵⁹

(vi) Bona Fide Purchaser for Value⁶⁰

The Act also stipulates that where a right has accrued to any person, that action cannot be brought against any person who bona fide purchased a legal estate in land for value without notice of the circumstances which gave rise to the right of action.⁶¹

So that if A purchased a land from B in good faith and for value without notice that C had been in adverse possession of that property for over 12 years, C who has a right of action would not be able to enforce it against A.

To successfully invoke this doctrine, the purchaser must establish in the words of Fry, J, in Re Morgan⁶²

"that he took all reasonable care and made inquiry, and that, having taken that care and made inquiry, he received no notice of the trust which affected the property."

The holder of a legal estate must take without notice of the prior equitable interest in order to take priority over it.

Notice may be actual, constructive or imputed. Actual notice is where a purchaser has actual notice of the relevant facts.

Sometime it may be difficult to draw a line between what will and will not constitute notice of a fact. Constructive notice is where notice of matters would have come to the purchasers attention if he had made all the usual and proper inquiries and inspections. A purchaser of a legal estate can plead lack of constructive notice if he has made all reasonable inquiries and has found nothing to indicate the presence of a prior, existing equitable interest.

Under the deeds registration system, interests creating or affecting interest in general law land may be registered. Where a purchaser is purchasing an interest in general law land, it will be reasonable to expect him to search the deeds register to

determine if there are any subsisting interests in the land he is purchasing.

Imputed notice is notice acquired or deemed to be acquired by any agent of the purchaser of the legal estate. If the purchaser appoints a solicitor to act for him in the purchase of the property, any notice, actual or constructive received by his solicitor is imputed to the purchaser.⁶³

(vii) Other Cases

By using the usual rule of statutory interpretation, the Act would not apply to proceedings for which no period of limitation is stipulated by the Act.

At common law, Criminal proceedings are generally excluded from the operation of the limitation provisions. The maxim of the common law applicable in criminal proceedings is nullum tempus occurrit rege or there is in general no limitation of time on the institution of criminal proceedings. In Tasmania, criminal proceedings would be outside the scope of the Act because they are not 'actions' as defined in S.(1) of the Act. It would appear that the Limitation Act would not apply to enforcement of a charge by a debenture holder as is illustrated in the Victorian case of Re Otway Coal Co⁶⁴. In this case the company issued a first debenture to secure \$25000 and in 1925 it created several second debentures to rank equally among the creditors after the first debenture, for a sum of \$30,000. In 1935, the first debenture holder appointed a receiver and the property was eventually sold for \$55,000. The second debenture holder appointed another receiver. The court was of the opinion that the only way in which a debenture holder can enforce his charge is by sale. Accordingly his right is not a right to sue for a debt within the meaning of section 82 of the Victorian Statute of Limitations (Supreme Court) Act, 1928, so as to be barred after six years, nor to bring an action to recover land, under the Property Law Act, 1928 (Vic) as that would be barred after

fifteen years.

As such the debt was not barred by lapse of time and the second debenture holders were entitled to the surplus.

2.2. CONFLICT OF LIMITATION ACT PROVISIONS WITH LIMITATION PERIODS IN OTHER STATUTES

2.2.1. Workers Compensation

The 1974 Act is not an exhaustive provision of the law of limitation and as such it is not uncommon to find specific limitation period provisions in various other statutes, which limit the time within which a specific statutory action must be instituted. These specific time periods may be different from those provided in the Limitation Act and thus there could be conflict between the time provisions in these Acts. In the event of a conflict between, the time periods in a specific act and in the Limitation Act which is to prevail?

The Supreme Court of Tasmania was faced with a conflicting provision as regards time for instituting proceedings under the Workers Compensation Act, 1927 which has now been superseded by the Workers Compensation Act, 1988 and the Limitation of Actions Act, 1965 in E A Watts Pty Ltd v Hawkins⁶⁵ S.9 (7)⁶⁶ of the Workers Compensation Act provided that in the case of a worker accepting payment of compensation under the Act, in respect of any injury, the civil liability of his employer would cease at the end of 12 months after the date of injury.

The Limitation of Actions Act provided on the other hand in

S.1 (1) "Notwithstanding any other law or rule of law to the contrary, an action of damages for negligence, nuisance, or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under an Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for negligence,

nuisance, or breach of duty consist of or include damages in respect of personal injuries of any person shall except as provided in subsection (2) of this section, be commenced within a period of two years and six months from the time when the cause of action arises."

The Tasmanian Supreme Court held,

"....The Limitation of Actions Act, 1965, is not an Act conferring a right on a limit to bring an action within the period of two years and a half. It is an Act which limits or curtails his common law right to bring an action (if a cause of action exists) to a period of two years and a half or by leave of the court within an upper limit of six years..... The Act is plainly concerned only to prescribe maximum periods of time of universal application within which certain actions may be brought. It follows that 'any other law or rule of law to the contrary' can be a law which prescribes a maximum period in excess of the periods prescribed by S.2. A law which prescribes in special cases a maximum period less than those prescribed periods is not a 'law to the contrary'."

The court was of the view that the provisions in the Workers' Compensation Act relate to substantive rights and are not procedural provisions and accordingly such substantive rights were not caught by the words 'any other law to the contrary' in S.2 of the Limitation of Actions Act.

This decision must be questionable, as the phrase 'any other law to the contrary', it is submitted, is very wide and should include laws dealing with substantive rights as well as procedural matters and furthermore they are certainly wide enough to embrace laws providing a period less than those prescribed by the Limitation Act.

A better interpretation would be to view the right under common

law and that under Workers' Compensation as two separate and concurrent rights except that the common law right is curtailed whenever a person receives compensation under the Workers' Compensation Act. In fact this approach was taken in a New South Wales case by Jacobs, J A in Andreoli v Sernack Pty Ltd⁶⁷. The Supreme Court of New South Wales, had to decide on the limitation provision under s.63 (3a) of the Workers' Compensation Act, 1926 which required a person to institute common law proceedings within three years of the receipt of Workers' Compensation and the Statute of Limitation which provided a six year period to institute proceedings.

In his judgment, Jacobs, J A stated,

"However, I think....that the two rights must be regarded as existing concurrently, the right to Workers' Compensation and the right to commence a common law action until appropriate periods of limitation have passed, and that the right to commence an action at common law must be regarded as continuing throughout the whole period of six years after the occurrence of the injury except so far as that right may be curtailed by S.63".

In cases of Contracts of Insurance, it is not unusual to find a time period of 12 months within which an insured would have to institute proceedings for breach, although the Limitation Act allows a period of up to 6 years for actions based on contracts.⁶⁸

Not only is the insured given a shorter period of time to institute proceedings but often he is called upon to comply with other requirements such as submitting the claim to arbitration as a pre-requisite to commencing an action in a court of law.

Such clauses are lawful and the insured would be required to comply with the arbitration requirement within the stipulated time.

There are two New South Wales cases and one Victorian case on point. Firstly, in Re Woolloomo Timber Co Pty Ltd and Sec.7 of the Arbitration Act⁶⁹, the court held that the requirement in the clause of the insurance policy that the claim should have been referred to arbitration within one year after the destruction or damage, was not satisfied by the request to appoint an arbitrator or the agreement of the parties to arbitrate, and in order to satisfy the clause there must have been a reference to arbitration. In other words, in order to comply with that requirement there had to be in fact a formal reference in accordance with the provisions of the Arbitration Act and that reference had to take place within the 12 month period.

However this decision was over-ruled in Gosford Meats Pty Ltd v Queensland Insurance Co. Ltd⁷⁰. A policy of insurance given to the plaintiff by the Defendants contained an arbitration clause, which provided, inter alia that after the expiration of one year after the accrual of a cause of action the insurer would not be liable in respect of any claim therefrom unless such claim should in the meantime have been referred to arbitration.

Within one year after the accrual of a cause of action arising out of the policy it was agreed between the parties that the matter be referred to arbitration and an arbitrator was chosen and agreed to act. No further steps were taken within the year.

Macfarlen J dismissed a summons for a declaration that the dispute had been duly referred to arbitration. The court stated,

"It is therefore in our opinion, a compliance with its requirement that, within the year, the parties intention or desire to go to arbitration shall in any manner but with sufficient clarity and certainty, have been manifested. We have spoken of the matter thus far as if what was required was such a manifestation on both sides. But we are far from saying that there may not be a unilateral "reference" in the relevant sense, particularly on the part of the

insured, there being, of course communication to the other side. However, we express no concluded opinion as to this, since on the facts of this case the occasion does not arise. It is not necessary in our opinion, to a "reference" in this sense that there should have already been or should at the same time be, an appointment of an arbitrator or arbitrators. All that is necessary is a manifestation, sufficiently clear and certain, of an intention or desire that there should be arbitration. There must of course be an existing unresolved difference; but it is not essential that the nature of this difference be stated as part of what is only a manifestation of the intention or desire of the parties with respect to a matter which is common ground between them."

So to comply with the time period, namely one year as in the above cases, in New South Wales, there need not be a formal reference as is required under the Arbitration Act but merely a clear intention or desire that the matter should be the subject of arbitration.

In the Victorian case of Grieve v Northern Assurance Co⁷¹ the court was asked to determine the validity of a condition for forfeiture if action was not brought within 3 months after rejection of a claim. It was argued that the condition was invalid in that it purported to prevent a plaintiff maintaining an action in a court of law during the period of time allowed by the Statute of Limitation. The court in rejecting this argument held that a condition in a policy of insurance that if a claim should not be made within 3 months after a claim under it had been rejected, all benefits under the policy should be forfeited, affords a good ground of defence to any action on the policy.

In Tasmania no problem arises as to the time of an arbitration as s.33 (3) of the Limitation Act, 1974 clearly states that

"an arbitration shall be deemed to be commenced when one

party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or agree to the appointment of an arbitrator, or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring him to submit the dispute to the person so named or designated."

So in Tasmania, time will commence when notice is given by one party to the other.

2.1.3. Unpaid Rates and Municipality Charges

Again, the courts have held that where the period of limitation stipulated in the Limitation Act differs from that in other acts dealing with rates or assessments, the provisions in the latter acts will prevail.

Decisions in Victoria and New South Wales, show that in the event of a conflict between limitation provisions in some other acts and the provisions in the Limitation Act itself, the tendency of the courts has been to lean in favour of the former.

In the Victorian case of Mayor etc of the City of Richmond v The Federal Building Society and others⁷², the court was called upon to interpret S341 of the Local Government Act, 1903⁷³, which provided inter alia that rates remained a charge on the property until it is paid.

Madden C J in delivering the judgment of the Supreme Court in Victoria said,

"The effect of the Statute of Limitations upon debts charged on land is that the charge shall remain no longer than 15 years from a certain time. But under S341, the charge is to remain not until 15 years have elapsed, but until the money is paid, and it appears to be quite impossible to give any other meaning to the words than their ordinary meaning."

Similarly in The Borough of Tamworth v Russell⁷⁴, the court had to decide on S176 of the Municipalities Act, 1867, which provided that over-due rates or assessments remained a charge on the property.

Although in the first instance the Statute of Limitation was successfully relied on, when the matter went on appeal the court held that the Statute of Limitation did not apply.

So it would appear that where a statute provides for rates to be a charge on a property, the Limitation Act is effectively ousted. Although there are no cases in point in Tasmania, by analogy it would appear that the situation in Tasmania would be the same as that in Victoria and New South Wales.

2.3 CONCLUSION

The Tasmanian Act like the English Act and the Limitation Acts of the other Australian States spells out proceedings to which the Act applies and in what instances they are inapplicable.

One notable area to which the Act does not apply is to equitable relief like specific performance, injunction and the like. Although the Limitation Act does not apply to cases where an equitable remedy is sought, the Court normally applies the common law limitation period by analogy, if the remedy in equity corresponds to a similar remedy at law. However, where it would be inequitable to follow the limitation period stipulated by the Limitation Act, the court of equity will not do so. The Limitation Act is not exhaustive, in the sense that there could be limitation provisions found in other statutes as well.

This would inevitably give rise to conflict between the time provisions found in the Limitation Act on the one hand, and the time period allowed under these other statutes.

In the event of a conflict arising between the time provisions

in the Limitation Act and another statute the Court may very well approach the issue of which provision prevails by considering whether the time provisions in the other statute confer a substantive right on the claimant.

In referring to the Limitation of Actions Act, 1965, the Tasmanian Supreme Court has held that it does not confer a right but merely limits or curtails the litigants common law right to bring an action.

If the court finds that the time provisions found in the other statute confer a substantive right than they would in all probability say that provision should take precedence over the provisions found in the Limitation Act.

NOTES

1. NSW: Limitation Act, 1958
Victoria: Limitation of Actions Act, 1936-1975
South Australia: Limitation of Actions Act, 1936-1975
Western Australia: Limitation Act, 1935-1978
Queensland: Limitation of Actions Act, 1974-1978
Tasmania: Limitation Act, 1974
2. For the corresponding section to the Tasmanian Act in the other states please look at Appendix II. Set out in Appendix I, in tabular form are the various time limits provided by the Act for various causes of action. The 1974 Act is divided into 4 parts; Part I is the preliminary part which contains the interpretation sections. Part II contains the periods of limitation for the various causes and has two divisions. Division II deals with limitation periods for contracts, tort, personal injuries and conversion whereas Division III deals with actions in respect of land, rent, money secured by charges and trust property. Part II deals generally with extension of limitation periods and in cases of disabilities or in cases of acknowledgment or part payment an extension is granted. The final part-Part IV contains several miscellaneous and supplemental provisions:
Section 39(1) of the 1974 Act states that it did not operate to revive any actions barred by the earlier limitation statutes unless there has subsequently been an acknowledgment or part payment by the debtor. This provision is now of little practical importance.
3. Limitation Act, 1974 s.1(); Prior to the commencement date, there existed in Tasmania Imperial Acts and the Limitation Acts of 1836, 1875 and 1965 (see Chapter 1 para. 1.2(f) infra). Section 40(1) of the Limitation Act 1974 expressly repealed the Imperial Acts and Section 40(2) repealed the state Limitation Acts of 1836, 1875 and 1965, the Fatal Accidents Act 1965 and certain sections of the other Acts

mentioned in Part II of the schedule.

4. As to the proceedings to which the Act does not apply see para 2.1.2 *infra*.
5. Limitation Act, 1974 s.2(1).
6. Ibid s.35.
7. See China v Harrow UDC (1954) 1 QB 178 at 185 (per Goddard LCJ).
8. Limitation Act, 1974 s.25.
9. For a detailed discussion on Arbitration see Russell on Arbitration, 18th Edn 1970 and Halsbury's Laws of England 4th Edn vol 2, pp 255-356.
10. Limitation Act, 1974 s.33(1).
11. Ibid S.38.
12. Per Atkinson J. Pegler v Railway Executive (1946) 62 TLR 474 at 477.
13. Limitation Act, 1974 s.33(2).
14. Ibid s.33(3).
15. Generally see Halsbury's Laws of England, 4th Edn vol 11 para 1401.
16. Limitation Act, 1974 s.37(1).
17. Ibid s.37(2).
18. Ibid s.10(1).
19. Ibid s.12(3).
20. See Halsbury's Laws of England, 4th Edn vol 8 para 966.
21. Generally on the subject of Foreclosure see Fisher & Lightwood's Law of Mortgage - ELG Tyler, 8th Edn, 1969, pp 322-328.
22. See Wakefield Bank v Yates (1916) 1 Ch 452, CA.
23. Limitation Act, 1974 ss 10-12.
24. Ibid s. 10(2).
25. (1909) 1 Ch 713 at 730.
26. Limitation Act, 1974 s.23(2).
27. Ibid s.23(3).
28. Ibid s.34.
29. Ibid s.2(1) See definition of "action" and "Land".
30. Ibid s.9.
31. Ibid s.4(1)(a).

32. Ibid s.4(1)(c).
33. Ibid s.4(3).
34. Ibid s.4(4).
35. Ibid s.4(1)(d).
36. Ibid s.5 & 6.
37. (1987) 2 Ch 421.
38. at p 432.
39. (1872) LR 5HL 656 at 674.
40. (1970) WLR 834.
41. (1886) LR 1Eq 418 LR 418.
42. at p 1226.
43. Limitation Act, 1974 ss. 10(1); 10(4) (a) & (b).
44. Wellington v Mutual Society (1880) 5 App Cas at p 697.
45. "the defendant or the Plaintiff, as the case may be, must raise by his pleading all matters which show that the transaction is either void, or voidable in point of law, and all such grounds of defence or reply, as the case may be, must be pleaded, which, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleading, as, for instance, fraud, equitable defence, Statute of Limitations, stopped, release, payment, performance, facts showing the illegality or invalidity of any contract either by Statute or common law, Statute of Fraud, or the Sale of Goods Act 1896."
46. See Keith Mason, Inherent Jurisdiction of the Court, 57 ALJ 449.
47. (1890) 15 App Cas 210.
48. Odgers, Principles of Pleading & Practice in Civil Actions in the High Court of Justice, Casson D.B & Dennis H, Stevens & Sons, 22 Edn 1981.
49. Limitation Act, 1974 s.37(1).
50. British Shipping Laws Vol 1, Admiralty Practice McGuffie KC, Frugeman PA, Stevens & Sons, 1964 p.5.
51. Limitation Act, 1974 s.8(1).
52. Maritime Conventions Act s.8 "No action shall be maintainable to enforce any claim or lien against a vessel

or her owners in respect of a damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of any overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment: Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on any such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any such reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or as his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

- 53. S.9(1) Maritime Conventions Act, 1911.
- 54. (1957) 1 Lloyds Rep 267.
- 55. (1965) 3 All E R 930.
- 56. Limitations Act, 1974, s.8(2). An action to enforce a claim or lien against a vessel or her owners in respect of damage or loss to another vessel, her cargo or freight, or any property on board her, or damage or loss of life or personal injuries suffered by any person on board her caused by the fault of the former vessel, whether that vessel be wholly or partly in fault, shall not be brought after the expiration of two years from the date on which the damage, loss or injury was caused. (3) An action to

enforce a claim or lien in respect of any salvage services shall not be brought after the expiration of two years from the date on which the services were rendered.

57. Ibid s.8(4).
58. Ibid s.8(5).
59. Ibid s.10(1), 10(4) (a) & (b).
60. Generally on the doctrine of bona fide purchaser see Barnsley's Conveyancing Law & Practice 2nd Edn pp 379-381.
61. Limitation Act, 1974 s.16A.
62. (1881) 18 Ch D. 93, 102.
63. Bradbrook, McCallum and Moore, Australian Real Property Law, 1991 pp 98-106.
64. (1953) VLR 537.
65. [1968] Tas S R 83.
66. This Section was amended by the Workers' Compensation (Alternative Remedies) Act, No. 93 of 1973 by inserting a new sub-section 7.
67. (1966) 2 NSW 123.
68. Limitation Act, 1974 s.4(1) (a).
69. (1969) 1 NSW 168.
70. (1970) 3 NSW 400.
71. (1879) 5 VLR 413.
72. (1909) VLR 413.
73. "All rates and other monies due to any municipality..... in respect of any property.... shall with interest thereon as in this Act provided be and until paid remain a charge upon such property."
74. (1886) WN 57.

CHAPTER 3. WHEN TIME BEGINS TO RUN

3.1. IN CASES OF CONTRACTS, TORTS AND PERSONAL ACTIONS

The general rule as to the commencement of the Limitation period stipulated by statute, is from the date of accrual of the cause of action, which arises when the breach occurs and not when the damage is suffered.¹ From the moment a breach occurs the plaintiff is assumed to be in a position to prove all the elements of a civil wrong and establish a prima facie case against the defendant.

Unfortunately, the Act does not define the term "cause of action." However a number of old English cases have defined the term as follows; Firstly, in 1888, Lord Esher defined cause of action as

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."²

In 1891, Lindley L J said in Reeves v Butcher,³

".....the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."

Lord Dunedin in Board of Trade v Cayzer, Irvine & Co.⁴, defined cause of action to mean "that which makes action possible."

For an action to be brought there must be an identifiable plaintiff who could institute proceedings and an identifiable defendant on whom process could be served. So the starting point for the limitation period in most cases would be from the time parties could be identified and all the elements of a civil wrong

exist, to enable the plaintiff to prove a prima facie case against the defendant. The inability to trace the defendant does not prevent the cause of action from accruing⁵, although without finding the whereabouts of the defendant, it might mean that the plaintiff cannot commence proceedings. However, a cause of action cannot arise unless there is a party in existence, capable of suing and another party in existence, who can be sued.⁶ For all the elements of a civil wrong to exist, the plaintiff must be in a position to prove his claim. In other words if the plaintiff is contemplating an action in negligence for instance, he/she should be able to prove that the defendant owed him/her a duty; that the defendant was in breach of that duty; and arising out of the breach the plaintiff suffered damages or loss and that such damages or loss was foreseeable.

3.1.1. Actions on Contract

The general periods of limitation for all common law actions are provided for in the Act.⁷ In the case of contracts, the Act makes a distinction between simple contracts and contracts under seal. In the case of simple contracts, a period of six years⁸ is provided from the date on which the cause of action accrued; in cases of contracts under seal (or speciality contracts) the time period is twelve years⁹ from the date of accrual of the cause of action. Perhaps a suggested reason for giving the former such a shorter time period could be due to the fact that since simple contracts could be made in writing or parol and in many cases because of their informal nature it could be difficult to prove these cases with the lapse of time, whereas speciality contracts because they are signed, sealed and delivered, they are provable for a much longer period.

The Act does not define a simple contract. However, Blackstone's Commentaries¹⁰ defines simple contracts as,

"Debts by simple contract are such, where the contract upon

which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and therefore only better than a verbal promise."

In Halsbury's Laws of England¹¹ simple contracts are defined

"to include all contracts which are not contracts of record or contracts under seal. Simple contracts may be express or implied, or partly express and partly implied."

In Anson's Law of Contract, a contract is defined as an 'actionable promise or promises'¹²

In the absence of a definition of a simple contract in the Limitation Act, it is suggested that the above definitions should apply to the Act.

(i) Determination of Breach

Having decided that a cause of action has accrued, the next vital step is to identify the exact point of time that gives rise to the cause of action. In other words, the plaintiff should be in a position to identify the time the breach occurred, as the material time for commencement of the Statute of Limitation is the date of the breach and not the date when the damage occurs¹³. That the operative time is the date of breach is demonstrated in Gibbs v Guild¹⁴ where Field J., said,

"It was well settled that in actions on assumpsit the time ran from the breach of the contract, for that was the gist of the action, and the subsequent damage, though happening within six years next before the suit, did not prevent the application of the statutes."

In a case of a simple contract where A contracted to sell 1000

tons of wheat to B to be delivered on 20th December, 1985, a breach would occur on the 20th December 1985 if the wheat was not so delivered.

If the wheat was to be delivered over 5 separate dates and the plaintiff A, is in breach of the first two deliveries, the problem becomes more complex. In this instance, A is in breach of the first two deliveries, but the time for performance of the next three deliveries is yet to come. Would the cause of action against A arise on the date when he was supposed to deliver his first instalment or must B wait until A fails to deliver the last of the 5 instalments? In such a case, if the innocent party accepts the initial breach as a repudiation of the contract, his cause of action accrues at once.¹⁵

However, if the initial breach does not give rise to a discharge either because it is not sufficiently fundamental¹⁶ or because the innocent party declines to accept it as a discharge, each time a breach occurs, a separate cause of action arises¹⁷. So where a seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, this will not necessarily permit the innocent party to treat himself discharged. In each case the question to be asked is whether the breach is a repudiation of the whole contract or whether it is a severable breach. If it is a severable breach the innocent party could only claim damages for the said breach and does not have a right to treat the whole contract as repudiated. It is possible that the breach or breaches may amount to an express or implied renunciation of the contract. However, if they amount only to a failure of performance, they must go to the root of the contract in order to justify discharge.¹⁸

(ii) Money Lent

Generally, where no time for repayment is specified in a contract of loan, or where the loan was expressed simply to be repayable

"on demand", the lender's cause of action accrues when the loan was made and time begins to run from the date of the loan. Six years¹⁹ from the date of the loan, the lender's right to recover the loan is barred, despite the fact that the lender has not made a demand.²⁰

As an example, where A makes a loan of \$5000 to B on 1st January, 1983 payable on 31st December, 1983. Here it is an express term of the loan that A cannot call back the loan till 31st December, 1983. So, as far as A is concerned time runs from 31st December, 1983, because that is the earliest period he could have recalled the loan. So in Reeves v Butcher²¹, which is an English case, the plaintiff lent money to the defendant and agreed that if the defendant paid interest quarterly, he could not call in the money for five years. There was also a provision in the agreement that if the defendant should make default in the payment of any of the quarterly interest payment for twenty-one days the plaintiff might call in the principal. No interest was ever paid and the plaintiff commenced proceedings within 6 years after the period of the loan i.e. after 5 years had expired.

The Court of Appeal held that the Statute of Limitation was a good defence, for that the time began to run from the earliest time at which the plaintiff could have brought her action - i.e. twenty-one days after the first instalment of interest became due.

As a second example, A makes a loan of \$5000 to B on 1st January, 1983, payable on demand. Here normally time runs from the date of the loan i.e. 1st January, 1983. However, one would have to look at the surrounding circumstances to ascertain whether the parties had intended that demand should be a condition precedent to the action. A demand would be a condition precedent only on the promise by a party to pay a collateral amount and not where he is principally liable for the debt. In re J Brown's Estate²² a father and son made a joint and several covenant to pay the principal sum secured by a mortgage "on demand". The father who

was a surety died 5 years later and no action was brought against the father's estate in respect of his liability on the covenant in the mortgage until nine years after his death. Chitty, J said,

"now, for those interested in the testator's estate it is said that the meaning of the words "on demand" is the same as that which has been attributed to them in promissory notes and the like. The law is quite settled that, with regard to a promissory note payable on demand, no demand is necessary before bringing an action, and indeed the Statute of Limitations begins to run from the making of the note."

".....It is plain that a distinction has been taken and maintained in law, the result of which is that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action is brought."

Therefore, where a surety undertakes to pay on demand, a demand is a condition precedent to liability and only when a demand is made and not complied with, does the creditors cause of action accrue.

An action to claim the principal amount of interest due under a mortgage of land, is contractual in nature and as such can fall within the rules relating to contract as well as to an action to recover money secured by mortgage or other charge.²³ In the English case of Wallis v Crowe²⁴, the court treated the claim as falling under the rule of contract. In this case the defendant's jointly and severally guaranteed the payment of the principal and interest moneys secured by a mortgage and undertook to pay the principal and interest if the mortgagor defaulted. The mortgagor defaulted and the principal moneys became due on 3rd June, 1930. The court held that after 6 years from the date of default, an

action for principal and interest was barred against the guarantors. The court also held that as regards interest the guarantee was a continuing one, which meant that a fresh liability arose in every case of default and that the liability was not barred until 6 years from the date on which it arose.

(iii) Guarantees

A guarantee is the promise of one person to be answerable for the debt or obligation of another if that other person defaults. Generally, in a contract of guarantee the primary obligation is owed by the borrower or principal debtor and a secondary obligation which is assumed by the guarantor or surety.

Chitty, J in re Brown's Estate, observed that where there is a promise to pay a collateral sum, a demand ought to be made prior to an action being brought²⁵. This arises in the case of guarantees, as the guarantor is not liable in the primary sense, since the primary debt is the responsibility of the borrower. The guarantor's liability arises only when the borrower defaults and when a demand is made by the lender to pay the collateral sum. Time in this case will only start to run from the date of demand. In the Victorian case of Union Bank of Australia Ltd v Barry²⁶, A, gave a guarantee to a Bank to secure the repayment of an advance made by the Bank to B "in case the said B should make default in payment of such advance and interest or any part thereof". B's account with the Bank continued to be overdrawn till she passed away. The Bank did not make any demand on B during her lifetime but made a demand on her executors within 6 years of the bringing of the action. The court held that no default was made within the terms of the guarantee until after demand and that the Statute of Limitations did not begin to run until such demand was made. A was therefore liable.

Depending on the wording of the contract, the guarantor is generally not liable for the total amount of the principal debt but merely for the amount in default by the principal debtor.

In Commercial Bank of Australia Ltd v Colonial Finance Mortgage Investment & Guarantee Corp Ltd²⁷, the guarantors gave a continuing guarantee to the Bank and undertook to pay all advances and debts owing or to become owing by the customer to the Bank "to the extent of \$12,500 and interest on the same respectively or any part thereof respectively". The customer failed to pay a portion of the overdraft on one occasion and interest on the overdraft on another occasion and the bank made demand on the customer on both occasions. The court held that a cause of action arose against the guarantor when the customer failed to pay part of the principal debt on demand. However, the cause of action against the guarantor was not for the whole amount of the guarantee but only the amount on which the customer defaulted. Therefore time began to run against the bank as to that portion of the indebtedness only, and the guarantee continued as security to the Bank for the balance. The court also held that as against the sureties, the statute ran as regards interest as well as the principal sums demanded. The liability of the guarantor in the event of a default by the borrower was also raised in the House of Lords in Hyundai Heavy Industries Co Ltd v Papadopoulos and Others²⁸. In this case the guarantors agreed with a firm of shipbuilders to guarantee payment by the buyers, who had contracted with the shipbuilders to build a vessel. The buyers defaulted on the second instalment and the shipbuilders pursuant to a provision in the contract, took steps to terminate the contract.

The House of Lords held that notwithstanding the notice of cancellation of the contract given by the shipbuilders, the buyers remained liable for payment of the second instalment because that was a liability arising before rescission, and accordingly the guarantors also remained liable under the guarantee for the buyers' default in paying that instalment.

(iv) Sale of Goods

In a contract of Sale of Goods, where the property in the goods

has passed to the buyer²⁹, the seller's right of action for the price accrues at the time for payment specified in the contract. In the absence of any contract, delivery of goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.³⁰ As far as the buyer is concerned, if he wants to institute proceedings against the seller for breach of an express or implied warranty, then the cause of action would arise from the time the goods are delivered and not when the defect is discovered or damages ensues. This was decided in Mack v Elvy³¹, where a purchaser bought a piano in 1904 on a time payment system which she completed in 1912. In 1915 she brought an action against the vendor for breach of warranty, alleging that the piano was secondhand and not new as warranted. The court held that since the warranty was made once and for all in 1904, time started running from the date of contract and thus the action was statute barred.

Although time runs from the date of the contract, or date of delivery in the case of warranty, if the party who gives the warranty makes unsuccessful attempts to carry out what he has warranted, time does not commence to run until the date of his final unsuccessful attempt. So in Swan Pools Ltd v Batter³², the plaintiff, in 1971, agreed to supply and install a fibre glass swimming pool and agreed to rectify and make good any damage or defect caused by faulty workmanship or materials which appeared in relation to the fibre glass tank within three years after the commencement of filtration. Between 1972 and 1978 the plaintiff made several unsuccessful attempts to rectify certain defects which ended in the owner replacing a new tank. In an action by the Commissioner of Consumer Affairs for damages for breach of warranty, the plaintiff pleaded that the breach of warranty alleged had occurred more than 6 years prior to the commencement of the action and that it was statute barred.

Mitchell, J in his judgment said,

"In Larking v Great Wester (Nepean) Gravel Ltd, Dixon J (as he then was) discussed the difference between a covenant imposing a continuing duty and one which is broken once and for all when the duty is not undertaken. The learned judge distinguished between a covenant 'by a lessor to put the demised premises in repair' which is 'broken once and for all if a reasonable time for putting the premises in repair elapses without his doing so' and a 'lessee's covenant to keep them in repair' which 'is continuing'. His honor discussed the fact that the time to perform a covenant may be enlarged with the consent of the covenantee. In my view this was the situation in the present case. The warranty was to rectify and make good any damage or defect which appeared within 3 years of the commencement of filtration. The appellant had a reasonable time within which to rectify the damage. The finding of the learned trial judge was that the fibre glass pool was incorrectly manufactured and that the defects could not be economically repaired but that the fibre glass needed to be replaced with a new structure. The finding was not challenged....The breach of warranty occurred when the reasonable time expired and in my opinion it expired at about the beginning of 1978."

It is submitted, that the approach taken by Mitchell, J is correct; Time cannot be said to run against the plaintiff when the defendant is attempting to carry out repairs for which he had given a warranty. In this case the defendant purported to carry out the repairs pursuant to the warranty over a period of six years, during which time the plaintiff could have lost his claim, if time started to run from the time of the sale. Furthermore, if time starts to run from the date of the delivery of the goods, unscrupulous defendants could mislead innocent plaintiffs by prolonging repairs or attempting to remedying defects until the limitation period has expired.

(v) Solicitors & Professional Advisers

As far as a solicitor is concerned, the duty he owes to his client is contractual³³ although in many cases the client may have a claim against the solicitor for the tort of negligence. The relationship between solicitor and his client is fiduciary in nature and as such in the event of a breach of this fiduciary duty, a client could institute proceedings as part of the doctrine of undue influence.³⁴ Thus in Tate v Williamson³⁵ the principle was stated that,

"Where two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage although the transaction could not have been impeached if no such confidential relation had existed."

Again Lord Hudson in Phipps v Boardman [1967] 2AC 46 at 105, which is the leading case dealing with the solicitor-client fiduciary relation, stated as follows:

"The proposition of law involved in this case is that no person standing in a fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person."

In determining the time when the cause of action arises, in the case of a contract, the normal practice is to use the general contractual rule i.e. it arises from the moment of breach and not

when the damage is suffered or negligence discovered. This is illustrated by the decision of Ward v Lewis³⁶. There the defendant, a solicitor advised the plaintiff, who was his client to invest certain trust monies in two building societies. The societies went into liquidation and the plaintiff lost financially. The defendant was in breach of his contract with the plaintiff, in that he had failed to exercise reasonable care and skill in giving his advice. The plaintiff instituted proceedings against the defendant within 6 years of the societies' liquidation, but more than 6 years after the date of the defendant's advice. The court held that the plaintiff's action failed as the cause of action arose when the defendant in breach of his contract to use due skill and care, tendered negligent advice and not when the plaintiff suffered damage.

It is submitted, that in such cases, time should run from the date of the loss or from such date when the plaintiff could have reasonably discovered that the defendant's advice was negligent. In fact until the plaintiff suffers loss, there could be no way of proving that the defendant's advice was negligent and that he was in breach of his contract to use skill and care. This would be the case with professional advisers such as Bankers, who normally, in the course of their business are called upon to give their opinion about the credit-worthiness of another party. Take the case of a Banker, giving a Bankers opinion about the credit-worthiness of a third party which in practice would possibly be given with a disclaimer of responsibility. A, relying on this opinion enters into a contract with the third party and eventually the third party is adjudicated a bankrupt causing severe financial loss to A. In this case A's cause of action in contract against the Bank could arise on the date of the opinion and not from the date of his financial loss. Now assuming the time period between the date of the opinion and the date of A's financial loss exceed 6 years, A would be unable to successfully claim against the Bank in contract. It is submitted that in such cases as the above, where the action is based on a breach of a contract, the time should start to run only from the date of

damage or when the negligence is discovered, or ought to have been discovered, by a reasonable person. The present rule as it stands would mean that in many instances the claimant would be left with no remedy under contract. This is because, it would be difficult to prove that the advice given was in breach of contract, until the date of damage or until the negligence is discovered, by which time the claim would be statute-barred.

(vi) Shares

An action for unpaid calls and interest thereon have been held to be a claim on contract. In Land Mortgage Bank of Victoria Ltd v Reid³⁷ there was a provision in the Articles of Association which read 'any member whose shares have been forfeited shall, notwithstanding, be liable to pay and shall forthwith pay to the company all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of forfeiture until payment at the rate of ten per cent per annum.'

3.1.2. Action Based on Tort³⁸

An action based on tort must be instituted within six years from the date on which the cause of action arose³⁹. However in actions in respect of personal injuries falling within s.5(1)⁴⁰, the limitation period is three years from the date on which the cause of action accrued. This period is subject to a discretionary provision whereby a judge may extend the time period up to six years from the date on which the cause of action arose.⁴¹ S.5(1) clearly states that the personal injury cases which fall within this section are

"an action for damages for negligence, nuisance, or breach of duty (whether that duty exists by virtue of a contract or a provision made by or under an enactment or independently of any contract or any such provision)..."

'Personal injuries' is defined to include 'any disease and impairment of a person's physical or mental condition'⁴². All other actions in tort, apart from those personal injury cases contemplated by S.5(1) and including actions for damages for a breach of statutory duty, fall under S.4(1)(a) and the time period is six years from the date on which the cause of action arose. That every case of personal injury does not fall within S.5(1) was recognised by Cox J, in the unreported Tasmanian case of Maher v Turvey⁴³. In this case the plaintiff suffered injuries at work and by virtue of a clause in the contract of employment the plaintiff had agreed that in the event of any injury he would receive the benefits provided under the Worker's Compensation Act, 1927.

The court held that this payment to the plaintiff under the provisions of the Worker's Compensation Act, 1927, which has now been superseded by the Workers Compensation Act, 1988 was a payment of an amount due under a contract and thus it did not fall under S.5(1) of the Limitation Act, 1974 but rather under S.14(1)(a).

Cox J in his judgment said,

".....the rights given to the plaintiff by the contract in question come into play on the happening of such eventualities as would give rise to a worker's right to receive any given benefit. If a man is permanently incapacitated by a tortious act, he may recover damages for his loss of earning capacity, both present and future, and the court will in awarding them take into account the wages he would have received but for the injury. In a case such as this, the plaintiff is not entitled to payment of wages which it is anticipated he may lose in the future. The contract gave him a right to weekly wages so long as the incapacity for work in fact lasted. He could not sue under the contract for payment of wages not then lost. His right to recover weekly wages under the contract only

accrued after each weekly period of incapacity elapsed.

Similarly, the costs of medical treatment would only be recoverable under the contract when it had been incurred. The failure of the defendant to pay such sums would then constitute a breach of the agreement."

Cox J in his judgment said that the word "actions for breach of duty" in S15(1) did not contemplate an action on a contract to pay monies on the contingency of any person sustaining personal injuries.

The phrase "actions for breach of duty" however has been held to include actions for trespass for intentional injury in Long v Hepworth⁴⁴ where the plaintiff received eye injuries when the defendant wrongfully and intentionally struck her face with a handful of cement. Cooke, J., held that the expression 'breach of duty' was wide enough to cover an intentional trespass. Likewise, an action or trespass to the person, where the trespass was unintentional, is also included in the phrase 'actions for breach of duty' as was held in the Victorian case of Kruber v Gresiak⁴⁵, but in such cases of trespass to the person, where the trespass was unintentional, proof of negligence is a necessary ingredient.

The courts have held that damages for loss of consortium or of servitium consequent upon personal injury to the plaintiff's wife or servant are 'damages in respect of personal injury to any person' under S.5(1) of the Act.⁴⁶

(i) Classification of Torts

Generally torts can be classified under two categories⁴⁷. Firstly, those that are actionable per se (such as libel and trespass), where the cause of action is complete the moment the wrongful act is committed although the plaintiff may not be able to identify the tortfeasor till a later date. The second

category of torts are those actionable upon proof of damage (such as negligence and malicious prosecution) where the plaintiff would have to prove actual damage.

It is important for a practitioner to determine firstly into which of these categories his clients case falls. If the action falls into the first category then time commences to run from the commission of the tort, whereas if it falls within the second category, time starts to run from the date of damage.

However, there are certain torts, (such as false imprisonment) which are continuing torts. In these cases, the cause of action accrues continuously throughout the period of false imprisonment and an action may be brought at anytime in respect of the false imprisonment occurring in the previous six years.⁴⁸

(ii) Negligence

To constitute negligence, there must be a duty owed to the plaintiff, a breach of that duty and arising out of that breach, the plaintiff must have suffered injuries or sustained damages.⁴⁹ The duty may arise by virtue of a contract or independent of contract. If the duty arises by virtue of a contract, then normally time will run from the commission of the negligent act and not from the occurrence of damage. In the famous case of Donoghue v Stevenson⁵⁰ it has been settled that a manufacturer owes a duty of care to the ultimate consumer of his goods. This is quite distinct from any contractual duty he may owe to a purchaser. In this case time would run against the consumer from the moment he suffers damage. In other words, the plaintiff's cause of action accrues upon the occurrence of the damage.

This, it is submitted should be the correct approach as there could be a substantial time interval between the negligent act and the resulting damage and if the plaintiff's cause of action should arise at the time of the negligence, he might very well find that he is barred by the Statute of Limitation by the time

he suffers damage.

It is not uncommon to find specific legislation which gives rights to persons to institute proceedings on the happening of certain events. In such cases time will only start to run from the moment all the requirements stated in that legislation are complied with. For instance in the South Australian case of Carslake v Guardian Assurance Co⁵¹ the court had to consider whether the requirements of S.113 of the Motor Vehicles Act, 1959 has been complied with in order to ascertain when time commenced to run. In this case the plaintiff claimed damages for injuries received in a road accident and the defendant successfully pleaded that the action was statute-barred. The plaintiff appealed. The South Australian Supreme Court was called upon to consider S.113⁵² of the Motor Vehicles Act, 1959 as amended and 36(1)⁵³ of the Limitation of Actions Act, 1936-1975.

Bray, C J said in his judgment,

"what are the facts which have to happen to entitle an injured plaintiff who sues the insurer of a deceased driver under S.113 to succeed? As I can see it they are:

1. an insured person must have caused bodily injury by negligence in the use of an insured motor vehicle.
2. the insured person must be dead.
3. the plaintiff must be a person who could have obtained a judgment in respect of that bodily injury against the insured person if he were alive.
4. as such a person he must have given a notice sufficient to satisfy the requirement of S.113(1)(b).

Bray C J was of the view that in limitation actions, the cause

of action does not accrue until all the facts have happened which are material to be proved to entitle the plaintiff to succeed. Only when all the 4 events enumerated above have happened can it be said that a cause of action arose against the insurer. Although the accident occurred on 1st December, 1971, and notice was given on 28th June, 1973, the court held that the three year period mentioned in S.36(1) of the Limitation Act (S.A.) started to run from the 28th June, 1973, i.e. from the date of the notice. Until the 4th event enumerated above has been complied with viz notice given, time cannot start to run.

In Tasmania, the legislation governing liabilities in respect of death or bodily injury arising from motor accidents is the Motor Accidents (Liabilities & Compensation) Act, 1973. Section 16(1) allows an action to be brought against the Motor Accidents Board, and S.16(2) states that a notice of intention to make a claim, together with a short statement of the grounds is to be furnished to the board in the 3 months following the accident and not later than 9 months if the court should grant an extension. However, S.16 (2A) provides that after the expiration of 9 months the court could still grant an application to extend the time "if it is satisfied that the granting of the application in the circumstances is just and reasonable in the circumstances." Unlike the South Australia provision, the Tasmanian Act does provide a primary period of 3 months, although the court is vested with a discretion to extend this period. Other than this, the Tasmanian provision is in substance similar to the South Australian provision and it is thus submitted that in Tasmania the time under the Limitation Act would only commence to run after notice has been duly given under the Motor Accidents (Liabilities & Compensation) Act, 1973.

(iii) Deceit

Where an action is based on the tort of deceit, the plaintiff has to prove that the defendant fraudulently made a false statement to the plaintiff intending that the plaintiff should act on it

and the plaintiff in fact acted on it and suffered damage. As Lord Fitzgerald said in Derry v Peek⁵⁴ "the action of deceit at common law is founded on fraud."

In such cases S.32 of the Limitation Act states that

"the period of limitation shall not begin to run until the plaintiff has discovered the fraud.....or could with reasonable diligence have discovered it."

Although the six year period for tort prescribed in S.4(1)(a) of the Act is applicable, the cause of action will not accrue until the plaintiff suffers damage and thereafter time does not run until the Plaintiff has or ought to have discovered the fraud.

(iv) Position in the United Kingdom

As far as the United Kingdom is concerned, the question of Limitation in respect of negligence has been discussed in a number of recent cases.

In Cartledge v E Jopling & Sons Ltd⁵⁵, Lord Reid said,

"a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when the injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action."

He then went on, however, to say,

"it appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action. If this were a matter governed by the common law I would hold

that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided. But the present question depends on statute, the Limitation Act, 1939, and section 26 of that Act appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions when fraud or mistake is involved; it provides that time shall not begin to run until the fraud has been or could with reasonable diligence have been discovered. Fraud here has been given a wide interpretation, but obviously it could not be extended to cover this case. The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered. So the mischief in the present case can only be prevented by further legislation."

New legislation was indeed passed in the form of the Limitation Act, 1963⁵⁶. This Act extended the time limit for action for damages where material facts of a decisive character were outside the knowledge of the plaintiff until after the action would normally have been time barred. However, this provision applied only to actions for damages consisting of or including personal injuries. It would thus appear that Parliament had deliberately left unchanged the law regarding damages of other types. This is borne out in Bagot v Stevens Scanlan & Co Ltd⁵⁷ where Diplock L J said that damage from breach of duty by an architect for not ensuring that the drains of a new house were properly constructed must have occurred at the time they were improperly constructed. This view was followed by Lord Denning, M R in Dutton v Bognor Regis Urban District Council⁵⁸ where the owner of a building instituted an action for negligence against a local authority for

inspection and approving the foundation of the building. Lord Denning said that the damage was done when the foundations were badly constructed.

Fortunately, this view did not prevail for too long as the Court of Appeal in Sparhan-Souter v Town & Country Developments (Essex) Ltd⁵⁹ held that where a house is built with inadequate foundations, the cause of action does not accrue until such time as the plaintiff discovers the damage, or ought, with reasonable diligence to have discovered it. The main reason for this view was that until the owner had discovered the defective state of the property he could resell it at a full price, and, if he did so, he would not suffer damage. Geoffrey Lane L J said,

"There is no proper analogy between this situation and the type of situation exemplified in Cartledge v E Jopling & Sons Ltd (1963) A C 758 where a plaintiff due to the negligence of the defendants suffers physical bodily injury which at the outset and for many years thereafter may be clinically unobservable. In those circumstances clearly damage is done to the plaintiff and the cause of action accrues from the moment of the first injury albeit undetected and undetectable. That is not so where the negligence has caused unobservable damage not to the plaintiff's body but to his house. He can get rid of his house before any damage is suffered. Not so with his body."

However, Lord Fraser of Tullybelton in Pirelle General Cable Works Ltd v Oscar Faber & Partners⁶⁰ disagreed with the contrast drawn by Geoffrey L J between the position of a building owner and an injured person.

He said,

"It seems to me that there is a true analogy between a plaintiff whose body has, unknown to him, suffered injury

by inhaling particles of dust, and a plaintiff whose house unknown to him sustained injury because it was built with inadequate foundations or of unsuitable materials. Just as the owner of the house may sell the house before the damage is discovered, and may suffer no financial loss, so the man with the injured body may die before pneumoconiosis becomes apparent, and he also may suffer no financial loss. But in both cases they have a damaged article when, but for the defendant's negligence, they would have a sound one."

So in the above case where the plaintiff discovered cracks in the chimney about seven years after its construction the House of Lords held that the date of accrual of a cause of action in tort for damages caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or should with reasonable diligence have been discovered. As such the plaintiffs claim was statute-barred.

It is hard to conceive why the plaintiff in *Pirelli's* case should be burdened with the responsibility of having to climb up the roof periodically to check if any cracks were appearing on his chimney. Surely if he had entrusted the building of a chimney to a specialist he should not be burdened with the responsibility of keeping constant check on his chimney. In such cases, it is submitted that time should commence to run from the time the plaintiff first discovered the cracks or from such time he ought reasonably to have discovered them.

Pirelli's case was applied, nevertheless, in *Dove v Banhams Patent Locks Ltd*⁶¹. In this latter case the defendants fitted a security gate in 1967 in a premises which was subsequently sold to the plaintiff. In 1979 a burglar broke down the security gate and stole valuable property of the plaintiff. The court held, giving judgment for the plaintiff that the cause of action in tort arose on the date when the damage came into existence, namely when the gate was broken down by the burglar in 1979 and

not when it was installed and, therefore, the plaintiff's claim was not time barred.

It will be observed that although the same test was used in Pirelli's case and Dove's case, in the latter case, the date of damage was apparently known to the plaintiff because it was on that date the house was burgled and there would be no excuse for him to plead otherwise.

From the above two cases it would appear that although fixing the cause of action to arise on the date when the damage arises prima facie appears to be reasonable, it could in some cases place undue responsibilities and burden on plaintiffs who may not be in a position to discover the resulting damages without incurring additional costs or effort.

As far as personal injuries are concerned, in England, the present position is that a plaintiff is entitled as of right to sue outside the normal limitation period, provided he does so within a relatively short time after the date on which he realises that he has a good cause of action against the defendants. Furthermore, a residual discretionary power is vested in the court to extend this period of time.

In Tasmania, the discretionary power to extend time is found in S.5(3)

"Notwithstanding anything in the foregoing provisions of this section, upon application being made by the person claiming the damages referred to therein a judge, after hearing such of the persons likely to be affected by that application as he may think fit, may, if he thinks that in all the circumstances of the case it is just and reasonable so to do, extend the period limited for the bringing of the action for such period as he thinks necessary, but so that the period within which the action may be brought does not exceed a period of six years from the date on which the

cause of action accrued."

This section, it is submitted, appears very ambiguous. On the one hand it purports to give the court an unfettered discretion to extend time "for such period as he thinks necessary". On the other hand it seems to limit the maximum period within which an action could be brought, "...so that the period within which the action may be brought does not exceed a period of six years from the date on which the cause of action accrued."

It is submitted that the problem faced by Cartledge's case could arise in Tasmania under the present legislation i.e. time would run whether or not the damage could be discovered and despite the limited discretionary power of the court, it could very well leave the plaintiff with no recourse, if he happens to be unfortunate in not discovering that he has a good cause of action within the six year period.

It is suggested that the Tasmanian Act, be amended to provide that in cases of personal injuries, the plaintiff should have a reasonable time from his "date of knowledge" to institute proceedings.

The Tasmanian Act only allows for an extension of time in the case of disability and unlike some other states in Australia⁶² does not allow for an extension of time from the date of knowledge of the applicant.

3.1.3 Other Personal Actions

(i) Recognisance

The Act states that a period of 6 years is allowed for actions to enforce a recognisance⁶³. A recognisance is defined in Blackstone's Commentaries⁶⁴ as,

"An obligation of record, which a man enters into before some court of record, or a magistrate duly authorised, with condition to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond, the difference being chiefly this, that the bond is the creation of a fresh debt or obligation de novo, the recognisance is an acknowledgment of a former debt upon record."

As a recognisance is a form of contract, time normally will run from the date on which it was entered into.

(ii) Award

In the case of a submission not under seal, any action to enforce it would have to be brought within 6 years from the date on which the cause of action accrued.⁶⁵

In this case it is not certain whether the cause of action on an award arises at the date of the award or on breach of its terms.

The case of Bremer Deltransport v Drewrey⁶⁶ seems to suggest that the latter view to be the more acceptable view since the court held that an enforcement action is founded on breach of an implied agreement to abide by the award.⁶⁷

If an award is given under seal, then presumably it would be treated as a speciality for which a period of twelve years is provided.⁶⁸

(iii) Judgment

Normally, the date on which a judgment becomes enforceable is the day on which it is pronounced, given or made, unless the judgment itself stipulates that it is to take effect at a later date. So the cause of action will accrue when the judgment becomes enforceable and continues for a period of twelve years⁶⁹. A

distinction is made between actions for enforcement of judgments and actions on judgments for which a time period is stipulated by the Act. This distinction is explained in the case of W T Land & Sons v Rider⁷⁰ as follows:-

"it follows from the above brief survey that the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and that the two conceptions have been the subject of different treatment.

Execution is essentially a matter of procedure - machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders.... The two subjects were formerly quite independent and distinct, the one from the other, and we are quite unable to attribute to the definition of 'action' in the Limitation Act, 1939, the effect of merging the two together."

As far as the Tasmanian Act is concerned, S.4(4) reads,

"An action shall not be brought upon a judgment after the expiration of 12 years from the date on which the judgment became enforceable."

The phrase "upon a judgment" is wide enough to include actions on judgments as well as actions for enforcement of judgment. It is submitted that it is futile to differentiate actions on judgment' from actions to enforce judgments. Such execution proceedings, it is submitted are actions on judgment, as 'action' is defined to include any proceedings in a court of law⁷¹. In practice, most judgments are enforced by execution.

3.2. ACTIONS IN RESPECT OF LAND

The Limitation Act provides that the normal period to recover land is twelve years from the date on which the right of action to recover it accrued.⁷²

3.2.1 Definition

'Land' includes corporeal hereditament, rent charges and any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale, but excludes incorporeal hereditament⁷³. 'Rentcharge' includes annuity or periodical sum of money charged upon or payable out of land and excludes rent-service or interest on a mortgage of land⁷⁴. From the definition it appears that an action for rentcharge in principle is not different from an action to recover landed property, as rentcharge is included in the definition of land and furthermore the term 'right of action to recover land' includes a right to enter into possession of the land or, in the case of rentcharges, to distrain for arrears of rent.⁷⁵

3.2.2. Adverse Possession⁷⁶

(i) Historical Development of the Rule of Adverse Possession

The rule of adverse possession derives from English law which was received into the new colony of Van Dieman's Land.

Title to land in the early English common law depended on "seisin", which was feudal possession of a freehold estate in land.

England did not have any system of land registration like the Australian Torrens system. Therefore, under the English law an intending Vendor had to prove ownership of the land to the purchaser. Unfortunately ownership of land could not be proved by reference to any Register and the Vendor would have to prove a good "root of title" for a specified period of time. This meant that a Vendor would have to prove a chain of possession from previous owners and in England by the Real Property Limitation Act, 1874, an intending Vendor was required to trace his ownership back for 60 years.

The various actions to recover land was also based on showing prior possession. However this system was subject to difficulties such as the problem for the dispossessed owner in proving his claim with the passing of time and ejectment becoming more unjust as the squatter became more settled on the land, particularly where improvements had been made to the land.

Consequently, legislation was enacted to make title to land more certain. The earliest English legislation aimed at making title more certain by limiting the action for recovery of land by reference to a certain event. The first such legislation required that, to recover land from an adverse possessor, the owner had to show seisin of land at the time of the King's last voyage to Normandy. Failing this title would go to the adverse possessor.

Later Statutes set the limitation dates as the coronation of Henry III in 1216, Henry III's first trip to Gascony and the coronation of Richard I. The limitation date of 3 September, 1189 ("time immemorial") operated for some 265 years.

The next stage in the development of limitations legislation was the establishment of limitation periods similar to those recognised today, rather than dates.

The statute provided a prescribed period, within which period an action may be brought for the recovery of land. Action was barred after the prescribed period expires.

The Act of Limitation with Proviso (1540) was the first such statute which prescribed a limitation period of 60 years. An adverse possessor who shows that he has been in possession of the land for 60 years would not be ejected. An owner would have to prove seisin of the land for the preceding 60 years and if he could not, the remedy to recover the land was barred. This statute did not incorporate the principle of extinction. The owner's remedy was barred by time but not his title to the land which was unaffected.

Subsequently, by the Statute of Limitations, 1623 once the limitation period had expired, not only the owner's right to bring an action was barred but his title was also extinguished.

The next development in the area of adverse possession was the enactment of the Real Property Limitation Act 1833 which reduced the period for bringing an action for recovery of land to 20 years and also provided that the right of the legal owner to the disputed land should cease to exist as soon as the owner's remedy was barred by the statute.

From 20 years the limitation period was further shortened to a period of 12 years by the Real Property Limitation Act, 1874.

All these statutes demonstrated that possession was the essential characteristic of ownership of land in England.

English law was received into the colony of Van Dieman's Land and by this reception certain English Statutes applied. The Australian Courts Act, 1828 (UK) confirmed the application of Imperial legislation to the colonies.

In 1836, a limitation Act was enacted by Governor McArthur which extended specific English limitation legislation to Van Dieman's Land. The Limitation Act, 1836 (6 Will IV Cap16) specifically recited the Real Property Limitation Act, 1833. The limitation period of 20 years under the English limitation period was thus applicable to Van Dieman's Land.

In 1875, the Real Property Limitation Act, was passed in Tasmania which reduced the 20 year period to 12 years.

Subsequently, the Limitations of Actions Act, 1934 (Tas.) repealed much of the contents of the 1875 Act but the 12 year period for recovery of land and for claims arising under adverse possession remained unchanged.

The present Limitation Act, 1974 later consolidated the various limitation statutes that were applicable in Tasmania.

Under the Crown Suits Act, 1769 it was possible to acquire title to Crown land in Tasmania by adverse possession. The imperial Act that applied in Tasmania provided for a period of 60 years adverse possession. This period of 60 years was reduced to a period of 30 years by the Limitation Act, 1974.

(ii) Limitation and Prescription

The effect of a limitation is similar to prescription in result although different in principle. Prescription is basically a rule of evidence arising under common law, although statute has extended it to rights like easements and profits which can be acquired over land belonging to others. Whilst prescription operates positively to vest a title, limitation operates negatively by extinguishing the title of the legal owner.

(iii) When cause of action accrues

The right of action to recover land accrues to the real owner, when there is a person in possession of the land against whom the limitation period can run. In other words, when there is possession adverse to the owner, then the cause of action accrues.⁷⁷ Any person who had been in possession of a property for the duration of the limitation period could not extinguish the title of the time owner. To succeed in a claim for adverse possession the claimant must establish that he has been in continuous actual physical occupation of all the land claimed by him.⁷⁸ An occasional or sporadic use of the land will not suffice. Any gap in possession will vest the control of the property in the time owner whose rights will remain unscathed. As Lord Macnaughten stated in The Trustees, Executors & Agency Company Ltd & Templeton v Short⁷⁹

"If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself."

Once the cause of action has accrued and the adverse possessor continuously remains in possession for 12 years, the true owners right of action will be barred and his estate extinguished.⁸⁰

The true owners right of action to recover land accrues and continues only if there is adverse possession and in a situation where the adverse possessor abandons the land he is occupying before the 12 year period, the true owner will have no right of action.⁸¹ However, the true owners rights are revived and he

obtains a fresh right of action if the property is again taken into adverse possession.⁸² In other words a right of action only accrues, and time only runs, if there is a person in adverse possession. Such a person in adverse possession must not be disqualified from relying on the Limitation Act. The Act clearly states that a trustee⁸³ cannot rely on the Act for protection from his beneficiary and furthermore a beneficiary in possession cannot claim title by adverse possession against the trustees or against his co-beneficiaries.⁸⁴

Again, the Crown is in a privileged position in that the Limitation period is 30 years⁸⁵ and not 12 years. Furthermore, the defence of limitation is not available in actions brought by the Crown to recover land for public purpose if such land has been reserved or set out as a road⁸⁶, or dedicated for any public purpose or reserved in any crown grant or forms part of the foreshore or bed of the sea, or for recovery of part of a block which fails to qualify as a minimum lot.⁸⁷

The Act clearly stipulates when a right of action arises in cases of present interests in land, future interest in land and in cases of settled land and land on trust.

Each of these instances, will be examined separately:

3.2.3 Present Interests in Land

Where a person has a present right to possession of land, he would deem to have a present interest in land. This would be so even though he does not have actual physical occupation, as where the property is tenanted. This is referred to as an estate in possession.⁸⁸ The Act recognises three different situations under which a claim could arise.

(i) Dispossession or Discontinuance

Firstly, where the person bringing an action to recover the land or some person through whom he claims had been in possession and has been dispossessed of it or has since discontinued possession.⁸⁹ 'Disposed' would imply that a person's land had been taken over by another against his wishes, whereas 'discontinued' would suggest a voluntary giving up or abandonment of the property whilst he was entitled to possession.

John Doe⁹⁰ distinguishes dispossession and discontinuance as follows:

"Dispossession arises where the squatter drives the owner out: discontinuance where the owner goes out and the squatter moves peaceably in. There can be no dispossession or discontinuance where the owner has merely failed to use and enjoy the land: the squatter must have done something inconsistent with the lawful owner's right of use and enjoyment, but it is not necessary that the new owner should be aware of the squatter's action. The squatter must prove possession on his part and dispossession of or discontinuance by the rightful owner."

Fry, J in Rains v Buxton⁹¹ stated,

"the difference between dispossession and the discontinuance of possession might be expressed in this way: the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in by others."

The Act states that,

"the right of action shall be deemed to have accrued on the date of discontinuance or dispossession."

In other words time would start running from the moment a person, other than the true owner obtains possession and it is not necessary for the true owner to be driven out of possession but where he abandons possession or dies, and another takes over, time will commence to run. Until there is adverse possession, time will not commence to run as there is nobody against whom the owner is failing to assert his rights.

(ii) Recovery of Land Belonging to Deceased

In the case of an action to recover land of a deceased person whether under a will or intestacy where prior to his death, the deceased was in possession of the land or in possession of the land charged in the case of a rentcharge, the right of action accrues from the date of death of that deceased.⁹² This provision would apply to claims of real property of a deceased, whether under a will or intestacy, where the deceased was in possession of real property, prior to his death, and in such cases, time would run from the date of death. If this provision was left alone without any qualification, it would have given rise to some problems as no one will be able to deal with a deceased's estate, be it movable or immovable property without first obtaining a grant of probate, where the deceased had made a will or a grant of letters of administration in cases of intestacy. In practice, in cases of complicated estates, it may take several years before a grant is finally made by the court and thus it would be inequitable to allow time to run from the date of death. To overcome this problem S.20 states,

"For the purposes of the provisions of this Act relating to actions for the recovery of land an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration."

So then, in view of this provision time will not start running until the grant of probate or letters of administration by the court.

(iii) Where Deed of Assurance Created

In the case of a failure to take possession under a deed

"the right of action shall be deemed to have accrued on the date when the assurance took effect".⁹³

Under this provision time would only start running if there is adverse possession as A Beckett J pointed out in Gregory v Poole⁹⁴ that the Statute of Limitations does not commence to run against the owner of land merely because he has not taken possession thereof, if the land remains unoccupied.

3.2.4. Future Interests in Land

Where a land owner creates an interest in his land which will in effect grant possession at some time in the future, he is said to have created a future interest in land.

If a settler transfers land to a trustee upon trust for "my wife X for life and then for my son in fee simple" he has in fact created a life interest in possession for his wife X, who is entitled to immediate possession of the land and a future interest for his son Y, whose interest arises in the future after the expiration of the life interest of X. Although the interest arises in the future Y, has nevertheless a present subsisting interest,⁹⁵ which he could sell or dispose of inter vivos or by will. So a future interest is one which gives a person a present right to the possession of land at a future time⁹⁶.

(i) Alternative Periods

Two limitation periods are applicable to the owner of a future estate. Firstly, where adverse possession began before the reversion or remainder fell into possession, the reversioner or remainderman has twelve years from the commencement of the adverse possession. Alternatively, the reversioner or remainderman had six years from the falling into possession of his interest. In other words he could sue either within twelve years of the previous owner's dispossession or within six years of his own interest vesting in possession, whichever is the longer period⁹⁷. If for example, A has life interest in Blackacre with the remainder to B in fee simple and an adverse possessor X dispossesses A fifteen years before A's death, B would have six years commencing from the time of A's death, to successfully recover Blackacre. However, if X had dispossessed A three years before his death, B would have nine years from A's death as in this case the twelve year period commences to run from the date of dispossession.

However, if X takes possession of Blackacre only after the death of A, then B's interest would not be a future interest and the relevant provision to apply would be the general rule under S.10(2) of the Act.

(ii) Entails

The alternative six year period is not applicable to a reversioner or remainderman expectant upon an entail in possession, if his interest could have been barred by the tenant in tail⁹⁸. So if B grants land to A in tail, retaining the fee simple reversion and X dispossesses A, B's reversion is barred twelve years after the dispossession, even though he had no right to the land during that period.

As Megarry & Wade point out⁹⁹ that this rule demonstrates the precarious nature of an interest expectant upon an entail as it may be barred by limitation, as well as by disentailment, and the owner is powerless to intervene.

Again the Crown in this instance is in a privileged position, as where the Crown is entitled to the succeeding estate, the period will be 30 years¹⁰⁰ instead of 12 years and in the case of non possession the longer of the two periods of thirty and twelve years applies.

Once time commences to run, it would continue to do so notwithstanding the fact that the person to whom the right of action accrues conveys his interest to another party.¹⁰¹

So that in the case of a settlement by a person against whom time has begun to run it will not give the remainderman under the settlement any more time than what the settler originally had. This provision also covers a situation where a right of action accrues to some person through whom the person making the assurance claims. For example, where a right of action accrues to A, time begins to run against A and against B who claims through A where B makes an assurance to C and so on, C and all others are also affected by the same time constraints as B and A are. When a person has successive interests, that is where he is entitled to any estate or interest in that land, if his right to recover the estate or interest in possession is barred by the Limitation Act, neither he nor anyone else claiming through him could successfully institute proceedings to claim the future estate or interest.¹⁰²

3.2.5. Settled Land and Land on Trust

The Act specifically provides that subject to S.24(1) the provisions of the Act apply to 'equitable interest on land, including interests in the proceeds of sale of land held on trust

for sale, in like manner as they apply to legal estates."¹⁰³

The definition of 'land'¹⁰⁴ inter alia includes equitable estate or interest, including an interest in the proceeds of the sale of land held upon trust for sale so that for the purpose of the Limitation Act, equitable interests in land and proceeds of sale of land held on trust for sale are 'land'.

Future interests other than terms of years and reversions will come within the ambit of this section, which clearly provides that the legal estate would not be barred while equitable interests subsist. Normally, the legal estate would be extinguished on the expiration of twelve years,¹⁰⁵ from the date a stranger took possession of the land, but in view of these provisions the legal estate will not be extinguished so long as a beneficial interest in the land to any person has not either accrued or been barred or for so long as the right to claim the proceeds of the sale has not accrued to any person or been barred.

The effect of these provisions is also to suspend the operation of S.21 which provides "subject to section 13, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action or an action to compel discharge of a mortgage) the title of that person to the land shall be extinguished". During this period of suspension the owner of the legal estate could proceed to institute action to recover the land.¹⁰⁶ In view of these provisions, what then would be the position of an adverse possessor? Would he be able to get a good title? Yes, he would, but only after all the equities are barred.¹⁰⁷

This is so because adverse possession under the Act means possession by some person in whose favour the period of limitations can run, and in this case the period of limitation will only commence to run after all the equities are barred.

As far as a trust property is concerned, the adverse possessor could be a stranger, the trustee or another beneficiary.

Each of these categories will be dealt with separately.

(i) Adverse Possession by Stranger

Where a trust property is the subject of adverse possession by a stranger, the trustee's title to the trust property will not be barred until all the beneficiaries have been barred. So, if land is held on trust for A for life with remainder to B, 12 years of adverse possession of the land by X would bar A's equitable interest and, but for the provisions mentioned above, would bar the trustee's legal estate.

In this case time will not commence to run against B's equitable interest until A's death and the same accordingly applies to the trustee's legal estate. Once the 12 years have run, the trustee will hold the legal estate on trust for X for the life of A, and subject thereto on trust for B. This would be so even if A is the trustee, as will normally be the case with settled land.

(ii) Adverse Possession by Trustee

As far as trustees are concerned, there is no way that they could obtain title by adverse possession. In other words, there is no period of limitation for an action by a beneficiary to recover trust property from the trustee, or in the case of a sale, the recovery of its proceeds in the trustee's possession or sums converted to the trustee's use, or in respect of any fraud by the trustee.

Thus if land is conveyed to X and Y as tenants in common, X cannot obtain a title to the land as against Y, no matter how long he excludes Y from the land or from its rents and profits,

as both X and Y hold the land on trust for themselves as tenants in common and X is thus a trustee for Y.

(iii) Adverse Possession by Beneficiary

Time does not begin to run against the trustees or beneficiaries if settled land or land held on trust for sale is in the possession of a beneficiary who is not solely and absolutely entitled.

In other words such a beneficiary cannot be adverse to the trustee or to his other co-beneficiaries.

3.2.6. Forfeiture and Breach of Condition

The Act also provides for recovery of land in the event of a forfeiture or breach of condition.

In the event of a forfeiture or breach of condition, a right of action to recover land accrues and time commences to run from the date of forfeiture.¹⁰⁸ Time would only run from the date of forfeiture, if the party intends to take advantage of the forfeiture to recover the land. The other option he would have would be to wait for the determination of the prior interest by lapse of time.

3.2.7. Certain Tenancies

Provisions in the Act which govern the running of time in certain types of tenancies will now be examined.

(i) Tenants at Will and at Sufferance

In cases of tenancies at will, time commences to run from the date of the determination which is at the expiration of a period

of one year from the date of commencement.¹⁰⁹

The running of time could be postponed by payment of rent. If there is nothing done to postpone the running of time, a tenant at will, gets a good title to the land after twelve years from the date of determination of the tenancy that is 13 years from the date of commencement of the tenancy. Tenants at will are definitely in a better position than tenants under a fixed term lease, as in the former case time begins to run against the landlord only after the expiration of one year from the commencement of the tenancy.¹¹⁰

So where a tenant holds from the landlord as tenant at will, he will be barred 13 years from the commencement of the tenancy, however, where either rent is paid or written acknowledgment made, time begins to run afresh. In the case of a tenancy at sufferance, time will run from the commencement of the tenancy as strictly speaking, a tenancy at sufferance is not really a tenancy but adverse possession¹¹¹. A tenancy at sufferance will arise where a tenant having entered under a valid tenancy, holds over without the assent or dissent of the landlord.¹¹²

(ii) Yearly or Periodic Tenant

In the case of a tenancy from year to year or other period, the tenancy is deemed to be determined at the expiration of the first year or other period and the right of action is deemed to have accrued at the date of such determination.¹¹³ If there is a lease in writing, then this section will not apply and time in that case will start to run when the tenancy is determined by a notice to quit or otherwise. In the event of any payment of rents by the tenant, the right of action shall be deemed to have accrued on the date of the last receipt of rent and time runs from then.

So, a tenant under yearly or other periodic tenancy who does not hold under a lease in writing is in a similar position to a tenant at will. A landlord is entitled to receive rent from his

tenant and if for some reason, the rent is received by some person other than the landlord, the landlord's cause of action arises from the moment the other person wrongfully received rent and time begins to run as from the date the other person receives rent from the tenant.¹¹⁴

However, in order to invoke this section the following conditions must be met:

- (i) There must be a valid lease in writing.
- (ii) The yearly rent should be not less than \$100.00.
- (iii) The rent must be received by a person wrongfully claiming to be entitled to the reversion.

(iii) Actions for Recovery of Rent

As far as landlords are concerned, the Act stipulates that no action could be brought to recover arrears of rent or damages after six years from the date on which the arrears become due.¹¹⁵

Each time the rent falls due and is not paid, the landlord has a fresh cause of action, so that where several instalments remain unpaid, the landlord will now have several causes of action,¹¹⁶ but if the landlord's title has been extinguished by the Act, then he would not be able to sue for arrears, even if they fall due six years before commencement of the action.¹¹⁷

3.2.8. Mortgages

The Limitation Act does not treat an action for redemption of mortgaged land as a action to recover land, and therefore the provisions which deal with the accrual of right of action to recover land do not apply. Also the provision which requires some person to be in adverse possession of the land if time is to run would be inapplicable.¹¹⁸

Under this section actions which concern the property mortgaged and secondly actions that deal with the principal sum secured and interest thereon will be considered.

(i) Actions Relating to the Mortgaged Property

In redemption actions, the Act states that the mortgagee must be in possession for twelve years.¹¹⁹ If the mortgagee could prove that he has been in continuous possession for twelve years, then the mortgagor or any person claiming through him will be barred. In other words, when the mortgagee takes possession, the mortgagor's right to redeem accrues and time starts to run against him,¹²⁰ so that after the expiry of 12 years, he will be barred and his title extinguished.¹²¹ However, whenever the mortgagee in possession receives any sum in respect of principal or interest or receives an acknowledgment in writing from the Mortgagor acknowledging the Mortgagee's title or his equity of redemption, time is stopped.¹²² As against the land the mortgagee's remedies are two fold. Firstly he could take an action to recover land and his right arises by virtue of the mortgage that he executed. In this case, the cause of action accrues and time starts to run against the mortgagee on the execution of the mortgage.¹²³ The mortgagee's other remedy is to foreclose.¹²⁴

Foreclosure is the extinction of the mortgagor's equity of redemption and this will normally arise when the mortgagor fails to repay in accordance with his covenant¹²⁵, so the mortgagee's cause of action will arise when there is a failure to make repayment and time starts to run against him from that date.

(ii) Actions for Principal and Interest

The relevant provision in the Act relating to actions to recover money charged on property is S.23(1) which reads,

"No action shall be brought to recover any principal sum of

money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued, notwithstanding that the money is by any Act or instrument expressed to be a charge until paid."

It is rather curious that the section makes reference to "proceeds of sale of land" as the definition of "land" in the Act includes "an interest in the proceeds of sale of land"¹²⁶. Any action instituted by mortgagees of land other than a mortgagee who is in possession of mortgaged land, which is covered by S.18, would normally be under Sections 12-15 as S.3 applies only to foreclosure actions, in respect of mortgaged personalty. As far as actions to foreclose mortgaged personalty, they would be barred twelve years after the date on which the right to foreclose accrued¹²⁷. However, in two instances, the period is extended: (i) If after expiration of 12 years from the date the right to foreclose accrues, the mortgagee was in possession, his right to foreclose is deemed to have accrued on the date his possession discontinued¹²⁸. (ii) Until the interest falls into possession, the rights to foreclose is postponed¹²⁹. So in cases of foreclosure of personalty, time would run from the last of three dates, viz the date on which the right to foreclose accrued; the date on which the mortgagee lost possession; the date on which future interest fall into possession. The scope of S.23(4) is limited by S.23(5) which excludes from the operation of this section "a foreclosure action in respect of mortgaged land." S.23(4) does, however, apply to the right of action to recover the principal sum charged on a future interest in land or personalty. So, if the property includes both present and future interests, time will not run against the present interests so long as the future interests are not determined. In other words, if for example, life policies are included and if they have not matured or been determined, then time will not commence running against the present interests until such time the policy matures or are determined. In a case where arrears

are claimed by a subsequent encumbrancer and a prior encumbrancer had been in possession during the whole period in which the arrears accrued, the subsequent encumbrancer has one year to recover the arrears and time runs from the moment the prior encumbrancer discontinues possession.¹³⁰ Capitalisation of interest commonly found in mortgages of future interest is dealt with in S.23(7)(b) which reads,

"where property subject to a mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued."

So, clearly in the case of recovery of arrears, time will only start running after the principal sum of money has accrued or is deemed to have accrued. Mortgagees are prevented from either exercising a power of sale, leasing or making other disposition and realisation of the mortgaged property, or appointing a receiver or in any other manner affecting the mortgaged property, once the time period provided by the Act has expired.¹³¹ It appears that the Act has not made any provisions for unpaid annuities charged on personal property. Such annuities cannot be called principal sum charged on property, nor are they arrears nor rent.

In cases of fraud or fraudulent breach of trust to which the trustee was a party or privy or where the trustee has got trust property or received proceeds from trust property and converted to his own use, no time period runs under the Act.¹³² However in all other cases, where the Act does not prescribe a period of limitation, an action by a beneficiary to recover trust property or in respect of any breach of trust is barred after six years from the date on which the right of action accrued.¹³³ In the

event of a future interest where an action is instituted by the remaindermen, the six year period against the trustee will not commence to run until their interests have fallen in.¹³⁴

3.3 CONCLUSION

It would be noted that for computing the period of limitation, it is vital to establish precisely when the cause of action arises, as time starts running from the accrual of the cause of action.

In cases of contracts, the cause of action normally arises on the date of the breach and not when the damage is suffered. Although in the majority of cases, this rule does not cause too much problems, there could be cases where it could operate unjustly on a plaintiff as he might not discover that he has a good cause of action, until the damage occurs.

The accrual of the cause of action in torts would be dependant on whether the particular tort is actionable per se or only upon proof of damage. If the tort falls within the first category, time commences to run from the commission of the tort whereas in the latter case, time starts to run from the date of damage.

As far as actions to recover land, the Limitation Act, 1974, has given a very wide meaning to 'land' which includes almost all the interests, both legal and equitable, that exist in real property.

Generally, the true owner's cause of action arises only when his property has been the subject of adverse possession. Once there is adverse possession time would continue to run and the effect of time having run is to bar the real owners right of action and extinguish his estate.

NOTES

1. See Chitty on Contracts, (26th Edn), 1989 Sweet & Maxwell para 1931.
2. Read v Brown (1888) 22 QBD 128,131.
3. (1891) 2 QB 509, 511.
4. (1927) AC 610, 617.
5. See R B Policies at Lloyds v Butler (1950) 1 KB 76.
6. Halsbury's Laws of England, 4th Edn para 624.
7. Limitation Act, 1974 Part II ss.3-25.
8. Ibid s.4(1)(a).
9. Ibid s.4(3).
10. Blackstone W, Commentaries of the Laws of England, 1966, Volume 2 page 465, 466.
11. 4th Edn vol 9 para 212.
12. Guest AG, Ansons Law of Contract, (26th Edn) 1984 p 21.
13. See para 3, 1(a) infra.
14. (1882) 9 QBD 59.
15. Reeves v Butcher (1891) 18 QB 593.
16. See Chitty on Contracts (26th Edn) 1989, Sweet & Maxwell, para 1733 where it states that "if the failure of performance is such as to go to the 'root or essence of the contract' the innocent party could repudiate the whole contract.
17. Arnott v Holden (1852) QB 593: Also Chitty on Contracts (26th Ed), 1989 para 1932.
18. Chitty on Contracts (26th Edn), 1989 para 1932.
19. Limitation Act 1974 s.4(1)(a).
20. See Chitty on Contracts (26th Edn), 1989 para 1933.
21. (1891) 2 QB 509.
22. (1893) 2 Ch 300.
23. Limitation Act, 1974 s.23(1).
24. (1942) SASR 23.
25. (1893) 2 Ch 300 at p.305; Generally on guarantees see O'Donovan, Modern Contract of Guarantees (2nd Edn), 1992.

26. (1897) 23 VLR 505.
27. (1906) 4 CLR 57.
28. (1906) 2 All E R 29.
29. See s.53(1) Sale of Goods Act (1896) Tas.
30. Ibid s.33.
31. (1916) 16 SR (NSW) 213.
32. (1932) AC 562.
33. Groom v Crocker(1939) 1 KB 194.
34. Chitty on Contracts (26th Edn) 1989, Sweet & Maxwell paras 525, 529; See also Meagher Gummow and Lehane, Equity Doctrines and Remedy (3rd Edn)1992, Ch 5 paras 508-517.
35. (1886) LR 2 Ch App 55.
36. (1896) 22 VLR 410.
37. (1909) VLR 284.
38. See PM North, "Limitation of Actions in Tort", 107 Sol Jo 66; Generally on torts see Fleming, Law of Torts (7th Edn).
39. Limitation Act, 1974 s.4(1)(a).

S.4(1) Except as otherwise provided in this Division, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say:-

(a) Actions founded on simple contract (including contract implied by law) or founded on tort, including actions for damages for breach of statutory duty.
40. Ibid s.5(1) An action for damages for negligence, nuisance, or breach of duty (whether that duty exists by virtue of a contract or a provision made by or under an enactment or independently of any contract or any provision) where the damages claimed by the plaintiff for the negligence, nuisance, or breach of duty consist or, or include, damages in respect of personal injuries to any person shall not, subject to this section, be brought after the expiration of a period of 3 years from the date on which the cause of action accrued: See JA Jolowicz, Forms of Action-Causes of Action-Trespass & Negligence (1964) CLJ 200, where the author discusses Letang v Cooper (1964) 3 WLR 573 a case where the court in the first instance held

that an action for trespass to the person was not covered by the equivalent provision to S.5(1) of the Tasmanian Act and therefore the action was within time although the other cause of action, viz, negligence was out of time. The author argues that if this situation continues, viz, that on the same facts one cause of action is allowed and the other is barred as out of time, in effect we are restoring the earlier forms of actions which have been abolished.

41. Ibid s.5(3).
42. Ibid s.5(5).
43. No. 92/1982 at p 5.
44. (1968) 3 All E R 248.
45. (1963) V R 621.
46. See Opperman v Opperman (1975) QR 345.
47. See Franks M, Limitation of Actions 1959 at p. 190.
48. O'Connor v Issacs (1956) 2 QB 288 CA.
49. See Donoghue v Stevenson (1932) AC 562; see also Fleming, The law of Torts (7th Edn) pg 168-174.
50. (1932) AC 562.
51. (1977) 15 SASR 378.
52. "where -
 - (a) an insured person has caused death or bodily injury by negligence in the use of an insured motor vehicle but is dead or cannot be served with process; and
 - (b) a person who could have obtained a judgment in respect of that death or bodily injury against the insured person if he were living or had been served with process, has given notice of a claim under this section and a short statement of the grounds thereof as soon as possible after he knew that the insured person was dead or could not be found or within such time as would prevent the possibility of the insurer being prejudiced by want of such notice, the person who could have so recovered judgment against the insured person may recover the amount of that judgment by action against the insurer."
53. S.36(1) "All actions in which the damages claimed consist

of or include damages in respect of personal injuries to any person, shall be commenced within three years next after the cause of action accrued but not after."

54. (1889) 14 App Cas 337 at p 356.
55. (1963) AC 758 at p 771.
56. This Act evidently dealt with the mischief disclosed in Cartledge's Case.
57. (1966) QB 197, p 203.
58. (1972) 1 QB 373.
59. (1976) QB 858.
60. (1983) 2 WLR 6.
61. (1983) 1 WLR 1436.
62. See s.31 of the Queensland Act & s.58 of the New South Wales Act.
63. Limitation Act 1974 s.4(1).
64. William Blackstone, Commentaries on the Laws of England, 1966, Vol 2 page 341.
65. Limitation Act, 1974 s.4(1)(c).
66. (1933) 1 KB 753.
67. See Josling JF, Periods of Limitation (5th Edn) p 22.
68. Limitation Act, 1974 s.4(3).
69. Ibid s.4(4).
70. (1948) 2 KB 331.
71. Limitation Act, 1974 s.2(1).
72. Ibid s.10(2).
73. Ibid s.2(1).
74. Ibid s.2(1).
75. Ibid s.2(6).
76. See Megarry & Wade, The Law of Real Property, (4th Edn) 1975 Ch, 16; see also D Macintyre, "Adverse Possession of Land" (1975) Sol J 32.
77. See Paradise Beach & Transportation Co v Price Robinson (1968) 1 All E R 530.
78. Limitation Act, 1974 s.16(1) & (2).
79. (1888) 13 App Cas 793 at p 798.
80. Limitation Act, 1974 s.21.
81. Ibid s.16(1).

82. Ibid s.16(2).
83. Ibid s.24.
84. Ibid s.13(5).
85. Ibid s.10(1).
86. Ibid s.10(4).
87. Ibid s.10(6).
88. See Hinde, McMorland, Si., Land Law 1978, vol 1 Ch 4 para 4001.
89. Limitation Act 1974 ss.11(1)(a) & (b).
90. John Doe "From Digger to Squatter" (1957) 101 Sol Jo 152.
91. (1880) 14 Ch D 537 at p 539.
92. Limitation Act, 1974 s.11(2).
93. Ibid s.11(3).
94. (1982) 18 VR 356.
95. See Megarry & Wade, The Law of Real Property 4th Edn p 173.
96. See Hinde, McMorland, Sim., Land Law 1978, vol 1 p 341.
97. Limitation Act, 1974 s.12(2); see also Megarry & Wade, The Law of Real Property (4th Edn) p. 1015-1016.
98. Limitation Act, 1974 s.12(4).
99. Page 1016.
100. Limitation Act, 1974 s.12(3).
101. Ibid s.12(5).
102. Ibid s.12(6).
103. Ibid s.13(1).
104. Ibid s.2(1).
105. Ibid s.13(2) & (3).
106. Ibid s.13(4).
107. Ibid s.13.
108. Ibid s.14.
109. Ibid s.15(1).
110. Ibid s.15(1).
111. See Megarry's Manual of Real Property (5th Edn) P V Baker, 1975 p. 495.
112. See Remon v City of Lond Real Property Co Ltd (1921) 1 KB 49 p 58.
113. Limitation Act, 1974 s.15 (2).
114. Ibid s.15(3).

115. Ibid s.22.
116. See Franks M, Limitation of Action 1959, p 146.
117. Hughes v Comes (1884) 27 Ch D 231.
118. Limitation Act, 1974 s.16.
119. Ibid s.18.
120. Ibid s.23(5).
121. Ibid s.21.
122. Ibid s.29(1).
123. See Hughes v Waite (1957) 1 WLR 713, 715.
124. See Fisher & Lightwood, Law of Mortgages pp 376 & 419.
125. See Wakefield Bank v Yates (1916) 1 Ch 452, 460.
126. Limitation Act, 1974 s.2(1).
127. Ibid s.23(2).
128. Ibid s.23(3).
129. Ibid s.23(8).
130. Ibid s.23(7)(a).
131. Ibid s.23(8).
132. Ibid s.24(1).
133. Ibid s.24(2).
134. Ibid s.24(3).

CHAPTER 4. WHAT STOPS OR SUSPENDS THE RUNNING TIME

4.1 IN CASES OF CONTRACTS, TORTS AND PERSONAL ACTIONS

In respect of simple contracts and torts, the Tasmanian Limitation Act (1974) provides in S.4(1) as follows:

"Except as otherwise provided in this Division, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say:-

- (a) Actions founded on simple contract (including contract implied by law) or founded on tort, including actions for damages for breach of statutory duty."

For a speciality contract the Act provides in S.4(3) as follows:

"An action upon a speciality shall not be brought after the expiration of 12 years from the date on which the cause of action accrued, but this subsection does not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act".

The general rule is that, once time has started to run, it cannot be suspended. However, there are circumstances which generally suspend the running of time in a limitation period. The plaintiff can take some positive steps to prevent time from running. The most common act which prevents time running is for the plaintiff to institute proceedings. A more onerous way is to obtain the agreement of the other party not to plead the Limitation Act and such agreement could be either express or implied and made before or after the limitation period has expired. However, any agreement, not to rely on the Limitation Act would have to be supported by consideration¹ and expressed in very clear terms². Sometimes, the running of time could be suspended by a statutory instrument made by Parliament in times of war or where a state of emergency has been declared. Other instances where the running

of time is suspended include the period during the administration of creditors and deceased estates; when a sequestrarian order is made; and on presentation of a winding up petition for companies.

(i) History

The general rule that once time has started to run, it cannot be suspended was reiterated by Lord Abinger, C.B. in Rhodes v Smethurst³ where he said,

"where an action has once accrued and the Statute has begun to run, there being a capacity of suing and being sued, the Statute continues to run".

It seems that this rule applies even through at some state during the period, it would be temporarily impossible to commence any proceedings as was the case in Rhodes's case where the cause of action accrued in 1829 against a person who died in 1830. The appointment of his personal representative was not finalised until 1835 owing to disputes over his will.

The court rejected a suggestion that the intervening period between 1830 and 1835 be omitted in calculating the statutory period and in his judgment Lord Abinger, C.B. said⁴,

"Therefor the legislature, as it appears to me, has by its own enactment shown in what cases the period of time in which there existed a disability in the plaintiff or defendant not being able to sue, should or should not form part of the six years limited by the statute. We have therefore, as I think, both authority and reason for concluding that the period of time from which the computation is to begin, is when the action accrued, and that when the statute has once begun to run, any portion of time in which the parties are under disabilities must

nevertheless form part of the six years".

In his judgment Alderson B., said⁵

"It appears to me that if the statute begins to run it must continue to run - that is to say, as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued in England, from that time that date of 6 years begins to run, and unless that were so, great inconvenience would follow; for it would be very difficult, in almost every case, to ascertain whether the statute had or had not run, and we should be obliged to take a great many documents and statements, a great many beginnings and endings, and should have added up to those precise periods to time, out of which the six years would have to be made out; so that great inconvenience would result; and therefore it is better to apply the law as it at present stands; it being far better that a particular injury should be inflicted on one individual, than that great inconvenience should be applied to all the community".

The principle that once time has commenced, it continues to run, is again supported by the case of Jenkins v Jenkins⁶ where the owner of considerable real property died intestate in 1853 and his heir died in 1866 leaving his son the plaintiff, who took out letters of administration and commenced action against the defendant, who had occupied the land since 1853, without acknowledging the title of the plaintiff or his father. The court held that the statute of limitation began to run in 1853 and thus the plaintiff's action was statute-barred. Sir J. Martin, C.J. in his judgment stated⁷,

"Now, it is an inflexible rule that nothing stops the statute running when once it has begun to run."

Counsel for the plaintiff argued that no time ran against the administrator before his letters of administration were granted,

during the interval from 1866 to 1880. The Chief Justice distinguished Murray v East India Company⁸, where the action was brought by an administrator upon bills accepted by the defendants after the death of the intestate. It was held that between the death and the grant, time did not run. Sir J. Martin, C.J. agreed that the statute will run only from the time of the grant but this is so only, if it had not begun to run before. In this case time had started to run in 1853 when the defendant took possession of the deceased's property.

(ii) The Tasmanian situation

The Limitation Act itself recognises that, in certain circumstances, strict adherence to the time period would not be fair and thus provides certain exceptions. For instance, certain disabilities of the plaintiff existing when the cause of action accrues⁹ are excluded.

4.1.1 Should the Courts be given a Discretion?

Apart from these few statutory exceptions, namely cases of infancy; cases of mental disorder where a person is incapable of managing his property or affairs; where a person is a convict and disability by reason of war circumstances, it would appear that no other qualifications on the absolute nature of the primary rule would ever be entertained by the courts.

In Prideaux v Webber¹⁰ an action was brought after the Restoration for assault, battery and false imprisonment. It was argued that the action was in time because at the date of the complaint and until just before the action was brought, "rebels had usurped the government, and none of the king's courts were open". However, this argument was rejected and the proceedings were held to be out of time, since "there is not any exception in the Act of such a case".

Also in Rhodes v Smethurst, supra the court was not prepared to omit the period during which there was a dispute on the deceased's will which delayed the appointment of the personal representative. Alderson B., in that case stressed that convenience is best served by the refusal to admit other exceptions.

It is submitted that the few statutory exceptions under Division 1 of part III of the Limitation Act for which extension can be granted are inadequate. Apart from cases of disability, mental illness or disability by reason of war circumstances and infancy, the courts should be given a discretionary power to extend time in any other case where it would be inequitable to allow time to run, once it has commenced. Although it could be argued that a wide discretion would give rise to more uncertainties in that the defendant could never be certain that a statute barred claim would not be resurrected, a discretion could have avoided the outcome of Prideaux v Webber where the plaintiff was not at fault. If the plaintiff is ready, willing and able to prosecute a claim, the plaintiff should not be penalised just because the courts are closed. In other words, if the plaintiff has taken all steps within his power to institute proceedings but is unable to go one step further to file the proceedings in court because the courts are shut, he should not be unduly penalised.

A better approach it is submitted, would be to say that the statute once it has begun to run, goes on running only in cases in which the plaintiff could have proceeded with the action, but fails to do so, through his own neglect. In other words, if it was within the power of the plaintiff to proceed with the action and if he fails to do so promptly, he should be penalised. However, if there is a delay because of circumstances beyond his physical control, as where the courts were shut as in Prideaux v Webber supra or where there is a delay in the appointment of the personal representative because of a dispute on the deceased's will as in Rhodes v Smethurst supra, that period should be omitted when calculating the time period for purposes

of the Limitation Act.

4.1.2 Commencement of Action

Once time has started to run, it cannot normally be suspended unless and until some definite and readily identifiable step is taken by the plaintiff. An identifiable step that the plaintiff could take is to institute proceedings. Where a plaintiff institutes proceedings, the running of time is suspended. The concept of instituting proceedings would appear to be straightforward, but it is an over-simplification, as on closer examination it does not state what is precisely meant by instituting proceedings. For instance, when is a plaintiff deemed to have instituted proceedings?

Should it be the time

- (a) when the plaintiff instructs his solicitors to issue process,
- (b) when the writ of summons is actually filed in the registry of the court, or,
- (c) the day the writ is served on the defendant?

There may be considerable delay from the time a solicitor is instructed to issue a writ of summons and the actual date of filing the summons. Again, there could be considerable delay before the writ is served on the defendant. Delay in service can arise as in most cases, personal service is required. This may pose a problem if the defendant tries to evade service. Of course there are provisions for substituted service of the writ, but there will inevitably be a considerable lapse of time before the writ is served on the defendant by means of substituted service. Substituted service is granted after all attempts at personal service have failed.

Ideally, the institution of proceedings should be

- (a) something simple as far as the plaintiff is concerned as in a case where time is about to run out, the plaintiff could act immediately to preserve that right.
- (b) it should be some unmistakable act where there could be no argument as to when or whether that act had been done.
- (c) that act having been done, it should come at once to the notice of the defendant¹¹.

Although ideally all the above 3 conditions should be met, in practice this is not possible especially when personal service on the defendant is required and the possibility of the defendant evading service of process makes it difficult to fulfil condition (c).

Time ceases to run upon the issue of process by the court registry¹². A plaintiff is required to commence his action within the relevant limitation period. In other words he need only issue a writ or other process within the limitation period to stop time running¹³. He is not required to serve within the period, so long as he serves within the twelve months of issue. The issue of process satisfies conditions (a) and (b) in that it is an unmistakable act on the part of the plaintiff which he fulfils by presenting the writ of summons with appropriate fee to the court. The court official receives the writ and seals it and records the date of issue. So, as far as the plaintiff is concerned, if the plaintiff can identify the cause of action and the defendant to sue, time can be stopped by issuing a writ. However, the law as it stands does not satisfy condition (c) in that the defendant would not be aware that process has been issued against him until the writ is served on him, which would be months after the limitation period has expired. As the writ

can be served any time within 12 months from the date of issue and bearing in mind that the court has power, on application by the plaintiff to renew the writ, there is a possibility that the defendant may not be aware that proceedings have been instituted against him until long after the limitation period has expired. Certainly one of the objects of the law of limitation is to enable a potential defendant to be confident, after the lapse of the relevant period, that he can no longer be sued. This object is not achieved if the defendant has no notice of the date of issue until the writ is served on him as by the time a writ is served on the defendant it could be well past the limitation period allowed for that cause of action. So if A wants to commence an action against B for breach of contract, A would have 6 years from the date of B's breach to institute proceedings. However, if A issues a writ of summons on B on the last day of the 6 year period, he would have another 12 months to serve the writ on B. If A cannot serve the writ on B during the ensuing 12 months, he could renew the writ for a further 6 months under The Rules of Supreme Court, Order 8 Rule 1(1). So effectively, it could take up to seven and a half years before B is served with the writ and it is only at the time of service that B gets to know that an action has been commenced against him.

It is not satisfactory to say that time should stop running from the date of service as this could give rise to several practical problems. Firstly, whether process has been effectively served is a question that cannot always be answered as precisely as the question whether it has been filed, especially where service is effected by post. Secondly, some special provision would be required for substituted service e.g. advertisements in newspapers. Thirdly, an unscrupulous defendant could evade service for a considerable time by moving and leaving no address or he may delay service by going abroad, since process cannot be served out of the jurisdiction without the leave of the court. If service of process is chosen as the effective terminus ad quem, which means the end of a calculation of time, a plaintiff would face considerable difficulty in trying to get a writ served

especially where negotiations with the defendant breaks down shortly before the expiration of the limitation period, thus leaving the plaintiff insufficient time to make an application to the court for leave to serve out of the jurisdiction or to effect substituted service.

It is submitted, that one way to overcome these practical difficulties and at the same time ensure that the defendant has immediate knowledge of the issue of process against him is to require the plaintiff to give the defendant notice of the issue of process within say, 7 days from the date of the issue of the writ which is to be sent to the last known address of the defendant.

If it is made mandatory for the plaintiff to give notice of the issue of process to the defendant, then to all intents and proposes we could accept the date of issue as the terminus ad quem, as all the three conditions outlined above would be satisfied.

As far as the defendant is concerned, he would have notice that process has been issued, although it may be several months before the writ is finally served on him. So, even though the statutory period has expired, so long as the defendant has notice that process has been issued before the expiry of the time period he would know that he has to preserve his records and be prepared to defend the suit.

(i) Where the Last Day for Process Falls on a Holiday

It is now well settled that where the limitation period or the last day on which formal notice has to be given falls on a day when the registry of the courts are closed, the time is extended to the first day thereafter on which the registry is open.

This was the decision in Pritam Kaur v S. Russell & Sons Ltd¹⁴ where the plaintiff's husband was killed at work because of a

fatal accident. The limitation period of 3 years expired on September 5, 1970 which was a public holiday. The plaintiff's solicitors filed a writ on Monday September 7, being the next available date on which the court offices were open. The question whether the writ has been issued in time was tried as a preliminary issue and held that the action was statute-barred. However, Lord Denning M.R. in allowing the appeal said¹⁵,

"the important thing is to lay down a rule for the future so that people can know how they stand. In laying down a rule, we can look to parallel fields of law to see the rule there. The nearest parallel is the case where a time is prescribed in both the County court and the High court is this: if the time expires on a Sunday or any other day on which the court office is closed, the act is done in time if it is done on the next day on which the court office is open. I think we should apply a similar rule when the time is prescribed by statute. By so doing, we make the law consistent in itself and we avoid confusion to practitioners. So I am prepared to hold that when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other day then the time is extended until the next day on which the court office is open.

In support of this conclusion, I would refer to Huges v Griffiths (1862) 13 C B N S 324. It was on a different statute, but the principle was enunciated by Erle C.J., at p. 333: 'where the act is to be done by the court and the court refused to act on that day, the intendment of the law is that the party shall have until the earliest day on which the court will act'..."

The decision in Pritam Kaur v S. Russell & Sons Ltd was applied

in The Clifford Maersk¹⁵ where the plaintiff alleged that their cargo was delivered in a damaged state by the defendant shipowner. Under the Hague Rules an action in respect of damaged cargo had to be brought within one year after delivery. Because of investigations, the defendant allowed the plaintiff several extensions of the one-year period, the last of which expired on a Sunday. The plaintiff issued a writ on the Monday following. The court held that in determining whether an act was done in time under an agreed time limit which expired on a day when the court offices were closed, the time extended to the next ensuring day on which the offices were open.

However, Pritam Kaur v Russell & Sons Ltd was distinguished in Swainston v Hetton Victory Club¹⁶. This case involved a complaint of unfair dismissal that was presented to the Industrial Tribunal on a Monday, as the last day for presenting the complaint fell on a Sunday on which the offices of the tribunal were closed. Though the tribunals offices were closed, there was a letter box through which communication could be posted at all times. The Court of Appeal held that since presentation of a complaint to an Industrial Tribunal for the purposes of the Act did not require any action on the part of the tribunal, a complaint could be presented if it was communicated to the tribunal through a channel of communication held out by the tribunal as being an acceptable means of communication. As such, since the complainant could have posted his complaint on the Sunday, which was the last day and he failed to do so, he was out of time when he presented it on the Monday.

The proposition of law laid down in Pritam Kaur's case, is still good law. However, it is clear from the judgment that the proposition is limited to cases where a statute provides for an act to be done and that act can only be done if the court registry is open on the day when the time expires. For example, where a writ or originating summons has to be taken out, it has to be stamped and filed in the court registry. In such cases where the presentation of a writ is not the unilateral act of the

one party but one which involves a court official as well, who has to stamp and assign a number to the writ and enter it into the cause register, time will be extended to the next working day, if the last day for filing the claim happens to fall on a non-working day.

However, if the institution of a claim is to be done by the unilateral act of the one party alone, and does not involve any others, and if there is an acceptable means of presenting that claim, (even on a non-working day as in Swainston's Case) then, if the last day for presenting the claim falls on a non-working day, the action will be statute-barred if not presented on that day.

It is submitted that in cases where one party can unilaterally present a claim, he should be allowed an extension to the next working day, if the last day for presenting a claim falls on a non-working day and in the event that there was no acceptable means of communication. In other words that the rule in Pritam Kaur's case would have been applied to Swainston's case, if not for the presence of a letter box located in front of the office, which the court found was held out by the tribunal as a acceptable means of receiving a complaint.

It has been seen that the issue of a writ of summons stops the running of the statutory period. An action is defined in the Act to include any proceedings in a court of law. So, where the proceedings are not started by writ, time ceases to run at the date of the issue of the originating process, as for instance, an originating summons or an originating notice of motion.

(ii) Amendments to Process¹⁷

Another issue that often arises and which I shall now examine is the question of amendment to a writ which has been filed within the stipulated time period. Before granting such an application the courts are careful to consider whether any injustice is done

to the defendant. The granting of an amendment could raise a new cause of action, which would have been barred by statute as out of time. Thus the courts are careful to ensure that the plaintiff is prevented from introducing a new cause of action by amendment which he would have been precluded otherwise as out of time. In the course of deciding when an amendment would be granted, the courts have drawn a distinction between a set-off and a counter-claim. In Mc Donnell & East Ltd v McGregor¹⁸ in the trial of an action for unliquidated damages, the defendant sought to amend his defence by adding a set-off of certain liquidated debts. The learned judge having disallowed the amendment, the defendant pleaded the same items by way of counter-claim, Dixon, J. in his judgment said,

"under the rule the distinction between set-off and counter-claim has, I think, been maintained. Its practical importance is illustrated by the decision of McKinnon, J., in the case of Lowe v Bentley, (1928) T L R 388, which applies to the present case. When the indebtedness of a plaintiff to a defendant is pleaded by the latter as an answer in whole or in part to the former's case, lapse of time will not bar the answer unless the indebtedness accrued more than the statutory period before the issue of the plaintiff's writ. But McKinnon, J., decided that in the case of a counter-claim the period of limitation must be calculated back from the time when the counter-claim was made. That decision, which I accept, involves the maintenance of a clear distinction between set-off affording an answer to a cause of action, and a counter-claim amounting to a cross-action."

(iii)(a) When Amendments will be Granted

In Harris v Reggatt¹⁹ the court had to consider whether to allow the amendment of a statement of claim after expiry of the time limited for action, where the amendment sought to add a paragraph alleging, in the alternative, a contract made between the

plaintiff and the members of the committee of the management of the hospital other than the plaintiff. The court held that all that was new in the proposed amendment was an allegation against the defendants as members of the committee of management of a contractual obligation already alleged and described as against the defendants as members of the association. This was sufficiently closely related to what had been alleged previously to make it fair that it should be allowed, despite the fact that the period of limitation had run.

Sholl, J. said,

"if we say that the law is that the plaintiff cannot be allowed, after the period of limitations has run, to set up a new cause of action, we use the term in a special sense meaning a 'new case' varying so substantially from what has previously been set up that it would involve investigation of matters of fact or question of law or both, different from what have already been raised and of which no fair warning has been given so that it would be unfair and unjust to the defendant to put him in peril of a judgment founded on the new matter."

The court also granted leave to amend a writ of summons in Hristeas v GMH Pty Ltd²⁰ in a claim for damages for personal injuries. The plaintiff in his original writ alleged that he had been engaged for the task of welding with an electric welding apparatus and on 16th October, 1963 his body had come into contact with a live electrified portion of such apparatus, whereby he suffered injuries. He subsequently sought leave to amend his writ by alleging that his injuries resulted from repeated operations by him during an unspecified period ending 16th October, 1963 of a pressure hand-grip which required repeated vigorous contractions of his right hand. The Supreme Court of Victoria, in deciding that leave to amend was properly granted, stated the general rule that leave to amend should be granted unless injustice is done to the defendant, but an

amendment may be refused if it would permit the plaintiff to raise a cause of action which would be barred under S.5(6) of Limitation of Actions Act 1958 (Vic), if a writ were issued in respect thereof at the date of seeking leave to amend. But if the proposed amendment does not raise a new cause of action or a different case, but merely changes or provides an additional approach to the same facts based on the same cause of action, the amendment should be allowed despite the expiration of the limitation period.

The court also allowed an amendment in a negligence action introducing breach of statutory duty as a cause of action in Christodouloupoulos v Rowntree & Co (Aust) Pty Ltd²¹. There the Victorian Supreme Court held that although the amendment raised a new cause of action, in the technical sense, it did not introduce a new case or new set of ideas and the court should in the exercise of its discretion allow it.

Again, where an amendment is the addition in the claim of another member of a class of dependents, an amendment after the expiry of time for action will be allowed. In Dickson v Lusher²², the plaintiff sued to recover from the defendants damages for negligence in the conduct of certain litigation under the Compensation to Relative Act, 1897-1953 (NSW), undertaken by them as solicitors for the plaintiff. The plaintiff sought to amend her claim to include a claim for a child of the deceased after the time limited for commencing an action against the defendants had expired. The court held that as the right sought to be enforced by the plaintiff belonged to all members of the class of dependents defined in the Act and as the solicitors were retained by the plaintiff on behalf of that class, the amendment should be allowed.

The courts will allow an amendment if the amendments did not change the plaintiff's cause of action but merely amounts to the particularising of the facts. In Black v City of Melbourne²³ where a bather was injured in an enclosed sea water bath when he

dived from a platform, claimed damages on the basis of breach of duty by the local authority in failing to use reasonable care to prevent damage from an unusual danger, namely, a submerged piece of timber. The plaintiff successfully obtained leave to plead that he had his head on the bottom and that the defendant had failed in its duty to him to warn him of the unusual danger constituted by the combination of the depth of water and the platform from which he had dived.

Finally, the courts will generally grant an amendment even to introduce a new cause of action based on the same facts, where the defendant cannot show any prejudice to him as a result of allowing the amendment. In Swain v North Thames Gas Board²⁴, the plaintiff suffered injuries when her gas stove exploded. The pleading alleged negligence against the defendants. Browne, J., allowed the pleading to be amended out of time at the trial to also allow allegations of breach of contract under the Sales of Goods Act, 1893 on the same facts for the tort action, namely the explosion.

Although we have seen that the issue of a writ of summons stops the running of the statutory period, an action is defined in the Act to include any proceedings in a court of law. So, where the proceedings are not commenced by writ, time ceases to run at the date of the issue of the originating process, as for instance, an originating summons or an originating notice of motion, or a petition.

In the case of an arbitration, there are specific provisions dealing with this point²⁵. An arbitration is deemed to have commenced when one party to the arbitration serves on the other party a notice requiring him to appoint or agree to the appointment of an arbitrator. So that time would stop running, when such a notice is given by the one party to the other.

(iii)(b) When Amendment Will Be Refused

If the amendment introducing a cause of action is covered broadly in wide terms in the writ but not relied on in the statement of claim, normally the plaintiff would not be allowed to re-introduce it in the statement of claim.

Kitto, Menzies and Owen J.J. in Renowden v McMullin²⁶ held that although the endorsements on a writ may be wide enough to cover a number of causes of action, if the statement of claims omits to rely upon one of them the cause of action so omitted is to be taken to have been abandoned. In such circumstances if the plaintiff later seeks the leave of the court to amend his statement of claim in order to re-introduce in the proceedings the cause of action which he had abandoned, he will not, except in very peculiar circumstances, be allowed to do so, if, at the date when he seeks to re-introduce it, a writ issued in respect of that cause of action would have been statute-barred.

The courts have refused an application for an amendment where the effect of it was to introduce a new party to the proceedings. In Church v Lever & Kitchen Pty Ltd²⁷ the Supreme Court in New South Wales held that no amendment ought to be permitted joining a defendant which would thereby deprive him of an immunity acquired under the Statute of Limitations (NSW) for to do so would be to work injustice upon him.

Where the effect of an amendment is to introduce a new cause of action, an amendment was refused in Horton v Jones (No. 2)²⁸. There the plaintiff brought an action for damages for breach of contract as well as a quantum meruit claim for services rendered. Both actions were unsuccessful.

The plaintiff then made an application to substitute a count of account stated instead of damages for breach of contract. The application was refused as it was held that the proposed amendments would substitute new cause of action for those originally sued upon and that these causes of action if set up in an action commenced on the date of the application for leave

to amend, would have been barred by lapse of time.

Finally, Williams, J. in Bainbridge-Hawker v Minister for Trade & Customs (C'th)²⁹, has summarised the instances where amendments have been disallowed.

"The cases where amendments of writs or pleading have been refused because at the time of the application the cause of action has become barred by some statute of limitation would appear to fall into three broad categories.

1. where there is proper plaintiff but it is sought to add to the causes of action being sued upon a new cause of action which is out of time at the date of the application.
2. where the writ has not been served within twelve months and has become ineffective and it is sought to renew the writ after the causes of action which it includes would have become barred.
3. where there is a defect in the title of the plaintiff, because either he is the wrong plaintiff or he is a fictitious person, there being no such person alive at the date of the writ, and is sought to add a new plaintiff after the causes of action included in the writ have become barred."

From an examination of the above cases, it is clear that where a party seeks leave to amend a writ, and the effect of such an amendment is either to introduce a new party to the proceedings or a new cause of action, the courts would generally disallow such applications. A party who pleads a cause of action in the writ, but does not rely on it in the statement of claim would be deemed to have abandoned that cause of action and thus generally will not be allowed to re-introduce that cause of action, if at the date of re-introduction, the said cause of action would have

been barred by statute.

4.1.3 By Agreement

Although the time limit provided in the Act is statutory and effect must be given to it, however harsh the outcome may be in any particular case, there is nothing to prevent parties from consenting to extend the time period. So in The Clifford Maersk³⁰ the plaintiffs alleged that the cargo carried and delivered by the defendant shipowner was in a damaged state. Under the Hague Rules³¹ an action in respect of damage to cargo had to be brought within one year after delivery. Because of investigations into the causes of the damage, the cargo owners requested and were granted extensions of the limitation period on four occasions. Sheen J. agreed with the submission by counsel for the plaintiffs that the letter seeking extension of time is a contractual agreement which was given in consideration of the plaintiffs refraining from issuing a writ.

Once time has started to run, an agreement not to enforce a claim will not prevent time from running unless a restriction on the operation of the limitation period is expressed in very clear terms. In Cave v E C (Holdings) Ltd³², a statute-barred debt to an unsecured creditor was acknowledged by the defendants in September, 1955 when preparing a scheme of arrangement approved by the court in November, 1955.

That scheme provided, inter alia, by clause 42 that

no unsecured creditors...shall take any steps during the trial period to enforce any claim they may have against the company without leave of the court.'

The trial period as extended expired on 14 November 1963 and on 12 January 1965 the plaintiff began an action for recovery of the

debt. The plaintiff claimed that it was an implied term of clause 42 that the operation of the Act should be suspended during the trial period and its extension, Roskill, J., in his judgment said the rule, that once a period of limitation had begun to run, it continued running until the point of time when it expired, had become less rigid. However, any contractual restriction on the operation of the Limitation Act, 1939 (UK) after the period of limitation had begun to run, as in this case, had to be clear, although it did not have to be expressed in so many words. Had the framers of clause 42 intended to provide that the Act should cease to run for a period of time equal to the trial period they would have said so in the plainest terms, but they had not; the rights of the plaintiff and defendants were merely in suspense; he could have issued a writ at any time solely to preserve his rights under the Limitation Act, and he might or might not have been granted leave to enforce them during the trial period.

4.1.4 Statutory Instrument and the Running of Time

It would also appear that regulations having statutory force can also suspend the running of time. In Bell v Gosden³³ the Defence (Evacuated Areas) Regulations, 1940 had provided that in certain cases rent payable in respect of houses in the evacuated areas should not be recoverable during the period of evacuation.

The Court of Appeal held that since these regulations, if they applied, had the force of statute, no action could be brought while they were in force and accordingly the running of time was suspended. Sir Raymond Evershed, M.R. said³⁴,

"In my judgment, the necessary effect of the regulation, which has, of course, the effect of an Act of Parliament when set beside the Limitation Act, is that, so long as it applied and the rent was irrecoverable by its terms the running of time under S.17 must be treated as suspended...That is, I think, clear from the language of S.17 itself - 'no actions shall be brought'. The basis of

the section is that, if, during the period a person can bring an action but he does not do so, but delays for six years, then thereafter he shall be barred."

In Whitford's Ltd (In Liquidation) v Carter³⁵ the court held that the running of the Limitation Act was suspended when the enforcement of claim is prevented by moratorium legislation. In this case the Act³⁷ forbade a vendor of land under a contract dated before the commencement of the Act from taking any proceedings (except by leave of the court) for the recovery of principal moneys due under the contract, but provides by S.10 that if a purchaser under such a contract is in arrears for a period of 12 months in respect of any payment of principal or interest, and has made during any period of six months no payment in respect of any portion of the amount due under the agreement, the vendor may serve one month's notice on him of intention to exercise his rights under the agreement. After the expiry of such notice the vendor may proceed to exercise his rights under the agreement unless the purchaser has paid the arrears or the court otherwise directs. S.13 of the Act provides that no period of time during which the enforcement of any right or claim is prevented by the Act shall be taken into account in computing the time limited by any statute of limitations or otherwise for the enforcement of such right or claim. The defendant agreed to purchase certain land from the plaintiff on payment of a deposit and balance by monthly instalments. The agreement also provided for interest to be paid quarterly on the balance outstanding. The defendant having only paid one instalment, the vendor served notice on him under S.10 of the Mortgagees' Rights Restriction Act, 1931 and upon expiry commenced an action. It was contended for the purchaser that as the claim did not accrue within 6 years, the vendors' action was barred by the Limitation Act. The court held that the vendors' claim was not barred by the Limitation Act, 1935, as, until the vendor had given notice under the provisions of S.10 of the Mortgagees' Rights Restriction Act, he was prevented from exercising his rights as vendor, and by virtue of the provisions of S.13 of that Act, time had not run

against the vendor under the Limitation Act since the date of commencement of the Mortgagees' Rights Restriction Act.

4.1.5 Administration of Creditors and Deceased's Estate

The next question is whether the Limitation Act is suspended during executorship of creditors and deceased's estate. According to English authorities, which are considered in view of the absence of Tasmanian authorities, it is well settled, that once the statute begins to run, subsequent events which preclude the bringing of an action do not prevent it from continuing to run³⁸.

In cases of administration, the mere fact that proceedings have been commenced will not stop the Limitation Act from running against other creditors. However, once an administration decree has been granted, time will stop running once and for all against all creditors then having a claim against the estate³⁹. This is so because an administration decree operates as a judgment.

In Seagram v Knight⁴⁰, a debtor had taken out administration of his creditors' estate and it was held that during the period of his administratorship the running of the statute was suspended. Lord Chelmsford L.C., decided that it was impossible to bring an action during the period because the plaintiff and the defendant would be the same person.

However, Seagram v Knight was not followed in re George⁴¹, where Mann, J., had to decide whether, a debtor having appointed as executor, a creditor to whom probate was granted, the operation of the statute was thereby suspended. His Honor held that it did not. He said that Seagram v Knight was a very unusual case and thought that the true justification for it might be found in the fact that it would be inequitable as against third parties to allow a debtor, by taking out administration to permit the statute to run so as to bar the debt. The creditor had the legal right to pay himself and in fact also the opportunity to do so without action.

He held, therefore, that the debt was statute-barred. In his judgment Mann, J.. said,

"Moreover, it is important to remember that where as here, the mortgagee was the executor of the mortgagor, he had not only the right, but abundant opportunity of paying himself without any action at all; so that, if he was not in a position to bring action, he was in a better position in that no action was necessary, and it seems to me quite impossible to find any reason in law or in equity for holding that the statute having begun to run, did not continue to run during the executorship of the mortgagee."

In Bowring-Hanbury's Trustee v Bowring-Hanbury⁴² where the husband, a creditor was the sole executor of the will of his wife, who was subsequently adjudicated a bankrupt and the trustee commenced an action against the executor to recover the balance of the debt from the estate of the testatrix, the executor resisted the claim on the ground that it was barred under the Limitation Act. On appeal the trustee argued, inter alia, that the running of the statute was suspended so long as the plaintiff and the defendant in an action to recover the debt would be the same person by reason of the creditor being the executor of the debtor. Lord Clauson in dismissing the appeal referred to Prideaux v Webber⁴³ and said, "these decisions would seem to make it difficult to read into the Act an exception of a space of time when no action could be brought because there was one hand only to pay and to receive." He also distinguished Seagram v Knight and said that it was authority only on its own facts pointing out that there the debtor was the administrator, not the executor, of the creditor. It would appear that Seagram v Knight is limited to cases where the personal representative is an administrator and an executor is not affected.

In as far as the administration of a deceased's estate is concerned it was held in Re White Bakewell v White⁴⁴ that an administration decree made on the application of an executor of

a deceased operates as a judgment in favour of such creditors as can substantiate their claims to the extent of preventing the time limited by the statute⁴⁵ from running against the recovery of debts. Prior to his death, the testator had settled certain property on his wife during her life, and after death as she might appoint, but, in default of appointment upon trust for himself. The testator's wife died without having exercised her power of appointment and thus there was considerable amount of money that fell into the testator's estate. At his death, the testator was insolvent and a mortgagee, the South Australian Land Mortgage and Agency Company Ltd failed to prove their debt, when a decree for general administration was made. Subsequently, they sold the mortgaged property but failed to realise the full amount of the principal loan and interest due under the mortgage. They thus took out a summon more than 20 years after the principal money became due under the mortgage and the date of administration decree to rank as creditors for the difference between the principal loan plus interest and the proceeds of the sale of the mortgaged property. The defendants objected on two grounds. Firstly, that the claim is barred by the Statute of Limitations and secondly, that even if it is not so barred the company is precluded from claiming now by reason of its conduct. Murray C.J. delivering the judgment of the court said,

"It has long been settled, however, that an action for general administration has the effect of stopping the time running against all creditors whose claims were not already barred at the date of the decree...Jessel, M.R., decided in re Greaves (1881), 18 Ch D, 551, that in consequence of the Acts of 1833 (3 & 4 Wm IVm C.27 and 3 & 4 Wm IV, C.42), the Court of Chancery Procedure Act, 1852, SS.45 & 47 (represented by our Equity Act, 1866, SS.115 & 117), and the Judicature Act (our Supreme Court Act, 1878), the reasons for checking the operation of the Statutes of Limitations at the filing of the bill in a creditor's suit for the administration of that personal estate of a deceased person have lost their force, and that as any

creditor may now institute proceedings in a summary way, and can obtain a decree within a few days, and thereafter all other creditors are shut out from obtaining a similar decree, the judgment operates for the benefit of all the creditors and their rights are to be determined at the date of the decree whether they have then proved or not."

So an administration decree operates like a judgment, in that it prevents time from running against the recovery of debts on all creditors, whose claims are both barred by statute, at the date of the decree. So that there is nothing to stop any creditors from coming in and proving their claims at anytime, after the decree has been granted, provided there are undistributed assets available for distribution, and provided no injustice arises to the other creditors. So, in re McMurdo, Penfield v McMurdo⁴⁶ where the testator died and a creditor's action was brought after the statutory period had run, calculating it even from the date of the decree, the Court of Appeal held that the creditor was entitled to come in and prove at any time, under either bankruptcy or chancery practice, if there were assets undistributed and no injustice would be occasioned to other creditors.

Vaughan Williams L.J. said⁴⁷.

"Now, according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is secured creditor, or whether he is an unsecured creditor, to come and prove at any time during the administration, provided that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come and ask for leave to prove, to any terms which the court may think it just to impose; and, of course, in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards,

subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the court. If that is so, leave must be granted on such terms as the court may think just."

Then, dealing with chancery practice, he said⁴⁸.

"I really do not think that it makes very much difference whether one looks at this proof as if it were carried on in bankruptcy or carried in the administration in chancery. In either case it seems to me that, by the machinery of what is in effect a supplementary certificate upon proper terms the court would allow the creditor to come in."

A creditor, having a claim against an estate normally proves his debt. This is because an administration of estate comes within the jurisdiction of the Chancery Courts. However, it remains a legal claim as Lord Davey observed in the House of Lords in Harrison v Kirk⁴⁹ where he said,

"When the Court of Chancery had taken into its own hands the administration of an estate, it restrained creditors from pursuing their legal remedy against the executors. The court made a decree for the administration of the estate, which operated as a judgment for all the creditors, and as it precluded the creditors from asserting their legal remedies, it provided other means for them to obtain payment of their debts. The court was bound to see that the creditors whom it restrained from pursuing their legal remedies were not deprived of the means of having the assets of the testator applied to the payment of their debts. It is an entire fallacy but I think a very common one, to suppose that because the debt had to be proved, or the debt had to be enforced through the medium of the Court of Chancery it became an equitable demand, and ceased to be a legal demand. Its character, was not altered one whit: it remained a legal demand, and the right of the creditor who

came in to prove under an administration decree remained a legal right and the debt which was recoverable was a legal debt, the only difference made was in the remedy by which the debt could be recovered. That being so, the Court of Chancery usually fixed a time within which the creditors could come in and prove their debts; and obvious convenience rendered that necessary, because otherwise the administration would have been hung up forever."

Lord Davey has very clearly stated in his judgment that although a debt may be enforced in a Court of Chancery, it does not change the legal nature of the debt. In other words, just because the claim is heard in a Court of Chancery, it does not become a claim in equity but continues to remain a legal claim. This would mean the equitable defence would not be available in such cases.

So, in cases of administration, the position is that a defendant would be precluded from pleading the defence of laches, as the action is not one at equity. Furthermore, the defence of limitation would not be available as time stops running on all creditors from the date of the decree. It would appear then that the only foreseeable defence available to a defendant, would be to prove that the plaintiff had either released, waived or abandoned his claim against the personal property or general estate of the testator.

4.1.6 Bankruptcy and Winding-up

In cases of bankruptcy and winding-up, the commencement of the proceedings in itself does not stop time running. However, time stops running from the moment a receiving order is made in the case of bankruptcy and a winding -up order in the case of winding-up proceedings. From the moment the order is made, time stops running against all claims which are provable in bankruptcy, and the same principle applies in winding-up proceedings; that is, the creditors' claims are frozen as at the date of the winding-up order.

This principle was explained by Mellish L.J. in re General Rolling Stock Co⁵⁰, where he said,

"Assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors or under a decree of the Court of Chancery in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

As in the administration of estates, so also in cases of bankruptcies, a creditor after the date of the receiving order could subsequently prove his debt with the leave of the court, as time under the Limitation Act ceases to run from the date of the receiving order. So in Ex Parte Lancaster Banking Corporation: In re Westby⁵¹ where after the court had made an order declaring the bankruptcy to be closed the bankrupt managed to secure assets from bequests made to him by his wife, the question that the court was called upon to decide was whether a creditor whose name and debt appeared in the bankrupt's statement of affairs, but who had not proved before the close of the bankruptcy, could subsequently prove the debt. In allowing the creditor to prove the debt with the leave of the court. Bacon, C.J., said⁵²,

"The argument founded on the Statute of Limitations as an answer to this claim is not tenable for the moment. The Statute of Limitations has nothing to do with the bankruptcy laws. When a bankruptcy ensures, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established in the

bankruptcy, and the Statute of Limitations has no application at all to such a case, or to the principles by which it is governed. I say that because here it appears that the present Appellant was a secured creditor. He found that there was no estate except that which was pledged to him, and he did not trouble about it until he became aware of the fact that his debtor, who was a penniless man at the time of the bankruptcy, had become a wealthy man, and able to pay his debt. Then he sent a proof of his debt, and he became, in the plain words of the statute, 'a creditor who has proved'. He always had a debt provable."

So although a very long period of time had elapsed, since the time of the receiving order and the time the plaintiff proved his debt, the court allowed the proof of debt, as the Statute of Limitation ceases to run from the time of the receiving order.

In fact what the learned judge says in his judgment in Re Westby is that the operation of the Limitation statute is at an end with reference to debtor and creditor. It is quite different from saying that bankruptcy puts an end altogether, to the operation of the statute in relation to all the other matters affecting the debtors property.

In Re Benzon, Bower v Chetwynd⁵³, the Court of Appeal had to consider whether in a case where a creditor, who had been adjudicated bankrupt and remained a bankrupt when he died nineteen years later, the fact that he had by his will exercised a general testamentary power and thereby had made the subject matter of that power assets for payment on his own death, enabled his creditors (time having started to run before bankruptcy) to say that they were entitled to come in and participate in the distribution of that asset and were not statute-barred.

Chanell, J., who delivered the judgment of the court, said⁵³,

"on the point of the Statute of Limitations, in as much as

the debts were incurred by the bankrupt before 1890 and 1892 respectively, they would prima facie have been barred long before his death in 1911. The contentions (of counsel for the appellants) on this point on behalf of the appellants were, first that the exercise of the power of appointment which made the fund available as assets gave them a new right of action or proceeding which was not barred, and, secondly that, even if that was not so, the effect of the bankruptcy was to prevent the statute running."

The court however did not accept the first contention. Then Chanell, J., goes on

"as to the second point, cases were quoted beginning with Ex P. Ross which show that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only in the bankruptcy."

The court accordingly held that, whilst the appointment at death gave the creditors a new fund out of which they could get payment and a new mode of proceeding in order to get it, this was merely a new remedy and not a new cause of action. The cause of action was really the old debt, and since the statute, had begun to run against the creditors before the commencement of the bankruptcy, it continued to run notwithstanding the bankruptcy, and that the claims of the creditors, not being claims in bankruptcy, were statute-barred.

It is important to note in relation to this case that only "in the bankruptcy" does the statute cease to operate. It does not have any effect on any rights or remedies which are unaffected by the bankruptcy. In Cotterell v Price and Others⁵⁵ the court had to decide whether a second mortgagee's rights to recover property against the mortgagor was statute barred. The third defendant created a first mortgage which became vested in the

first and second defendant and a second mortgage over the same property which became vested in the plaintiff. The legal date for redemption under the second mortgage expired without the plaintiff exercising his rights. A receiving order was made against the third defendant and he remained an undischarged bankrupt. Buckley, J. said,

"In my judgment a mortgagee who relies on his security retains and stands on rights which he had before the bankruptcy and which remain unaffected by the bankruptcy....Section 7 of the Bankruptcy Act 1914, provides in Sub-5 (1) that, once a receiving order has been made, 'no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.'"

Subsection (2) of S.7 goes on: 'But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.'

Although the bankruptcy takes away the rights of ordinary creditors to sue for their dues and regulates their right of proof in the bankruptcy, the rights of secured creditors are unaffected under that section, and there is no reason why time should not continue to run under the Limitation Act, 1939, as regards those rights and remedies which the secured creditors have outside the bankruptcy."

The court held that on the second mortgagee's rights of action against the mortgagor becoming statute-barred, the second mortgagee lost all estate and interest in the mortgaged property and with it his status as mortgagee, and the equity of

redemption, being incidental to that status, could not survive. Buckley, J. went on to say

"It may be that his right to sue on the covenant (which was merely a right to sue on debt) was a right with which the supervening bankruptcy interfered so as to prevent this becoming statute-barred but that is not a matter in which I have any concern because that right alone would not, in my judgment, constitute the plaintiff a secured creditor within the meaning of the rules. A secured creditor must, for present purposes, be somebody who has some interest in property which is security for his debt, and not merely the benefit of a covenant."

Although once a sequestration order is made, for purposes of bankruptcy, time ceases to run, there is no provision to say that intervening bankruptcy shall act as a stay on the period of limitation. In Christensen v Davidson⁵⁶ the plaintiff instituted proceedings for recovery of a sum of money obtained from the plaintiff by fraud after the defendant was adjudicated a bankrupt and subsequently discharged. The court held that since time started to run against the plaintiff before the defendant's bankruptcy supervened and since the action was not commenced until after the termination of the bankruptcy, the plaintiff's right to recover his debt was statute-barred.

The effect of the Statute of Limitation vis-a-vis the winding-up of a company under the Company Act, (1961) NSW was considered in Motor Terms Co Pty v Liberty Insurance Ltd (in liquidation)⁵⁷. Section 221 (1) (b) of the Companies Act 1961 (NSW) authorises the court to make a winding-up order "on the petition of.... any creditor." The majority of the High Court of Australia, Barwick, C.J. Taylor and Menzies J.J., held that S.222 (1) (b) authorises the making of an order on the petition of a creditor whose debt was not statute-barred at the time of presentation, notwithstanding that by the time the petition comes to be heard the debt is so barred. Barwick, C.J., said,

"I would wish merely to say for myself that, in my opinion, the relevant date at which to determine whether or not for the purpose of a liquidation under the Companies Act 1961 (NSW) a debt is statute-barred is the date of the presentation of the petition on which the winding-up order has been made. That date, to my mind, is both logical and the practical date, as well as being the date chosen by the legislature, as at which to determine who are the creditors and as at which to adjust their rights."

However, in a dissenting judgment, Kitto, J. was of the opinion that the material time should be the commencement of the bankruptcy or the order for winding-up. In other words, he felt that the operative time is the date of the order and not the date of presentation of the petition. His Honor stated,

"In the case of a bankruptcy or the winding-up of a company the event upon which the substitution takes place is not the event which the relevant legislation deems to be the 'commencement' of the bankruptcy or of the winding-up: it is the commencement of the administration that is to say the adjudication in bankruptcy or the making of the order for winding-up..... Under the Bankruptcy Act 1924-1965 (Com), a creditor's right to recover his debt by ordinary legal proceedings is taken from him at sequestration (S.60, Cl.63) and the right of proof which he is given in its place is expressly limited to liabilities to which the bankrupt is subject at the date of the sequestration order (S.81). Under the Companies Act 1961 (NSW) in the case of a compulsory winding-up, the more important provisions by which a right of participation in distributions under the authority of the court is substituted for a pre-existing right of suit are S.233, placing all the company's property in the custody of the liquidator upon the making of the winding-up order; s.244, requiring the assets to be applied in discharge of the company's liabilities; S.291, giving creditors their right of proof in the winding-up; and S.226

(3), which operates automatically on the making of a winding-up order to prevent any action or proceeding from being proceeded with or commenced against the company, in contrast with S.226 (1) which recognises that prima facie the presentation of a petition is no bar to a creditor's pursuit of his remedies in the ordinary courts."

I submit that the dissenting judgment of Kitto, J. is preferable. In bankruptcies as well as in the winding-up of companies, there could be a considerable lapse of time between the presentation of the petition and the date of the final order. Furthermore, there are many cases where a final order is not made by the court, as the petition may be withdrawn or dismissed. As such it would certainly be more practical to fix the material time for limitation purposes as the date of the order. It may however be argued that this would be unfair on a party whose claim is not statute-barred at the time of presentation of the petition but becomes statute-barred by the time the final order is made. This problem could be overcome, it is submitted, by the party issuing a writ of summons.

4.2 IN CASES OF LAND

Where a person is trying to get title to land by way of adverse possession he would have to show that he has been in continuous possession of the property for 12 years⁵⁸ or if the property belongs to the Crown, he should prove continuous possession for 30 years⁵⁹.

In the event where an adverse possessor gives up possession before the expiry of the 12 year or 30 year period, as the case may be, time stops running and he completely loses whatever period of time he may have accumulated. Once the statute has begun to run, it runs continuously. In the case of a landowner whose property is the subject of an adverse possession, his rights to action ceases, once the adverse possessor vacates, and a fresh right of action accrues only when the land is taken into

adverse possession again⁶⁰. In cases of property it is well settled that where there is adverse possession, the true owner can, by re-entry and possession of the land before the expiration of the limitation period, stop the time from running against him, rather than commencing proceedings against the adverse possessor. On the termination of the time period, the true owner's rights are extinguished, including his right of re-entry. However, the adverse possessor would lose his right if he is out of possession before the full period of time has run, namely 12 years in Tasmania. This was decided in Chisholm v Comino⁶¹ where one of the defendants went into possession adversely to the plaintiffs who had legal title. Some time later the defendant went away and his wife had possession. The wife attorned to the plaintiffs as their tenant. The court held that the attornment by the wife was equivalent to possession being taken of the land by the plaintiffs as owners of the legal estate, and operated to stop the running of the statute against them. Martin C.J. in his judgment said,

"It is clear law that if a person is out of possession of land, of which he is the legal owner, for nineteen years, and if some other person is in possession, holding adversely to the legal owner, for less than twenty years, then if the person in occupation retires from possession of the land, and leaves it vacant, the owner may come in and resume possession and stop the running of the statute, and thus acquire a new point of departure. All the previous years will go for nothing, because the owner has got possession before being barred by the statute. Adverse possession for nineteen years, or for any other number of years short to twenty, will go for nothing against the real owner."

Although the general rule is that once time starts running it cannot normally be suspended, however, where an adverse possessor abandons possession without acquiring title, time stops running as against the rightful owner. In this event, the true owner is

restored to his full estate and he is in the same position as he was before the adverse possession took place. This was clearly stated by Lord MacNaughton in Trustees Executors & Agency Company v Short⁶², where he said,

"If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, in the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there a principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.

4.2.1 Acknowledgment

Generally, under the Limitation Act, 1974, time will stop running and will commence to run afresh if the defendant acknowledges the title of the plaintiff⁶³.

To establish that the period for making any entry or bringing an action to recover land has determined and that the Mortgagee's right and title to the land has consequently been extinguished, it is not enough for the mortgagor to show that the mortgagee's right to make an entry or to bring an action first accrued more than 12 years before. This is because a payment of principal or interest or an acknowledgment in writing may have caused the time to run afresh.

The Queensland Full Court in Cameron v Blau & Anor⁶⁴ held that in certain cases as for instance in the case of an allegation of concealed fraud, the onus of showing that despite the expiry of the limitation period, the case is within one of the exceptions under which the statute allows the title to continue, lies on the person who makes the assertion. However, a person who asserts that the title of another has been extinguished by the operation of S.5⁶⁵ Distress Replevin & Ejectment Act, 1867, must show that the other party is barred by the Statute from making an entry or bringing an action to recover the land. This is established by showing that 20 years have elapsed since the last payment of any principal or interest, and possibly also that during the limitation period there was no acknowledgment given by the person in possession. The court also held that an acknowledgment under S.21 Distress Replevin and Ejectment Act, 1867, must be signed by the person in possession and that the signature by an agent is insufficient. Further, the acknowledgment to be effective, must be given within the limitation period and an acknowledgment given after the period has expired is of no avail under S.21 as once title has been extinguished it cannot be restored.

The acknowledgment must be made to the plaintiff or his agent and must show an admission by the maker or a promise to pay. So in Magee v Wilson⁶⁶ where it was held that in pleading an acknowledgment, it must be alleged that it was made to the plaintiff or to his agent, and that it amounts to a promise to pay the debt. Dixon, J. in dealing with the sufficiency of acknowledgment and implication of promise to pay in Bucknell v Commercial Banking Co of Sydney Ltd⁶⁷ said,

"An express promise in writing by the debtor to pay revives his liability. But the liability is revived only according to the tenor of the promise. It is so expressed as to be conditional or subject to limitations, the condition must be fulfilled before the liability becomes enforceable and the limitations must be observed. But, although a document relied upon as an acknowledgment contains no express

promise, it may effect a revival of the debtor's liability if there is found in it a distinct admission of the debt. The law implies from an acknowledgment of the existence of the liability a promise to discharge it. Words clearly acknowledging that the writer is liable to pay suffice to raise the implication. But although the promise is implied as an artificial legal consequence of the written admission of liability and is not the result of a search after the true meaning disclosed in the writing yet if the document in which the admission occurs expresses an intention inconsistent with the making of such a promise or an intention consistent only with the making of a qualified promise, the implication will be rebutted or qualified accordingly. Thus, if the context includes a flat refusal to pay, the admission of liability cannot be made the foundation of an implied promise to discharge the debt."

So, although an acknowledgment may contain no express promise to pay, the law would generally infer from it a promise to pay the same. However, where the maker refuses to pay the amount or makes only a qualified promise to pay, then the courts will not infer a general promise to pay from the acknowledgment.

4.2.2 Re-entry, Possession or Dealing by Owner

Where a person is in adverse possession of a property, the rightful owner by re-entry and possession of the said property will be in a position to defeat the claim of the adverse possessor, provided the rightful owner does so before expiry of the 12 years limitation period. In Hodgson v Thomson⁶⁸, the defendant set up a title by possession from 1884 to a block of land of which the land in dispute was a portion. The plaintiff, who claimed to have a documentary title to the land, gave evidence that in 1893 he went with a surveyor on to the land and that they surveyed and marked it out and remained on it for two

days, but saw no one else in occupation of it. The court held that that act was sufficient to establish a taking possession by the plaintiff to the exclusion of the defendant.

Again in Scanlon v Campbell⁶⁹, in an action of ejectment the defendant set up a title to the land by possession from 1890. Evidence for the plaintiff showed that a surveyor went on the land in 1908 under instructions from the plaintiff's solicitors, surveyed it and marked it out. An assistant and a labourer were with him. They worked for two days and saw no one on the land. The court held that there was sufficient evidence of dispossession of the defendant. Similarly, in A.G. v Swan⁷⁰ evidence was adduced that the land within 100 feet of the water of a lake and creek had for more than 60 years been used by the defendant and his predecessors in title partly for farming and partly for grazing and that the land was fenced from the lake to the creek. The court held that the acts of dispossession relied on by the Crown⁷¹ were insufficient evidence of re-entry and that the Crown had not resumed possession by any of the above acts.

A re-entry by the owner to defeat a claim by the adverse possessor must be such as to show resumption of possession and any infrequent acts of re-entry would not be sufficient to defeat the claim of an adverse possessor. Thus in Robertson v Butler⁷², in an action to assert his right to a certain land of which he was the registered proprietor, the plaintiff stated that about three or four times a year he entered on the land (which had saplings growing upon it) sometimes with his wife and family, sometimes with friends, picnicked on it, walked about it, occasionally shot a rabbit on it, and sometimes put upon it a notice prohibiting the cutting of timber which, however, did not appear to have come to the defendant's knowledge until after the expiration of the period; that he wrote a letter to the defendant stating that he objected to the defendant's unauthorised occupation; and that he once sent a man to see as to the possibility of obtaining grazing for horses and to report.

The Court on Appeal held that the acts of re-entry relied upon by the plaintiff were of such a character and so infrequent, that they could not be given a cumulative effect and did not amount to a resumption of possession, and were insufficient to divest the possession out of the defendant and re-vest it in fact in the plaintiff.

However, in Clement v Jones⁷³ where land belonging to two separate persons were enclosed within one fence and the whole of the enclosed land was used by the first person for grazing cattle for a period of fifteen years during which time the second party entered his land only to cut firewood or for the renewal of survey marks on boundaries, the court held that the taking of firewood was evidence that the second party was using the land in such a way as would only be justified by actual possession and the renewal of the survey marks would have been sufficient to establish a resumption of possession.

So, to successfully resume possession, a person would have to satisfy the Court that the acts he was relying upon were consistent with that of a person who had actual possession such as cutting and removing firewood and renewal of survey marks.

4.3 CONCLUSION

Although the general rule is that once time starts running, it will normally continue to run and cannot be suspended, it is now well settled that the commencement of an action will stop a Limitation Act from running. Commencement of an action is the commonest way of stopping the Limitation Act from running. In this regard where the last day for commencement of an action happens to fall on a holiday, time will be extended to the next working day.

After commencing proceedings, there have been instances where

attempts have been made to amend the writs. The courts have generally refused to grant amendments, where the effect of so granting would be to cause injustice to the defendant or to introduce a new party to the proceedings, or add a new cause of action, after the time period has expired.

Besides the commencement of an action, the running of time could be suspended by any regulation having the force of statute, and by the agreement of the parties, in which event the agreement must be expressed in very clear terms and supported by consideration.

The commencement of proceedings for administration of estates and bankruptcy however, does not stop time running. In cases of administration, it is the making of the administration decree that stops time running against creditors, as it operates as a judgment, and in bankruptcy proceedings, the making of a receiving order will stop time running against all claims, that can be proved in the bankruptcy. This same principle is also used in winding-up proceedings.

In cases where the true owners title is extinguished by effluxion of time, even an acknowledgment by the defendant will not revive the rights of the true owner. In personal actions, as far as the Tasmanian Act is concerned, this would be relevant only in an action for the conversion or wrongful detention of chattels, as this is the only instance when title is extinguished⁷⁴.

However, in cases of actions to recover land, including redemption actions, the true owners title is extinguished after the lapse of the period stipulated in the Act⁷⁵ and an acknowledgment by the defendant would be of no effect. In cases of land, the running of time is suspended not only by the commencement of an action but also in cases where the true owner by re-entry takes possession of the land before the expiration of the limitation period.

NOTES

1. See Pearson v Dublin Corp (1907) AC 351, 368
2. See para 4 1(b) *infra*
3. 150 ER 1335; (1838) 4 M & W 42
4. at p.476
5. at p.477
6. (1882) 3 L.R. (NSW) 35
7. at p.40
8. 106 ER 1167; (1821) 5 B & Ald, 204
9. Limitation Act (1974) ss.26 - 28
10. 83 ER 282; (1661), 1 Lev. 31
11. See "Window Out of Time", 1969 Sol Jo 630
12. See GH Newson & L Abel-Smith, Preston & Newson Limitation of Actions (3rd Edn) 1953 p,8
13. See J. O'Hare & RN Hill, Civil Litigation (1943) p.74
14. (1973) 1 QB 336
15. at p.349
16. (1982) 3 ALL E R 905
17. (1983) 1 ALL E R 1179
18. See "Amendment out of Time", 110 Sol Jo 513
19. 56 CLR 50
20. (1965) V R 779
21. (1968) V R 14
22. (1963) 80 WN (NSW) 208
23. (1971) VR 378
24. QBD (Unreported Judgment) 7th June, 1966
25. 38 ALJR 309
26. S. 33 (3) "For the purpose of this Act an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or agree to the appointment or an arbitrator or where the submission provides that the reference shall be to a person named or designated in the submission requiring him to submit the dispute to the person so named

or designated."

(4) A notice referred to in subsection (3) required to be served on any person may be so served - (a) by delivering it to him; (b) by leaving it at his usual or last known place of abode or business; or (c) by sending it by certified mail to him at his usual or last known place of abode or business, as well as in any other manner provided in the submission.

- 27. 44 ALJR 283
- 28 (1970) 3 NSW 566
- 29. (1939) 39 S R (NSW) 305
- 30. (1957) 99 CLR 521
- 31. (1982) 3 ALL E R 905
- 32. Rule 6 of the Hague Rules, so far as material, provides
'....the carrier and the ship shall... be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen."
- 33. (1966) 110 Sol Jo 710
- 34. (1950) 1 ALL E R 266
- 35. at p.270
- 36. (1938) 41 WALR 4
- 37. Mortgagees' Rights Restriction Act, 1931, Section 7
- 38. Rhodes v Smethurst 150 ER 1335; (1938) 4 M & W 42
- 39. Finch v Finch (1876) 45 LJ Ch 816
- 40. (1867) LR 2 Ch App 628
- 41. (1935) VLR 29
- 42. (1943) Ch 104
- 43. 83 ER 282; (1661); 1 Lev 31
- 44. (1917) SALR 193
- 45. Limitation of Suits & Actions Act , 1866-7 (S.A.)
- 46. (1902) 2 Ch 684
- 47. at p.699
- 48. at p. 701-2
- 49. (1990) AC 1

50. (1872) LR Ch, 646 at 649
51. (1818) LR 10 Ch, D 776
52. at p.784
53. (1914) 2 Ch 68
54. at p.75
55. (1960) 3 All E R 315
56. (1971) QLR 208
57. (1967) All E R 465
58. Limitation Act, 1974 s.10(2)
59. Ibid s.10(1)
60. Ibid s.16(2) "Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue until the land is again taken into adverse possession."
61. (1884) SLR (NSW) 440
62. (1888) 13 App Cas 793 at p, 798
63. Limitation Act, 1974 ss. 29-31
64. (1963) Qd R 421
65. Sections 1-31 inclusive of the Distress Replevin and Ejectment Act 1867, were repealed by the Limitation Act, 1960, under which the limitation period is 12 years in lieu of 20 years.
66. (1906) 23 WN (NSW) 137
67. (1937) 58 CLR 155
68. (1906) 6 SR (NSW) 436
69. (1911) 1 SR (NSW) 239
70. (1921) 21 SR (NSW) 408
71. The Crown argued that there was re-entry and dispossession as a result of the following acts -
 - (a) that a government surveyor made a survey of the reservation and no exception was taken to this by the occupant.
 - (b) that a constable purported to take possession by turning up a sod of grass on the reservation.
 - (c) the Crown served a notice on the defendant's

predecessor in title to the effect that her title was illegal and that an agent purporting to act on her behalf had offered to take a lease of the land from the Crown.

- 72. (1915) VLR 31
- 73. (1909) 8 CLR 133
- 74. Limitation Act, 1974 s.6(2)
- 75. Ibid s.21

CHAPTER 5. EXTENSION OF TIME

The earliest limitation statutes in England recognised that in some instances, a plaintiff should be given respite from the operation of the statutes; the principle was recognised that time should not run where an action could not be brought, or could not be conveniently brought.

The Limitation Act 1974 (Tas) recognises two methods of granting a plaintiff respite from the operation of the Act. Firstly, the Act provides for an extension of the limitation period in cases of disability¹. Secondly, time is extended where there is acknowledgment or part payment made by the defendant and in cases of fraud and mistake². This chapter will discuss the disabilities that were recognised under the earlier legislation and the present list of disabilities under the Tasmanian Act which are much narrower. The cases where the courts have granted or refused extensions will be examined. The scope of the extensions provision under the Tasmanian Act are rather limited. Accordingly, the broader provisions in the Victorian and United Kingdom, are discussed to allow a comparison between the narrower Tasmanian provisions and these broader provisions of the Victorian and United Kingdom legislation.

5.1 DISABILITIES UNDER EARLIER LEGISLATION

The earliest Imperial legislation³ in addition to disabilities like infancy, unsoundness of mind and a conviction, recognised that a person absent beyond the seas and married women were also under disability.

(i) Absence beyond seas

Various Imperial statutes of limitations⁴ recognised that a person was under a disability for as long as he was 'beyond the seas'. In the Victorian case of Griffith v Bloch⁵, the court

interpreted the words 'beyond the seas' as 'out of the territory', and held that in an action on a bill of exchange, if the defendant is absent in Tasmania when the cause of action arose the statutory period of limitation does not begin to run till he returns to Victoria. Again Platt, B., in Forbes v Smith⁶, said,

"If the plaintiff is abroad when the cause of action accrued, he has six years from his return though they may not be for ten or twenty years; but he is not prevented from bringing his action before his return. So if the defendant is abroad, limitation does not begin to run until six years after his return, but the plaintiff is not obliged to wait until his return."

The Tasmanian Act does not make any provision for the absence of either party to an action from beyond the seas, as a disability. This is also the position with the other Australian states except the Australian Capital Territory and Western Australia. In the Australian Capital Territory, the absence of the plaintiff and defendant overseas is recognised as a disability, and in Western Australia the absence of the defendant overseas is recognised as a disability.

A suggested reason for removing 'absence beyond the seas' as a disability both in England and most of the Australian states may be due to the provisions that now exist for service of process by means of substituted service and for provisions that now exist for service of process out of the jurisdiction⁷. Furthermore, reciprocal enforcement legislation between various countries enables a judgment obtained in Australia to be registered and executed in another country which has such reciprocal agreement with Australia and vice versa⁸.

(ii) Married Women

The Common Law regarded husband and wife as one person and as

such the law incorporated the wife's legal existence into that of her husband. A married woman had no contractual capacity, and her contracts were void. A married woman was incapable of acquiring, enjoying or alienating any real or personal property apart from her husband⁹. The modern law however is that a married woman could and is capable of acquiring, holding and disposing of any property as if she were a feme sole¹⁰. In Tasmania, the Married Women's Property Act, 1935 s. 3, provides that a married woman should:

- a be capable of acquiring, holding and disposing of any property; and
- b be capable of rendering herself and being rendered, liable in respect of any tort, contract, debt or obligation; and
- c be subject to the law relating to the enforcement of judgments and orders, in all respects as if she was a feme sole.

So, the provisions of the Limitation Act are now applicable to a married woman in all respects and thus a married woman is no more under a disability.

5.2 DISABILITIES UNDER PRESENT LEGISLATION

Part II of the Limitation Act, 1974 prescribes the ordinary periods of limitation for various classes of cases there referred to, but section 3 provides, "The provisions of this part have effect subject to the provisions of Part III". In other words, all the limitation period for different classes of action are subject to provisions for their extension in case of disability. Part III is entitled "Extension of Limitation Periods" and is divided into three divisions. The first division deals with Disability; the second with Acknowledgment and Part Payment; and the third division with Fraud and Mistake. Although the Act deals

with (i) disability, (ii) acknowledgment and part payment and (iii) fraud and mistake under the same part, the latter two are dealt with in the next chapter under the heading of Postponement of Time.

The opening section of Part III reads,

"Subject to this section if on the date when any right of action accrued for which a period of limitation is prescribed by this Act the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of 6 years, or in the case of any action for which a less number of years is prescribed by this Act as a period of limitation then such less number of years, from the date when the person ceased to be under a disability or died which ever event first accrued notwithstanding that the period of limitation has expired¹¹.

The Limitation Act, 1974 recognises only four disabilities for purposes of limitation and they are (i) infancy, (ii) unsoundness of mind, (iii) conviction and (iv) disability by reason of war circumstances. The Act states that a person is deemed to be under disability while (a) he is an infant; (b) he is incapable, by reason of mental disorder, of managing his property or affairs; or (c) he is a convict within the meaning of section 435 of the Criminal Code¹².

(i) Infancy

As far as Australia is concerned, an infant is a person under 18 years of age. A person of 18 years now enjoys full contractual capability¹³. If a person is able to prove that when the cause of action arose, such as is referred to in s.5 ie an action in respect of personal injuries he was under 18 years old, he would be able to obtain an extension if he proves he was not, at the time the right of action accrued to him, in the custody of a parent.¹⁴

(ii) Unsound Mind

The disability of unsoundness of mind presumably covers all forms of mental incapacity. A person is conclusively presumed to be of unsound mind in the following cases:

- (a) while he is liable to be detained or subject to guardianship under the Mental Health Act, 1963;
- (b) while the Public Trustee has the powers of the committee of his estate¹⁵.

The interpretation section provides that there should be a conclusive presumption of disability in the above events, so that the running of time is postponed if the disability existed at the time when the cause of action accrued. In Harnett v Fisher¹⁶, a person who was wrongfully detained as a lunatic on the certification of a medical practitioner, was unable to get the benefit of the extension for disability because he was able to prove that he was compos mentis. As a result his action in respect of negligence against the medical practitioner failed as being out of time.

This was obviously an unjust decision as the plaintiff's detention though wrongful, prevented him from suing just as effectively as if he was properly detained¹⁷.

There is no provision in the Act for extension to be granted to a person who is detained after a cause of action has accrued. A person who is detained after the cause of action has arisen is, it is submitted, still under a disability, and the act should make provisions for extension in such cases, as well. S.26 (2) reads,

"Subsection (1) does not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability

claims".

This is very clearly illustrated in Goodall v Skerrat¹⁸, where one of the issues was whether one of the three sisters was barred as to both her original share of the property comprised in a settlement and a share accruing from another sister. When the disseisor entered, both sisters were alive, and the one in question was under coverture (which was a disability at that time). Sometime later, the other sister died and her share accrued. The court held that the surviving sister was not barred as to her original share, because she has been disabled when the right of action arose, but that she was barred as to the accruing share because her sister, who first had the right of action in respect of it, was not disabled when that right arose.

(iii) Conviction¹⁹

Persons defined as 'convict' under s. 435 of the Criminal Code are also under disability under the Tasmanian Act²⁰, so that if a cause of action arises whilst the plaintiff was imprisoned, the statutory period does not commence until after his release.

Of all the other Australian states only Queensland, has a similar provision. This means that time would run against a person in prison in the same way it would do so in normal circumstances. It is submitted that this should also be the case in Tasmania, as solicitors can have access to clients or potential clients in prison for briefing and instructions and the prison authorities could be ordered to produce a prisoner in court for a trial. So, there is no justification to treat a prisoner as being under a disability as he is quite capable of setting the machinery moving for an action, though detained in prison. The Law Reform Commission²¹ in fact recommended that the Limitation Act be amended by omitting the words "other than a convict within the meaning of s.435 of the Criminal Code in s.27(1).

(iv) Disability by Reason or War Circumstances

The Tasmanian Act specifically provides that in the case of any war or circumstances arising out of any war in which the Commonwealth is engaged, any period during which it is not reasonably practicable for a person to commence proceedings would be excluded when computing the time period²². The section also provides that the time period will expire only at the end of 12 months from the date it became reasonably practicable to commence proceedings. The only other Australian state with a similar provision is Victoria²³.

Section 26 and its provisos will be applicable to all actions falling within the Limitation Act, 1974. The extension allowed by the Act for disability is six years, where the Act provides a limitation period of six years or more for a cause of action, and where a lesser number of years for that action is provided, than the extension is such lesser period as provided for that cause of action. This period will be calculated from the date when the person under the disability ceases to be under it or dies, which ever occurs first. However, the Act stipulates that a person under the disability, will not have the benefit of the extension provision of the Act²⁴. Thus, where a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time will be allowed by reason of the disability of the second person²⁵.

Where a person under disability intends to bring an action to recover land or money charged on land, he would have 30 years from the date on which the right of action accrued to him or to some person through whom he claims²⁶. Where an action is brought to recover a penalty or forfeiture, or sum by way thereof, by virtue of any enactment, the person bringing the action may rely on a disability only if he is an aggrieved party²⁷.

In actions in respect of personal injuries for damages for

negligence, nuisance, breach of duty including damages under the Fatal Accidents Act, 1934, a judge is given a discretion, if he thinks it is just and reasonable to do so, to extend the period of limitation up to 6 years from the date on which the cause of action accrued²⁸, notwithstanding that the limitation period had expired²⁹.

Instead of allowing a claimant 30 years to recover land or money charged on land and a maximum of 6 years in respect of personal injuries for damages for negligence, nuisance or breach of duty, it is submitted that a better approach would be to grant shorter periods of time for both recovery of land matters as well as personal injury claims. Coupled with this shorter period, the court should be vested with a residual discretionary power to extend time beyond that period. Once a person ceases to be under a disability, there should be no reason why he should not commence proceedings forthwith, and as such a relatively shorter period of time, should be sufficient once the disability ceases to exist.

However, a discretion vested in the courts would not unduly prejudice claimants, who for some good reasons were not in a position to commence proceedings within the stipulated time period.

5.3 THE OPERATION OF THE EXTENSION PROVISIONS

The Tasmanian Act provides that in cases of disabilities, an extension of the time period provided in the Limitation Act can be sought to accommodate a particular claim. Where such a discretion is given without stipulating the grounds on which the discretion is to apply, as in the Limitation Act, the court looks into the scope and purpose of the legislation before exercising its discretion. This is clearly stated by Dixon C.J. in Klein v Domus Pty Ltd³⁰ where he said,

"This court has in many and diverse connections dealt with

discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised and in a sense this is one such case. We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is investigating the facts and considering the general purpose of the enactment to give effect to the view of the justice of the case....."

The person seeking an extension, must be able to furnish the court with an acceptable explanation for his delay in prosecuting his claim, as noted by Barwick, C.J. in Hall v Nominal Defendant³², where the learned Chief Justice said³³,

"A very short time is set by the statute within which an action against the nominal defendant may be brought, and therefore a power to extend that time is given to a court of law so that justice may be done according to the circumstances. No doubt this extension of time is not as of course. Some acceptable explanation for the failure of the appellant to sue in time must be given before the court is required to consider the substantial question whether it would be just to grant the extension. The door, as it were, must first be opened. No hard and fast rule can be stated defining what may be held an acceptable explanation. But at least, in my opinion, it should be that it is the litigant's failure to sue in time which must be satisfactorily explained."

So the extension, is not as of right and each individual case has

to be examined on its merits. A person who is seeking an extension would be required to give a satisfactory explanation for his delay in prosecuting his claim earlier. If the claimant can furnish some acceptable explanation for the delay in prosecuting the claim and under the circumstance the court thinks it is just to grant an extension, the claimant's request for an extension would be granted.

5.3.1 Cases Where Extension Granted

Extensions have been sought and granted by the courts. The factors relevant to an exercise of the judicial discretion to extend time include the following:

1. Whether the granting of the extension would substantially prejudice the respondent;
2. Whether there is evidence to substantiate the applicant's claim;
3. The applicant's conduct in the prosecution of the case.

In Peter Joseph Scott v Tasmania Broadmills Ltd³⁴, an application was made under S.5(3) of the Limitation Act, 1974 for an extension of time to commence a common law action by the plaintiff against his employer. In the course of his judgment Everett J. referred to the judgment of the Full Court in Knight v Smith³⁵ where it was held that three essential matters should be considered in an application for extension of time, namely,

1. whether or not the granting of the application would result in any substantial prejudice to the respondent in that application;
2. whether or not there is evidence of what has been

termed a prima facie case of negligence or an arguable case of negligence so far as the applicant is concerned, and

3. the conduct of the applicant in the prosecution of the claim.

Justice Everett in granting the application, followed the three principles enumerated by the Full Court and in addition observed that in considering the justice of the case he also took into account the conduct of the employer who had improperly avoided making any payments under the Workers' Compensation Act.

In Scott v Ellis³⁶, an application was made under S.5(3) of the Limitation Act, 1974 for an extension of time. Justice Everett after enumerating the three essential matters discussed in the above case, allowed the extension and said,

"Nor do I accept the argument that because the ultimate period of six years referred to in section 5(3) of the Act has almost expired, there is of necessity prejudice to the respondent. The legislature has fixed a finite period of six years from the date on which the cause accrued. Depending upon all the circumstances, it may be just and reasonable in one case to extend time close to the end of this finite period but not just and reasonable in another case to extend time shortly after the expiry of the three year period referred to in section 5(1) of the Act."

Justice Everett again allowed an extension of time in Mawer v Williams³⁷, where the applicant sought legal advice only on the advice of friends after 5 years from the date of the cause of action. Justice Everett again applied the same three principles which were discussed in the two previous cases.

In the course of the judgment Justice Everett said,

"In all the circumstances I regard the explanation given by the applicant for the delay in the decision to institute proceedings if time is extended as one which is not unreasonable, having regard to his standard of education and his lack of knowledge of the relevant legal provisions, including the question of a time limit for the commencement of legal proceedings. I consider it would be just and reasonable to extend the period for the bringing of the action."

An extension was granted in Guy & Anor v Treffett³⁸. In this case, Chambers J. adopted the three factors outlined above and held that it was just and reasonable to grant the applicants an extension where the delay was due to their solicitors lack of care and negligence. It is submitted that in the above case, extension should not have been granted because of the established principle "that ignorance of the law is no excuse". The applicant's "lack of knowledge of the relevant legal provisions" are certainly a matter of law.

As to the three cases of Peter Joseph Scott v Tasmanian Broadmills Ltd, Scott v Ellis and Guy & Anor v Triffett it is questionable whether an extension should have been granted where the acts clearly showed that the failure to institute proceedings within the stipulated time period was due to the sheer negligence of the solicitors. In such cases, where the solicitor is at fault, the client would not be prejudiced, if an extension is not granted, as the client would have recourse against his solicitor for professional negligence. Further, as solicitors are required to have compulsory professional indemnity insurance, the client would be virtually guaranteed of securing the amount of damages from his solicitors' insurance company.

In the first case Justice Everett noted, "In this case it is clear that there was continuing and substantial negligence by the solicitors who were consulted by the applicant." Again in Scott's case the applicant had since his injuries consulted three

different solicitors who sat on the matter and allowed time to pass by. Chambers J. in Guy's case noted,

"that the failure of the appellants to commence proceedings against the respondent for damages for injuries sustained by them was due, or very largely due, to default on the part of their solicitors".

Surely, in such cases where the solicitor is clearly at fault, extension should not be granted and the applicants should be encouraged to pursue a claim against their solicitors instead.

Section 5(3) it is submitted contemplates a situation where the applicant for some just and reasonable cause has been unable to commence proceedings and to extend the benefit of this section to the applicants' solicitor is certainly to encourage slowness and slackness on the part of solicitors without the prospect of any real penalty.

5.3.2 Cases Where Extension Refused

In John Maxwell Lucas v Trevor John Eadie³⁹ Justice Everett was asked to decide whether an extension of time should be granted to the applicant to pursue a claim based on negligence of the defendant when the defendants' motor car collided head-on with the applicant's vehicle. The applicant saw a solicitor but did not expressly and unequivocally ask his solicitor to institute proceedings. In his judgment, Justice Everett said,

"When Parliament enacted S.5(3) of the Act, and in doing so preserved the language of S.2(2) of the Limitation of Actions Act 1965, whereby jurisdiction to extend the period limited for the commencement of a common law action for damages in respect of personal injuries (now three years from the date on which the cause of action accrued) was conferred on a judge of this court 'if he thinks just and reasonable so to do', it no doubt believed that the

discretion could hardly have been expressed in wider terms. But decisions, binding on me, since the 1965 Act has tendered to make the judicial discretion somewhat sterile, and that sterility will remain so long as the existing form of S.5(3) of the Act is preserved. To what extent (if any) the discretion should be made less trammelled is one of policy for the Executive and ultimately for the decisions of Parliament.". He then went on to say,

"I am bound by the decision of the High Court of Australia in Klein v Domus Pty Ltd (1963) 109 C L R 467 in which the statutory provisions under consideration did not, in my opinion, differ in substance to any significant degree from those of S.5(3) of the Act. In that case, the question was whether an extension of time should be granted under the NSW Workers' Compensation Act in accordance with a judicial discretion to do so expressed as follows:-

'If he' (that is, the judge) 'is satisfied that sufficient cause has been shown, or that having regard to all the circumstances of the case it would be reasonable so to do'. The following extract from the judgment of Dixon C J in Klein's case is relevant at the threshold of a determination of the applicant's rights⁴⁰:

'An analysis of those words, perhaps, indicates that there is not a little difficulty in knowing how the words 'if he is satisfied that sufficient cause has been shown'.

'But there is one thing perfectly clear about the sentence - at all events it is clear to me - and that is that the burden is upon the applicant to satisfy the condition that those words express.

The applicant has got to show that this is a reason, within the expression which I have read, for extending the time, and it is a positive burden on the applicant, not of any

great severity perhaps, but it is positive burden which the applicant must discharge as he must discharge any other matter in which the burden of proof lies on him. The appellant allowed the time to elapse and it is for her to show that there is a reason why it should be extended.

Expressions used in the cases cited before which suggest that the usual thing is to extend and the unusual thing is to refuse to extend time cannot, in my opinion, be supported as indicating the true meaning of this section.

I think that words which I have read, namely, 'sufficient cause has been shown' really mean that a positive reason has been shown and the words immediately following them mean 'or if the positive reason cannot be isolated and put in a distinct form all the facts which are alleged by the appellant amount to - although not dealt with analytically - a sound and positive ground on which an indulgence shall be allowed.'

It is also apposite to bear in mind the following view of Windeyer J. in Klein's case⁴¹:-

'I do not think that there is prima facie right to an extension. And I do not understand why it is said that only in a rare case should an extension be refused, unless it be that in the great majority of cases a sufficient ground for an extension is made out. The applicant must make out a case for permission to agitate something that prima facie time has put to rest. The matter is one for the discretion of the Supreme Court. I should add that I do not think that the words 'or that having regard to all the circumstances of the case it would be reasonable so to do' create an alternative to a 'sufficient cause' as a ground on which an extension may be sufficient cause for extending the time, it could ever be reasonable to extend it.

I therefore read those words as explanatory of what is meant by a 'sufficient cause' rather than as stating a distinct alternative. They obviously confer a wide discretion'....."

Justice Everett did not allow the extension sought stating that the applicant's conduct in this case went against him. In this case the applicant (1) did not expressly and unequivocally ask his solicitor to institute proceedings. (2) He left everything up in the air for 4 3/4 years without any attempt to communicate with his solicitor after the first two initial consultations. (3) The applicant made no enquiry as to what the time limit was despite the fact that he was conscious that there was some time limit, and (4) the applicant waited for 4 years and 9 months before he again consulted his solicitor. In relation to the conduct of the applicant, Justice Everett said that consideration of the applicant's conduct does not begin when the period limited by the statute for commencing an action expires but rather that his conduct during the whole period since the accrual of the cause of action has to be taken into consideration.

So a person seeking extension will have to convince the court that there is sufficient good reasons for granting the extension, as there is no extension as of right.

In re K J Baker⁴², Green, C J was faced with an application for extension of time under S.2(2) of the Limitation of Actions Act, 1965 the language of which was similar to S.5(3) of the 1974 Act. In this case the applicant suffered personal injuries in a motor vehicle accident in which the driver of the motor vehicle was killed. The court found that the failure to commence proceedings within the period of limitation was due directly to the failure by the applicant's solicitors to make adequate inquiries to ascertain whether a competent defendant existed on whom process could be served; their failure to take appropriate steps to have some person appointed to represent the estate; and their failure to advert to the necessity for serving the writ within twelve

months of filing. In dismissing the application, Green C J said,

"In exercising my discretion my finding that the respondent would not suffer any significant prejudice if I granted the application weighs heavily in the applicant's favour. However, notwithstanding that consideration, in all the circumstances I do not consider that the applicant has discharged the burden of persuasion which rests upon him. In reaching that conclusion I am to some extent influenced by the largely unexplained delays which occurred initially in the prosecution of the claim, but I am influenced to a much greater extent by the conclusion that the failure by the applicant's solicitors to find or appoint a competent defendant and serve him in accordance with the rules has not been adequately explained or been shown to have been reasonably excusable. In all the circumstances of the case I do not think it would be just and reasonable to extend the time for the commencement of the action."

It is submitted, that the above decision is sound, as to hold otherwise would only encourage solicitors to be slack in their duty. It would however be argued that because of the neglect of the solicitor, a client's claim is statute-barred and the innocent client is penalised and made to suffer the loss. In such cases, the client certainly has a right of action against his solicitor for negligence and his quantum of damages would be that amount he would have recovered, if his claim was not statute-barred. So the client is not penalised for the neglect of his solicitor.

Section 26(1) allows a person under a disability to use the date upon which he ceases to be under disability, as the date from which the period of limitation is to commence. However section 26(6) makes an important exception namely if the person under the disability was in the custody of a parent, the extension referred to earlier does not apply for an action instituted under section 5 of the Act. The question to be determined here is whether the

term 'custody' in this context is a legal or factual concept. As there are no Tasmanian cases in point, we will examine an English case where the Court had to decide on what the term 'custody' meant. In Hewer v Bryant⁴³ the plaintiff sought to recover damages in respect of personal injuries sustained in an accident when he was 15 years of age. His father had not sued during his minority, and the plaintiff launched his action upon attaining majority. The question was whether the action was barred under S.22 of the Limitation Act, 1939 (UK) as amended by S.(2) of the Law Reform (Limitation of Actions) Act 1954. By the latter provisions, defendants were protected after a three year period 'unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent.' As the plaintiff in this case succeeded in proving that the parents either had not got nor exercised powers of both care and physical control at the material time, the period of limitation did not begin to run. So in practically all cases involving injured infants, the limitation period will be three years from the date of the accident, unless the plaintiff could prove that though he was in the custody of a parent, the parent did not exercise powers of care and physical control over him at the material time.

The cases where extensions can be granted under the Tasmanian Act are rather restrictive and limited compared to the other Australian States like Victoria and New South Wales as well as provisions in the United Kingdom.

Whilst in Tasmania an infant who is in the custody of a parent is not able to get extension of time in respect of personal injury claims, the Victorian Courts have interpreted the word "knowledge" in their extension provision of their limitation Act as that of the claimant and not of his parent, agent or any other person.

For comparative purposes, I have included here a discussion of the relevant legislation and case law both in Victoria and in the

United Kingdom.

In Victoria, Section 23A⁴⁴ of the Limitation of Actions Act, 1958 gives the court a discretion to vary the stipulated limitation period of three years, in circumstances which, broadly speaking, depend on the knowledge of the injured person as to various aspects of his accident and injuries. The injured party is given an opportunity to apply for an extension of the period of limitation. To succeed, the injured party must show that he did not know certain "material facts" relating to his cause of action and would not have known them had he taken all reasonable steps to ascertain them.

S.23A (3) spells out what the material facts include in relation to a cause of action. They are:-

- a the fact of the occurrence of negligence, nuisance or breach of duty on which the cause of action is founded;
- b the nature of the wrongful act, neglect or default that constituted the negligence, nuisance or breach of duty;
- c the identity of the person whose wrongful act, neglect or default constituted the negligence, nuisance or breach of duty;
- d the identity of the person against whom the cause of action lies;
- e the fact that the negligence, nuisance or breach of duty caused personal injury;
- f the nature of the personal injury so caused;
- g the extent of the personal injury so caused; and

h the extent to which the personal injury was caused by the negligence, nuisance or breach of duty.

In addition he must show that the material facts were not known to him until at least two years after the cause of action arose and that he has since known of it no longer than 12 months prior to the application.

A number of cases have arisen concerning the interpretation of various words in S.23A. Firstly, Smith v Browne & Ors⁴⁵ involved a infant who was 5 years old when he received treatment for an eye complaint. Although the event occurred in 1967, the application for extension was made only in 1974. The respondents argued that "claimant" in S.23A of the Act meant "claimant, his servants or agents or parents". The claimant's parents having had knowledge of the material fact for over 12 months, it was argued that this knowledge ought to be attributed to the claimant. Kaye J. rejected this argument and said that the references to 'knowledge' in Section 23A relate to the claimant and to no other person⁴⁶.

Again in Anasiena v H Crane Haulage Pty Ltd⁴⁷ it was held that knowledge of the claimant's solicitor would not be attributed to the claimant as his own knowledge.

The Full Court in Guest v Ingram⁴⁸ confirmed the principle that though an infant is in the custody of his parents and the parents have knowledge of all the material facts of the claim to succeed in an application under S,23A what is important is the personal knowledge of the claimant himself. The court also held that all the claimant need show is that he was ignorant of the material facts for at least two years after the date upon which the cause of action arose and that he could continue to be ignorant even up to the time of the application. Counsel opposing the application argued that at the time of the application, the claimant must have knowledge of the material facts in question. The decision of the court, it is submitted, is correct as an

infant who suffers from a brain damage may never know the material facts indefinitely.

Guest v Ingram was applied in Kosky v The Trustees of the Sisters of Charity⁴⁹ where the Supreme Court in Victoria held that the primary fact which the applicant must establish in any claim against the hospital was that she received a blood transfusion in 1967. This fact was unknown to her until 6 July 1979. The facts known to her prior to that time were not sufficient to give her a cause of action for negligence or breach of duty. She had not failed before 6 July 1979 to take any reasonable steps to ascertain that act. The applicant's application was therefore made within the time stipulated by S.23A(2)..

In all the circumstances the discretion should be exercised to extend the period within which the applicant could bring her action. The court also held that a claimant under S.23A need not establish that his claimed cause of action could be established at a trial. In the present case, there was evidence upon which it could be established at a trial that, as a matter of law, a duty of care was owed by the respondent to the infant. The question whether a duty of care existed in the circumstances alleged should not be determined on an application under S.23A.

For the purpose of S.23A facts which are 'material' for claiming an extension of time include 'the nature of the personal injury so caused'⁵⁰, and 'the extent of the personal injury so caused'⁵¹. In Kosky v The Trustees of the Sisters of Charity the plaintiff was unaware of these facts till 6 July 1979 and thus an extension was granted to her.

In McManamny v Hadley⁵² the respondent, a doctor had performed an operation negligently on one of the claimant's toes. About two and a half years after the operation the claimant had to undergo further surgery which was performed by another doctor. This resulted in partial amputation of the affected toe and other related disabilities to the other toes. Medical evidence showed

that the second operation was necessary because of the inefficient way in which the first operation was carried out.

It was not until the second operation was done that the claimant became aware of the extent to the disability arising out of the first operation. The knowledge first came to the claimant's attention more than two years after the date the cause of action arose, and less than one year before making the application for an extension of the limitation period. The Full Court accordingly granted the application.

In Hevey v Leonard⁵³ the claimant was involved in a car accident in 1970. He knew that he suffered neck injuries in 1973 for the first time when he was informed by his doctor that injuries to his neck were caused by the collision in 1970, but did not know the full nature and extent of his injuries until 1975 when he consulted another doctor who advised him that his work as a driver of a motor vehicle, aggravated the condition of his neck. The earlier doctor had advised him that he could continue with his work. The Full Court dismissed his application. "Injury" in paragraphs (f) and (g) of S.23A of the Limitation of Action Act 1958 means physical injury and not the signs and symptoms thereof; pain and suffering do not constitute the injury but are merely evidence of it. They also held that 'injury within the said paragraphs (f) and (g) does not comprehend effects on the working capacity of the injured person; such effects are consequences of the injury but are in themselves neither 'the nature of the personal injury'; nor 'the extent of the personal injury'. The nature and extent of an injury, the court said, do not depend upon the possible varying prognoses of medical practitioners whom the applicant may consult. Any such prognosis is no more than an expression of opinion as to what the effects of the injury will be in the future, but such an opinion does not reveal to the applicant knowledge of the nature or the extent of injury.

The one feature that distinguishes McManamny's from this case is

the fact that in McManamny's case the extent of his injury could be measured in physical terms as from one affected toe it spread on to the other toes.

For the purposes of an application under S.23A of the Limitation of Actions Act 1958, ignorance of legal rights or legal principles or the legal quality of acts or omissions is not ignorance of a 'material fact' within the ordinary meaning of that expression as used in S.23A(3). Harris v Gas & Fuel Corporation of Victoria⁵⁴ was a case where the claimant suffered injuries in 1968 when a gas stove exploded. However, she did not seek legal advice until she read of a similar case reported in the papers in 1972, where the claimant succeeded. She applied for extension of the limitation period on the basis that she first knew the material facts of her cause of action when she consulted her solicitor. The court in reaching the above decision overruled an earlier decision of Gowans J. in Evans v Repco Transmission Co. Pty Ltd⁵⁵ where it was held that ignorance on the part of the claimant that his employer had a duty to warn him of the danger of exposure to high level noise and to supply him with ear muffs was a material fact for the purpose of S.23A application. The Full Court in disagreeing with Evans case said that the ignorance in this case was ignorance of a legal duty and not a fact.

It is submitted that because S.23A(3) (a)⁵⁶ is drafted in very wide terms, it could be argued that the facts of Harris' case could amount to absence of knowledge of material facts and as such that the claimant's application for an amendment should be granted. The claimant did not know of the fact of the occurrence of negligence until she read in the papers that on similar facts, a court had held that it amounted to negligence and awarded damages. It was only on reading the papers that she first realised that the Gas & Fuel Corporation that installed the stove which exploded and injured her, were negligent. However, there are two limbs to S.23A(2)(a)⁵⁷ and both have to be read conjunctively. So although Mrs Harris might well be able to

satisfy the first limb, she would not be able to satisfy the second limb, as, if she had taken reasonable steps, such as consulting a solicitor earlier, she would have found out that she had a good cause of action. A claimant has to satisfy the court that the material facts of which he was ignorant would not have been known to him even if he had taken reasonable steps to ascertain the material facts apart from consulting his solicitor. Starke J. in his judgment held that putting the matter in the hands of his solicitor was both reasonable and proper.

The effect of S.23A as interpreted by the various cases that have come before the courts on this section seem to indicate the trend towards expanding the limitation period. All the claimants that have come before the courts on this section have succeeded in obtaining an extension, with the exception of Harris' case where the claimant's knowledge was classified as ignorance of law. From an examination of the above cases it is very clear that the knowledge of material fact cannot be attributed to the parent, agent or solicitor of the applicant. Under S.23A it has to be the personal knowledge of the applicant, which alone is material. This, it is submitted, should be the proper means of ascertaining knowledge for purposes of extension, as any other interpretation could leave the unfortunate claimant with no remedy at all, if the claimant's parent or agent had failed to institute proceedings within the stipulated time period.

It is submitted, that a similar provision to S.23A should be incorporated into the Tasmanian Limitation Act, as the present provision limits any extension of the limitation period to a maximum of 3 years and furthermore an infant in the custody of a parent is denied any extension at all. Alternatively, the time provided for extension of up to 3 years should be amended to grant the courts some form of discretion to extend time in suitable cases where it is equitable to do so and no prejudice is suffered by any party.

5.3.3 The Position in the United Kingdom

Having examined the extension provision in Victoria, I will now proceed to examine the extension provisions in the United Kingdom.

The position as far as the United Kingdom is concerned is governed by S.2 of the Limitation Act 1975 (UK)⁵⁸. Although three years is the normal limitation period S.2D gives the court a discretion to extend the period in any case in which it is equitable to do so and if there is no prejudice to any party.

In Fireman v Ellis⁵⁹ the Court of Appeal had to consider a claim for extension of time, where the plaintiff's solicitor had failed in his duty of not having the writ served in time. In granting the application Lord Denning saw the discretion conferred by the Limitation Act 1975 (UK) as a 'revolutionary step'.

He said,

"section 2D as I read it gives a wide discretion to the court which is not limited to a 'residual class of case' at all. It is not limited to 'exceptional cases'. It gives the court a discretion to extend the time in all cases where the three year limitation has expired before the issue of the writ. It retains three years as the normal period of limitation (being three years from the date on which the cause of action accrued, or the date, if later, of the plaintiff's knowledge of the facts) but it confers on the court an unfettered discretion to extend the three year period in any case in which it considers it equitable to do so. The granting of this discretion is a revolutionary step. It alters our whole approach to time bars. I do not regard it as a retrograde step."

Ormrod L. J., referring to section 2D said,

"The language of the section, in my judgment, is quite clear. Having laid down the norm, it then gives the court the widest discretion to adapt this norm to the circumstances of any case in which it would work inequitably. This is, in fact, a statutory analogy of the old tradition by which equity was called in to mitigate the rigidity of the common law in the interests of individual justice In my judgment, therefore, the act should be applied as it stands, and we should be careful not to impose judicial fetters on this new and, to my mind, valuable discretionary power."

In Walkley v Precision Forgings Ltd⁶⁰ the plaintiff had issued and served his writ within the primary limitation period. No further steps were taken in the action within the primary limitation period and it was ripe to be dismissed for want of prosecution. In order to avoid this, the plaintiff's new solicitors issued a second writ on the same cause of action. An application was then made under S.2D to allow the action started by the second writ to proceed. The House of Lords were of the opinion that the plaintiff having brought his action for damages within the primary limitation period, for the very negligence which constituted the cause of action in the second writ, was not affected or prejudiced by S.2A⁶¹.

In Thompson v Brown Construction (Ebbw Vale) Ltd and Others⁶², the appellant was injured when scaffolding on which he was working collapsed, the accident was caused entirely by the negligence of the firm of scaffolders which erected the scaffolding. The appellant instructed solicitors with a view to claiming damages against the scaffolders but the solicitors negligently allowed the three year limitation period prescribed by S.2A (4) of the Limitation Act, 1939 to expire before issuing the writ. When the writ was finally issued, the scaffolders pleaded by way of defence that the action was out of time. Lord Diplock in allowing the appeal and confirming the unfettered discretion of the court under S.2D said,

"My Lords, when the court makes a discretion under S.2D that the provisions of S.2A should not apply to a cause of action, it is making an exception to a general rule that has already catered for delay in starting proceedings that is due to excusable ignorance of material facts by the plaintiff as distinct from his lack of knowledge that the facts which he does know may give him a good cause of action in law. The onus of showing that in the particular circumstances of the case it would be equitable to make an exception lies on the plaintiff; but subject to that, the court's discretion to make or refuse an order if it considers it equitable to do so is, in my view, unfettered. The conduct of the parties as well as the prejudice one or other will suffer if the court does or does not make an order are all to be put into the balance in order to see which way it falls."

5.4 CONCLUSION

Although the disability provisions under the Tasmanian Act prima facie appear reasonable, there could be some instances where injustice could be caused to persons under disability who are under the custody of a parent, in relation to an action for damages for negligence, nuisance or breach of duty.

The Act virtually says that a person in this situation will not have the benefit of the extension provisions⁷⁶ provided in the Act for persons under disability, so that after 3 years his action will be statute-barred unless an extension is granted under S.5(3) which discretion of course is limited to a period of 6 years from the date on which the cause of action accrued. This could give rise to claims being barred in cases where the plaintiff does not realise he has a good cause of action till after the 6 year period has run.

The United Kingdom has overcome this problem by granting an unfettered discretion to the court to extend the time period

beyond the normal 3 year period and this could be one of the alternatives the Tasmanian Act could incorporate. Although a discretionary power is desirable, the discretion should be qualified and not an unfettered discretion which could lead to cases of extension being granted where the plaintiff could have a cause of action against another person such as his solicitor, who is at fault.

Whilst the Tasmanian Act has restricted the application of the extension provisions for disability to persons under the custody of a parent the courts in Victoria have on the other hand given a liberal interpretation to the word "knowledge" as that of the claimant and not of his servant, agent or parent.

NOTES

1. Limitation Act, 1974, (Tas) ss. 26-28
2. Ibid ss. 29-31.
3. Limitation Act, 1623, s. III: 4 & 5 Anne c.3 s. 19:
4. Limitation Act, 1623 (s,III) which covered plaintiffs who were overseas. This provision was later extended to cases where the defendant was overseas by 4 & 5 Anne C.3 S.19 This disability was later removed in England with the passing of the Limitation Act, 1939. In Tasmania the Limitation of Actions Act 1836 recognised absence beyond the seas as a disability. However, the 1875 Act subsequently removed this.
5. (1878) 4 VLR 294
6. (1855) 156 ER 786 at p.788; (1855) 11 Exch. 161
7. Order 11 r.1 (Tas) spells out the circumstances when such summons could be served out of jurisdiction, e.g. when a tort is committed within the State or relief is sought against a person ordinarily domiciled or resident within the State, or where the subject matter of the action is within the state or where parties by contract agree that the court should have jurisdiction.
8. In Tasmania, the relevant provision is the Foreign Judgments (Reciprocal Enforcement) Act, 1962.
9. See Cheshire & Fifoot, Law of Contract 4th Australian Edition para 1801-1809.
10. Law Reform (Married Women & Tortfeasors) Act, 1935 s.1(a).
11. Limitation Act, 1974, s.26(1).
12. Ibid s.2(2)
13. Tas: Age of Majority Act, 1973; NSW: Minors (Property & Contracts) Act 1970; Vic: Age of Majority Act, 1977; NT: Age of Majority Ordinance, 1974; WA: Age of Majority Act, 1972; SA: Age of Majority (Reduction) Act 1930; QLD: Age of Majority Act, 1974; ACT: Age of Majority Ordinance, 1974.
14. Limitation Act, 1974 s.26 (2).
15. Ibid s.3 (3)
16. (1927) AC 573; The Limitation Act, 1623 under which this

case was decided, did not have the equivalent of S.3 (3) of the Tasmanian Act.

17. The position in England would be different in view of the presumption in s. 3(2) of the Limitation Act, 1939, which presumption would operate now to make the plaintiff in Harnett v Fisher (supra) to be of unsound mind by virtue of his detention and thus afford him the benefit of the extension provision for this disability. The presumption under S.3 (3) of the Limitation Act 1939 is similar to the presumption under S.3 (3) of the Tasmanian Act.
18. 61 ER 885; (1885) 3 Drew 216.
19. In England, the Forfeiture Act, 1870 (33 & 34 Victoria C.23) rendered a convict incapable of bringing an action however, when the Criminal Justice Act, 1948 (11 & 12 Geo 6, C.58) came into force on 18th April 1949, it repealed the relevant sections of the Forfeiture Act, 1870, so that in England now, a person in prison is just as competent to commence proceedings as any other and no extension of time is granted to him on the basis of his detention.
20. Limitation Act, 1974; Conviction is also recognised as a disability in Queensland, Limitation of Actions Act 1974-1978 S.5(2).
21. The Law Reform Commission in its Report No. 20 recommended that the Limitation Act be amended by omitting the words "other than a convict within the meaning of s. 435 of the Criminal Code" in s. 27(1).
22. Ibid s.28;
23. Limitation of Actions Act, 1958, s.23 (2)
24. Limitation Act 1974, s.26 (2).
25. Ibid s. 26 (3)
26. Ibid s. 26 (4)
27. Ibid s. 26 (5)
28. Ibid s. 5 (3)
29. Ibid s. 5 (4)
30. (1963-64) 109 CLR 467
31. Ibid s. 473;
32. (1967-68) 117 CLR 423;

33. Ibid at p. 435
34. Supreme Court of Tasmania (Unreported Judgment) Serial No. 9/1979
35. (1975) Tas. S.R. 83
36. Supreme Court of Tasmania (Unreported Judgment) Serial No. 35/1979
37. Supreme Court of Tasmania (Unreported Judgment) Serial No. 46/1979
38. Supreme Court of Tasmania (Unreported Judgment) Serial No. 43/1975
39. Supreme Court of Tasmania (Unreported Judgment) Serial No. 65/1979
40. at page 472 & 473
41. at page 474
42. Supreme Court of Tasmania (Unreported Judgment) Serial No. 3/1974
43. 1969 Sol Jo 525: See also 'Custody of a Parent' (1969) Sol Jo 514:
44. This section was inserted by the Limitation of Actions (Personal Injuries) Act, 1972 and came into operation on 1st January, 1973 and operates retrospectively.
45. (1974) V R 846
46. Smith v Browne & Ors was followed in Neilson v Peters Ship Repair Pty Ltd (Supreme Court of Queensland (Unreported Judgment) No. 970/80) where the Supreme Court in Queensland held that for the purpose of S.31 (2) of the Limitation of Actions Act 1974-1978 (Qld) empowering the extension of the period of limitation for bringing an action for personal injury where a material fact of a decisive character was not within the means of knowledge of the applicant's solicitor is not necessarily the knowledge of the applicant.
47. (1974) V R 670
48. (1977) V R 539
49. (1952) V R 961
50. S. 23A (3) (f)
51. S. 23A (3) (g)

52. (1975) V R 705
53. (1976) V R 624
54. (1975) V R 619
55. (1975) V R 150
56. 23A (3) For the purpose of sub-section (2) "material facts" in relation to a cause of action include - (a) the fact of the occurrence of negligence, nuisance or breach of duty on which the cause of action is founded.
57. 23A (2) where on the application to a court by or on behalf of a person (in this section called "the claimant") claiming to have a cause of action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently or any contract or any such provision) the damages claimed by the claimant consist or include damages in respect of personal injuries to any person and it appears to the court that - (a) any of the material facts relating to the cause of action -
- (i) was not known to the claimant; and
 - (ii) would not have been known to the claimant if he had taken all reasonable steps in the circumstances of the case to ascertain all the material facts.
58. This section was inserted by the Limitation Act 1975 S.1
59. (1978) QB 886
60. (1979) 2 ALL E R 548
61. The provision of S. 2A are those which require an action for personal injuries brought within three years.
- (1) if it appears to the court that it would be equitable to allow an action to proceed having regard to the degree which -
 - (a) the provisions of Section 2A or 2B of this Act prejudice the plaintiff or any person whom he represents, and
 - (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents, the court may direct that those provisions shall not apply to the action, or

shall not apply to any specified cause of action to which the action relates.

(2) in acting under this section the court shall have regard to all the circumstances of the case and in particular to

- (a) the length of, and the reasons for, the delay on the part of the plaintiff.
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 2A or as the case may be under section 2B.
- (c) the conduct of the defendant after the cause of action arose including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant.
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action.
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages.
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

62. (1981) 2 ALL E R 296

63. Limitation Act, 1974, s.26.

CHAPTER 6. POSTPONEMENT OF TIME

Generally, when the time stipulated for bringing an action expires, the claim is said to be statute-barred, and the defendant has a good defence under the Limitation Act. However, the Limitation Act recognises certain acts of the defendant as postponing the running of time. In cases where a party has made an acknowledgment, that is where he admits owing a debt, or made a part-payment by making a payment to account of the claim and in cases of fraud or mistake the Limitation Act postpones the running of time stipulated in the Act.

In certain cases, at the expiration of the stipulated period, the claimant's remedy is barred but in other cases such as landed property, effluxion of time could lead to the barring of the right. The early English Limitation Act, 1623 did not contain any provisions for acknowledgment. The courts, nevertheless, recognised that acknowledgment should have some effect on a statute-barred debt.

In the absence of Tasmanian case law, this chapter will discuss the early English cases on acknowledgment before looking at the acknowledgment provisions under the Tasmanian Act, which deal with money claims and the following,

- (i) actions to recover land
- (ii) foreclosures and
- (iii) redemption

This chapter will also discuss the doctrine of fraud and mistake, and examine the effect of both these doctrines on the running of time.

6.1 ACKNOWLEDGMENT AND PART-PAYMENT

Where a debtor, in writing admits owing a creditor a liquidated sum of money, he is said to have acknowledged the debt as in

Cohen v Cohen¹ where the defendant against whom the plaintiff obtained a total sum of thousand pounds upon various causes of action, some well founded and some not, gave the plaintiff a document in these words; "In case of my becoming bankrupt and death I owe your one thousand pounds for money lent"; In law none of the causes of action were money lent, although a layman might have so described them. The court held that there was absolute acknowledgment sufficient to take the cause of action out of the statute of Limitation.

Similarly, if he makes any payment to account of the debt, he is said to have made a part-payment.

The effect of an acknowledgment or part-payment in respect of an existing liability is to postpone the time for the commencement of the Limitation Act and allow time to run afresh. Where a party has made an acknowledgment or part-payment, a fresh period of limitation commences to run from the time of the acknowledgment or part-payment and this new time period will be of the same duration as the original period stipulated in the Act for that cause of action.

So where A has 6 years from January 1981 to bring an action against B and B either acknowledges A's claim or makes a part-payment to A in January 1985, time will commence to run afresh from January 1985. In other words, A will have 6 years to institute proceedings against B from January 1985, and not from January 1981 when his cause of action against B first arose. As Lawton J., observed in Busch v Stevens² this provision

"provides that in the specific circumstances of an acknowledgment or payment the right shall be given a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth - and also like the phoenix, it is still itself."

The provision relating to acknowledgment and part-payment would

be applicable to the following actions;

- (i) actions to recover land or personal property³,
- (ii) foreclosure or other action in respect of real or personal property⁴,
- (iii) actions to redeem land of which the mortgagee is, by virtue of the mortgage in possession⁵,
- (iv) actions for debt or other liquidated pecuniary claims⁶,
and
- (v) claims to the personal estate of a deceased person or to any share or interest therein⁷.

However, it must be noted that an acknowledgment made or part-payment given after the expiry of the stipulated period would be ineffective, where the effluxion of time has barred the right of the plaintiff⁸. In other words, if by the effluxion of time the defendant obtains title to land, then any subsequent acknowledgment by him or part-payment made by him will not affect his position nor will it give the plaintiff a cause of action against the defendant. But an acknowledgment or part-payment made or given in cases where the effluxion of time has merely barred the plaintiff's remedy will entitle him to institute proceedings against the defendant, as the effect of that acknowledgment or part-payment by the defendant is to start time running from the date of the acknowledgment or part-payment.

Like an individual, a company can also acknowledge a debt as was the decision in In re Coliseum (Barrow) Ltd⁹ where it was held that where money was owing to a shareholder, the issue to him of annual accounts showing the outstanding liabilities, including the liability to the shareholder, will keep the debt alive so long as the accounts continue to be issued and supplied to the creditor. However, the accounts will not act as acknowledgments.

in favour of any signatory of the accounts and also the person signing the document which would otherwise be an acknowledgment must be an authorised agent of, the company¹⁰. Although there is no difficulty in accepting that a debt to a shareholder whose name and amount of the debt is reflected in the company accounts, amounts to an acknowledgment, it is difficult to accept the decision of the Court of Appeal in Jones v Bellgrove Properties Ltd¹¹. In this case it was held that a statement in the balance sheet "Sundry Creditors - £7,638 8s, 10d" was an acknowledgment in writing of a debt of £1,807 claimed by the plaintiff. As the term 'sundry creditors' is a general term referring to all creditors and as no specific mention was made to the plaintiff, it is submitted that there could be no acknowledgment of the plaintiff's debt.

Although acknowledgment and part-payment have different effects depending on whether effluxion of time has barred the right or the remedy, it is possible that both effects could occur in respect of the same matter. If, for example, a mortgagor stays in possession of the mortgaged property for twelve years without paying any interest to the mortgagee, the mortgagee is precluded from bringing any action to redeem the land. The Act states, 'When a mortgagee of land has been in possession of any mortgaged land for a period of 12 years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him'¹².

At the same time the title of the mortgagee is extinguished in this case as 'at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action or an action to compel discharge of a mortgage) the title of that person to the land shall be extinguished'¹³.

In other words, where time has run out, the mortgagee's remedy against the land by way of foreclosure can never be revived by

an acknowledgment or part-payment made by the mortgagor, although it could revive the mortgagee's personal remedy against the mortgagor.

6.1.1 Early English Position

In tracing the history of acknowledgment, it must be noted that the earliest of the English Limitation Act namely the Limitation Act, 1623 did not contain any provision regarding acknowledgment. Although the 1623 Act, did not contain any provision for acknowledgment, the courts were prepared to recognise that acknowledgment should have some effect on a statute barred debt. As Viscount Cave said in Spenser v Hemmerde¹⁴ after observing that the 1623 Act made no reference to any acknowledgment,

".... but it was held in a series of cases that a promise by the debtor to pay the debt, if given within six years before action brought, was sufficient to create a new contract and so to take the case out of the operation of the statute, the existing debt being a sufficient consideration to support the promise. It was also held that a simple acknowledgment of the debt, without any express promise, was sufficient for the purpose, an acknowledgment implying a promise to pay."

However, in Tanner v Smart¹⁵ it was held that an acknowledgment did not revive the debt unless it contained within itself, expressly or by implication, a fresh promise to pay. There will be a fresh promise to pay if the person making the acknowledgment renews and affirms without condition or qualification his obligation to pay. Even if the acknowledgment shows that the debt has never been paid it is immaterial, unless it contains a fresh promise to pay.

Wigran V-C, in Philips v Philips¹⁶ stated,

"The legal effect of an acknowledgment of a debt barred by

the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived, it is revived as a consideration for new promises. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt when he is able, or by instalments or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

The kind of acknowledgment needed has been described by Mellish, L.J., in The River Steamer Company¹⁷ thus;

"There must be one of three things to take the case out of the Statute. Either there must be an acknowledgment of the debt from which a promise to pay is implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

So the position under the early English cases was that there should be an unconditional acknowledgment of the debt and an implied promise to pay the same or an unconditional promise where the condition has been performed before the person who makes the acknowledgment could be held liable¹⁸.

In the event that the person making the acknowledgment proposes payment of a specified sum, then the liability of that person would be limited to the extent of the sum specified. So in Hepburn v McDonnell¹⁹ the plaintiff, by his solicitor, wrote to the Defendant a letter stating that the Defendant had made no attempt to reduce her indebtedness, that the plaintiff required payment of the money and interest, and that any reasonable proposal put forward by the defendant would be considered. In

reply the defendant wrote to the plaintiff:

"I was indeed more than surprised to receive a letter through your solicitor re my indebtedness to you. Well, in the first place I always knew, and had intended to pay you a certain sum, which I knew was indebted... I am offering you 26s. per year until the war is over, and then when my daughter is of age we can sell some land, which I shall advise them to give you a portion... At any rate this is the best offer I can offer at present - what the future brings forth rests in God's hands.. I trust you will see your way clear to answer this at once, and trust my word to do what I say I will."

In an action brought by the plaintiff against the defendant, the sum, including the sum specified in his letter to the defendant, the defendant pleaded the Statute of Limitations (UK), and the plaintiff relied on the defendants' letter as being an acknowledgment in writing of the debt sued upon. The court held that the defendants' letter contained an unconditional acknowledgment of the debt to the extent of the sum specified in the plaintiffs' letter, and that there was nothing in the defendants' letter to contradict the implied promise to pay arising from that acknowledgment, and therefore that there was a sufficient acknowledgment within Lord Tenterden's Act²⁰ of the plaintiffs claim to the extent of the specified sum.

In stating the general principles as to acknowledgments and promises to pay, Dixon, J. in Bucknell v Commercial Banking Co of Sydney Ltd²¹ said,

"An express promise in writing by the debtor to pay revives his liability. But the liability is revived only according to the tenor of the promise. It is so expressed as to be conditional or subject to limitations, the condition must be fulfilled before liability becomes enforceable and the limitations must be observed. But, although a document

relied upon as an acknowledgment contains no express promise, it may effect a revival of the debtor's liability if there is found in it a distinct admission of the debt. The law implies from an acknowledgment of the existence of the liability, a promise to discharge it. Words clearly acknowledging that the writer is liable to pay suffice to raise the implication. But although the promise is implied as an artificial legal consequence of the written admission of liability and is not the result of a search after the true meaning disclosed in the writing, yet if the document in which the admission occurs expresses an intention inconsistent with the making of such a promise or an intention consistent with the making of such a promise or an intention consistent only with the making of a qualified promise, the implication will be rebutted or qualified accordingly. Thus, if the context includes a flat refusal to pay, the admission of liability cannot be made the foundation of an implied promise to discharge the debt."

So, although generally from an acknowledgment, there would be an implication to pay, if the document containing the admission expresses a contrary intention or if it contains only a qualified promise, the courts will give effect to such intention or qualified promise as contained in the document.

6.1.2 The Tasmanian Position

Acknowledgment and Part Payment are dealt with under Division II of Part III of the Tasmanian Act²².

Under the Limitation Act, 1974 both simple debts as well as speciality debts are treated in the same way in that where any right of action has accrued to recover either a simple debt or a speciality debt, and there has been either an acknowledgment of part-payment by the debtor, the right is to be treated as having accrued on and not before the date of acknowledgment or part-payment. This would mean that the period of limitation could

be indefinitely extended by part-payment or acknowledgment as each time there is an acknowledgment or a part-payment time would accrue from the date of acknowledgment or the last payment.

Acknowledgment and part-payment may in all cases be made by the agent of the person required to make them, and to the agent of the person required to receive them²³.

However, where an acknowledgment or payment made by an agent is relied on it must be one which he has authority to make.

The agent may have been expressly appointed or his agency may be inferred. The authority of the agent to acknowledge or make payment must be continuing. So that although payment or acknowledgment by an agent has the same effect as payment or acknowledgment by the principal, it is a question of fact whether the person making the payment or acknowledgment was an agent for that purpose.

The effect of acknowledgment and part-payment on all debts, whether by simple contract or speciality, and claims to shares in the personal estate of deceased persons is that it runs from the accrual of the right to receive the same²⁵.

However, it runs in respect of simple contract debts time runs from the accrual of the cause of action.

In Section 29(4) the expression "right of action" is used and that expression is given a wide definition by s.2(8) to cover both classes of cases.

To be effective, an acknowledgment or part-payment must be made by "the person liable or accountable thereof", or his agent. This means primarily the principal debtor, or, in the case of a claim to share in the personal estate of a deceased person, the personal representative.

Since there is no case law in Tasmania, English cases will be examined and as the wording in the English and the Tasmanian Acts are similar, the English decisions would be applicable in Tasmania.

(i) Acknowledgment

Where any right of action, including a foreclosure action, to recover land has accrued, or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property has accrued, and the person in possession of the land or personal property acknowledged title of the Crown to whom the right of action has accrued, the right is deemed to have accrued on and not before the date of the acknowledgment²⁶.

This provision applies to a right of action to recover land accrued to a person who is entitled to an estate or interest taking effect on the determination of an entailed interest and against whom time is running under the limitation provisions relating to defective disentailing assurances, and on the making of the acknowledgment that provisions ceases to apply to land²⁷.

An acknowledgment made to a mortgagor after he had been made a bankrupt is ineffective as the equity of redemption is then vested in his assignee and the bankrupt is not the assignee's agent. This was the decision in Markwick v Hardingham²⁸.

In order to amount to an acknowledgment of the claim, a statement made by the debtor must admit his indebtedness and his legal liability to pay. If he denies the liability in some way, as for instance by pleading a set-off or counter-claim, the statement is not an acknowledgment and time does not begin to run afresh.

Also, an acknowledgment can only start time running afresh, if it amounts to an admission by the debtor that the debt remains due. So in a case where, the debtor denies liability, time does not run afresh. This was the decision of Kerr J. in Surrendra

Overseas Ltd v Government of Sri Lanka²⁹ where he held that a debtor could only be taken to have 'acknowledged the claim', if he had, in effect, admitted his legal liability to pay that which the creditor was seeking to recover, and that if the debtor denied liability, whether on the ground of an alleged set-off or cross-claim, then his statement did not amount to an acknowledgment of the creditor's claim.

Alternatively, if he contended that some existing set-off or cross-claim reduced the creditors' claim in part, then the statement, taken as a whole, could only amount to an acknowledgment of indebtedness for the balance. In order to be a valid acknowledgment, the Act stipulates that every acknowledgment must be in writing and signed by the person making the acknowledgment³⁰ or his agent³¹.

However as Parke B., observed in Bodger v Arch³², writing is, however, only necessary to an acknowledgment by words, not where it is "coupled with a fact". Normally the "fact" is payment of money, but it may be a payment in money's worth. Thus in Bodger's case, the parties agreed that the maintenance of the creditors' child which the parties agreed shall be treated as equivalent to a payment in money. Not only should the acknowledgment be in writing and signed, it must also be made to the person, or to an agent of the person, whose title or claim is being acknowledged.

A person is not an agent for the purpose of making an acknowledgment or part-payment unless he is duly authorised to make it. The court held in Newbould v Smith³³ that payments of interest to the mortgagee by the mortgagor's solicitor, after the solicitor had ceased to act for the mortgagor was ineffective.

Although an acknowledgment has to be in writing and signed by the maker or his agent, no particular format is required.

The present position since 1939 is aptly summarised by Harman J., in Wright v Pepin³⁴ where he said,

"All that is necessary, as it seems to me, for an acknowledgment which takes the case out of the statute is that the debtor should recognise the existence of the debt, or that the person who might rely on the statute should recognise the rights against himself."

Once there is an acknowledgment, it would be an effective acknowledgment even though the debtor says he would not pay the debt. Lord Denning, M.R. in Good v Parry³⁵ said,

"Nowadays, as the result of this new Act, there is no necessity to look for a promise express or implied. There need only be an acknowledgment of a debt, or other liquidated amount. That means, I think, that there must be an admission that there is a debt or other liquidated amount outstanding and unpaid. Even though the debtor says in the same writing that he will never pay it, nevertheless it is a good acknowledgment."

Kerr J. in Surrendra Overseas Ltd v Government of Sri Lanka³⁶ made the following observation:

"Section 23(4) of the 1939 Act omits the words 'or promise' and it is now clear and common ground that an implied promise to pay is no longer required."

It would appear that an acknowledgment would be valid though it did not specify the amount of the debt, provided extraneous evidence could be adduced as to the amount without the parties' further agreement.

Diplock, L.J. in Dungate v Dungate³⁷ said,

"There is a clear authority that an acknowledgment under the Limitation Act, 1939 need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by

extraneous evidence."

There cannot however be an acknowledgment of an unliquidated claim. Lord Denning, M.R. in Good v Parry³⁸ said,

"A person may acknowledge that a claim has been made against him without acknowledging any indebtedness. It is clear that what the Limitation Act, 1939, means is 'acknowledges the debt or other liquidated pecuniary amount' In order to be an acknowledgment, however, the debt must be quantified in figures or, at all events, it must be liquidated in this sense that it is capable of ascertainment by calculation, or by extrinsic evidence, without further agreement of the parties."

Sections 31(5) and (6) prescribe the effect of an acknowledgment. An acknowledgment of a money claim binds only the "acknowledger and his successor". The word "successors" is however widely defined in s31 (10) and means in this connection "personal representatives and any other person on whom.... the liability in respect of the debt or other claims devolve(s), whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise."

Therefore an acknowledgment by a debtor will not bind a co-debtor or a surety for the debt but will bind his personal representatives and his trustee in a subsequent bankruptcy. However, in the case of a part-payment made in respect of a money claim. "all persons liable in respect thereof" are bound³⁹.

(ii) Part-Payment

The effect of a part-payment is similar to an acknowledgment in that time runs afresh from the date of part-payment. The effect of part-payment are dealt with in s. 31 (7) & (8) of the Limitation Act, 1974.

In the case of a foreclosure or other action by a mortgagee, if the person in possession of the mortgaged property or the person liable for the mortgage debt makes any payment in respect of it, be it principal or interest, the right of action is deemed to have accrued on and not before the date of payment⁴⁰.

Similarly, in redemption actions, where a mortgagee is in possession of the mortgaged land and either receives any sum in respect of the principal or interest of the mortgaged debt, an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment⁴¹.

Where an action is brought to recover debts and legacies the same principle applies and therefore where the person liable or accountable makes any payment in respect of the debt or legacy, the right is deemed to have accrued on and not before the date of the last payment⁴².

However, payment of part of the rent or interest due at any time does not extend the period of claiming the remainder then due, but any payment of interest is treated as a payment in respect of the principal debt⁴³. In re Wilson⁴⁴, there was an agreement that the creditor should live rent free at the debtor's farm and be provided with farm produce. On this principle, it is quite possible to have part-payment without actual passing of money. Thus in Maber v Maber⁴⁵ a father after calculating the interest due to him from his son, stopped the son as he was putting his hand into his pocket and wrote a receipt which he gave to the son's wife, saying he made her a present out of the interest. It was held that any facts which would prove a plea of payment of interest in an action brought to recover it would be a payment sufficient to stop time running. Similarly, in Amos v Smith⁴⁶ there was held to be a sufficient payment where a wife gave a receipt for interest to trustees to prevent them making a claim on her husband to whom they had lent the fund.

As in cases of acknowledgment, for purposes of part-payment, a person is not an agent unless he is duly authorised to make part-payment.

The remaining provisions dealing with acknowledgments in the Limitation Act will be discussed under the following headings⁴⁷:

(1) Actions to recover land.

(2) Foreclosures, and

(3) Redemption

(iii) Actions to Recover Land

A person to whom a right of action has actually or notionally accrued under ss 10-15, will not be barred after the ordinary period, if an acknowledgment of his title has been made to him or his agent. Acknowledgment is a statement or statements from which an admission of the true owner's title can be implied. Thus in Fursdon v Clogg⁴⁸, where the occupier, in answer to a demand for rent, asked for an allowance to be made from it for the cost of litigation he had been involved, it was held that an admission that rent was due was a good acknowledgment of the landlord's title. Again in Dublin Corporation v Judge⁴⁹ an application for a lease made by the occupier to the true owner has been held to be an acknowledgment. But in Doe d Curszon v Edmonds⁵⁰ where the occupier wrote:

"Although, if matters were contested, I am of the opinion that I should establish a legal right to the premises in question, yet under all the circumstances, I have at length determined to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years", it was held that there was no acknowledgment.

The effect of an acknowledgment of the title to land by any

person in possession is to bind all other persons in possession during the ensuring period of limitation.⁵¹

Time starts to run afresh from the acknowledgment, and no person, whether claiming through the acknowledgment or not, can rely on the period of adverse possession before the acknowledgment. Although not expressly stated, s31 (1) implies that an acknowledgment made after the statutory period has expired is ineffective, as the title is then extinguished and there is nothing left to acknowledge.

(iv) **Foreclosures**

In foreclosure actions, in addition to the postponement of the accrual of the right to foreclosure in a case of acknowledgment⁵², provisions is made in s29 (2) for such postponement in the case of payment on account of the mortgage debt. So, where the right to foreclose the mortgage has accrued, namely, where the date fixed by the mortgage deed for redemption has passed and either the person in possession or the person liable for the mortgage debt makes payment, whether of principal or interest, time will only run from the date of payment.

Once the statutory period has expired, the right of foreclosure is barred and an acknowledgment or payment is ineffective to restore it. As Romer J., noted in Kibble v Fairthorne⁵³,

"A mortgagee has two remedies: one being against the land comprised in his mortgage, and the other against the mortgagor, personally, to recover the moneys secured.. As to the land, it is provided that when the statutory limitation operates, not only is the remedy against the land barred, but the mortgagee's interest in it is extinguished. In the second set of provisions - those relating to personal remedies - the statutory limitation has a different effect. There, only the remedy is barred, the debt itself not being extinguished."

(v) Redemption

In redemption actions, where there is only a single mortgagee in possession, any acknowledgment by the mortgagee in possession or receipt by him of principal or interest extended the time for redemption⁵⁴.

In the event of two or more mortgagees in possession, an acknowledgment given by one of the mortgagees binds him and his successors but does not bind the other mortgagee⁵⁵.

It is interesting to note that unlike s.29(3) which clearly states that any acknowledgment or receipt of principal or interest extends the time for redemption, s.31 (3) omits any reference to receipt of any sums of money to account of principal or interest. s.31 (3) reads "Where two or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor's title or of his equity of redemption or right to discharge of the mortgage by one of the mortgagees shall only bind him and his successors and shall not bind any other mortgagee or his successors: and where the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgaged debt, the mortgagor shall be entitled to redeem or to compel discharge of the mortgage of that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land." s.29 (3) reads "Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiration of 12 years from the date of the payment or acknowledgment." Surely, a receipt of payment of interest or principal should have the same effect as an acknowledgment but in the absence of express provisions, it

would be interesting to see if the courts are prepared to read that into the subsection.

Section 31 (3) may also cause practical difficulties when it comes to conveying an undivided share as a result of an acknowledgment made by one of the two mortgagees lending as trustees on a joint account.

However, if two mortgagees lending on a joint account take possession separately of different parts of mortgaged land, then there could be no problem, if one of the mortgagees makes an acknowledgment. In such a case the latter part of s.31 (3) provides that the mortgagor may redeem the part of the land in the possession of the mortgagee who has made an acknowledgment.

He may do so on payment of a part of the debt proportionate to the value of the land. Where there are two or more mortgagors and acknowledgment is made to one of the mortgagors, it is deemed to have been made to the other mortgagors as well⁵⁶.

Again, it is to be noted that s.29(3) refers to receipt of any sum on account or acknowledgment of title by a mortgagee in possession, but there is no reference in s.31 (4) to the receipt of any sum on account.

6.2 Fraud

Section 32(1) of the Limitation Act, 1974 (Tas), applies in the case of any action for which that Act prescribes a limitation period, except that a purchaser for valuable consideration who is not a party to the fraud and who did not at the time of the purchase know or have reason to believe that any fraud has been committed is protected⁵⁷. It enacts that where:

- (a) any action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;

(b) the right of action is concealed by the fraud or any person referred to in paragraph (a):....the period of limitation shall not begin to run until the plaintiff has discovered the fraud...or could with reasonable diligence have discovered it.

Paragraph (a) would cover common law actions⁵⁸ in which fraud is a necessary ingredient as in the tort of deceit. For an action based on the tort of deceit, the period is 6 years⁵⁹, but obviously it must be "based on the fraud of the defendant" within S 32 (1)(a) of the Act, in which event the limitation period does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

The word 'fraud' in s 32 (1) is not limited to deceit or dishonesty used in the common law sense⁶⁰, but to other types of fraud as well. Paragraph (b) would include the equitable doctrine of concealed fraud⁶¹. In Archer v Moses⁶² the covering up of foundations which did not accord to specification was held to be concealment by fraud of the cause of action. So also was a failure to disclose to a purchaser facts showing a risk of the subsidence of a house⁶³. Further, in Clarke v Wooll⁶⁴, Lawton J., said referring to the Limitation Act, 1939, that 'fraud' in the context of the Statute of Limitation is not limited in its meaning to the tort of deceit and includes the kind of conduct known as equitable fraud. He adopted the judgment of Lord Evershed M.R. in Kitchen v The Royal Air Force Association⁶⁵, where he said;

"...it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

Thus, where the defendant who sold a plot of land to the plaintiff and agreed to build a house on the plot with a certain quality of brick and subsequently replaced inferior quality

bricks was held liable⁶⁶. Lawson J. held that there was such a special relationship because the defendant knew the plaintiff was relying on a decent honest performance of the contract and he was not employing anyone else to supervise the performance of it. The defendants behaviour was unconscionable because, at the time he made the contract, he knew he could not perform it to the very letter.

Paragraph (a) and (b) have also been applied to fraud in its tortious and criminal meaning⁶⁷, and to fraudulent breaches of trust⁶⁷.

Whenever a person makes a false statement which he does not actually and honestly believe to be true or which he did not know to be true, or know or believed to be false, he is deemed to have made a fraudulent statement⁶⁸.

Equity recognised the doctrine of concealed fraud, which occurs when a person committing a wrong or a breach of a contract, conceals the right of action of the other party by fraud. Kindersley V-C defined fraudulent concealment of a proprietary right in Petre v Petre⁶⁹ as,

"a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right and by means of such concealment enables himself to enter and hold."

Although in most cases involving fraudulent concealment there is an active concealment on the part of the person charged, a non-disclosure by a person who is under a duty to disclose, would amount to an active concealment of the fraud, as was the decision in Montgomeries Brewery Co Ltd v Blyth⁷⁰ where the court held that a non-disclosure by the directors of a company of the fact that they participated in secret profits fraudulently made in connection with the promotion of the company amounted to such concealment as to prevent the Statute of Limitation from

commencing to run in their favour before their fraudulent conduct had been discovered by the company.

The equitable doctrine of concealed fraud received limited statutory recognition with the enactment of the Real Property Limitation Act⁷¹. Although the equitable doctrine applied to all claims in equity and to plaintiffs who had the means of knowledge itself, the statutory provision was limited to recovery of land or rent and time commenced to run when the plaintiff could have known of his rights. Subsequently, a similar provision to s.26 of the Real Property Limitation Act, 1833 was incorporated into the Limitation Act, 1939⁷² except that under the latter Act it was not limited to recovery of land or rent. The provision in Tasmania is similar to that in England⁷³.

Prior to 1939 in order to invoke the equitable doctrine of concealed fraud it must be shown that the defendant has acted in an "unconscionable" manner either by concealing the plaintiffs cause of action from him or by failing to make the plaintiff aware of the facts from which a cause of action would arise. Unless the defendant had been aware of the facts alleged to have been concealed, there could be no fraud.

The present position on concealed fraud has been aptly summarised by Lord Denning M.R. in King v Victor Parsons & Co⁷⁴:

"The word 'fraud' here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be 'against conscience' for him to avail himself of the lapse of time. The cases show that, if a man knowingly commits a wrong (such as putting in a bad foundation to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim. In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrong-doing or

breach of contract. It is sufficient that he knowingly committed it and did not tell the owner about it. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the cases. To this word 'knowingly' there must be added 'recklessly'. Like the man who turns a blind eye, he is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk if it being so. He refrains from further inquiry lest it would prove to be correct; and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive; but that does not matter. He has kept the plaintiff out of the knowledge of his right of action; and that is enough. If the defendant was, however, unaware that he was committing a wrong or a breach of contract, it would be different. So if by an honest blunder he unwittingly commits a wrong (by digging another man's coal), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations."

From the judgment of Lord Denning M.R., it is clear that section 26 of the Limitation Act, 1939 is not limited to fraud in the common law sense; and is not limited to cases of active concealment. Further, cases of recklessness are also covered by that section. This, it is submitted should be the position in Tasmania, as the wording of s.32 of the Limitation Act, 1974 is much the same as the Limitation Act, 1939. In Tasmania the Limitation Act deals with actions based upon fraud⁷⁵ as well as rights of action concealed by fraud⁷⁶, similar to the English position.

Although at common law neither actions based on fraud nor fraudulent concealment could postpone the running of time, equity did allow the running of time in both cases to be postponed until the plaintiff was only barred at the expiration of six years

after actual or notional discovery⁷⁷. The effect of S 32(1) of the Limitation Act, 1974 is to postpone the commencement of the limitation period to the time of discovery of the fraud. So, as long as the plaintiff is ignorant of the fraud, through no fault of his own, time will not run under the Act. However, it should be noted that the protection afforded by the Act is limited to the original miscreant and a bona fide purchaser for value without notice of the defence afforded by the statute, will be protected.

As Lord Denning said in Eddis v Chichester Constable⁷⁸,

"But, the property reached the hands of someone who took it in good faith and for value without notice of the fraud, such a man could avail himself of the Statute of Limitation. Equity did not deprive innocent purchasers of the benefit of the statute. Nor did the law."

S 32 (2) of the Limitation Act, 1974 clearly states that where a person has given valuable consideration and was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed, the transaction would be protected, despite the fraud of the original miscreant⁷⁹. The Act also attributes to the defendant, any fraud or fraudulent concealment by the defendant's agent or other person for whose acts he is responsible⁸⁰. So although in cases of fraud or fraudulent concealment, the effect of the Limitation Act is to postpone the running of time till the plaintiff has discovered the fraud, any purchaser who has furnished valuable consideration and who is ignorant of the fraud or does not have reason to believe that the property has been the subject of fraud will be protected in that no action can be successfully brought to set aside or recover that property.

To succeed in an action under s.32 of the Limitation Act, it would be necessary for the plaintiff to establish and prove fraud; as where the word 'fraud' is used in the context 'action

based on fraud', the reference is to such fraud as an essential ingredient of the cause of action⁸¹. Lord Greene, in referring to s.26 of the Limitation Act, 1939⁸² said in Beaman v A.R.T.S. Ltd⁸³,

"It must be borne in mind that S 26 is a section of general application. It applies to every sort of action which is affected by the Act. Of these, many can properly be said to be based upon fraud; for example, an action for damages for deceit and an action claiming rescission of a transaction brought about by fraud."

In all cases fraud is a necessary allegation in order to constitute the cause of action. In other actions covered by the Act fraud is not a necessary allegation at all and the action of conversion is one of them.

6.3 MISTAKES⁸⁴

Another ground for postponement of time is mistake. Where two parties enter into a contract and subsequently one makes a mistake concerning the contract, he would not have a remedy at law, because the maxim caveat emptor would be applicable in this case. Even if one of the parties knew that he was getting a better deal than the other, he was under no duty to divulge. However, common law did place some limitation. A party for instance would not be allowed to remain silent when he knows that the other party is mistaken as to what the actual terms of the contract are⁸⁵, or in cases of mistake as to the identity of the contracting party⁸⁶.

Whether a remedy was available at common law for mutual mistake is unclear. It has been said that such a mistake may be so fundamental as to render the contract void as in Bell v Lever Brothers⁸⁷, or that the contract can be avoided only by reference to the further intention of the parties, or by equity⁸⁸. P.S. Atiyah⁸⁹ argues that the true effect of a contract for sale of

perished or non-existent goods is always a question of construction and three possible constructions could be placed on such contracts. Firstly, the contract may be void or secondly the buyer may be making an absolute promise to pay the price or thirdly the seller may be promising that the goods exist. Atiyah seems to favour the third option.

Generally, equity has not disturbed the long-established principles of common law. In order to obtain rescission in equity, both the contracting parties must show that they were contracting under a common mistake. As Lord Westbury stated in Riverlate Properties Ltd v Paul⁹⁰ that where there is a unilateral mistake, there is no principle of law which entitled the other party to rescind or annul the agreement.

At common law, the only remedy available to the plaintiff was an action to recover money paid by mistake. The mistake has to be one of fact and not one of law.

However, equity allowed a contract to be rescinded if it can be shown that the parties contracted under a mutual mistake of fact, and in some cases where the mistake is a unilateral mistake. Lord Denning has said that equitable relief may be granted in cases where a mistake is not sufficiently fundamental to avoid a contract of sale of goods at law.⁹¹

Equity's jurisdiction was not merely limited to a mistake of fact⁹² and in certain cases relief was also available from a mistake of law. A mere lapse of time did not bar the claim for any of the equitable relief available at equity until the mistake had been discovered or ought to have been discovered⁹³.

However, an undue delay could be fatal to the plaintiff. In Leaf v International Galleries⁹⁴ a picture, represented to have been painted by John Constable was sold and after five years the plaintiff purchaser sought to have the sale rescinded on the ground of innocent misrepresentation. The question, which the

Court of Appeal had to decide, was whether the buyer was entitled to rescind on grounds of innocent misrepresentation. In order to answer this question, the court had to decide whether there had been any laches, that is, whether the buyer had sought to pursue the equitable remedy of rescission within a reasonable time.

Jenkins L.J., said⁹⁵,

"....in my judgment, contracts such as this cannot be kept open and subject to the possibility of rescission indefinitely. Assuming that acceptance of delivery was not fatal to his claim, at all events, I think it behoves the buyer either to verify, or, as the case may be, disprove, the representation within a reasonable time or else to stand or fall by the representation. If he is allowed to wait five, ten or twenty years and then reopen the bargain, there can be no finality."

So although mistake may postpone the running of time, and allow the affected party to rescind the contract, any person intending to rely on this ground has to prosecute his claim within a reasonable time, as a delay could mean the loss of his right.

The English Limitation Act, 1980 S.32(1)(c) refers to actions "for relief from the consequences of a mistake", and is broad enough to cover relief whether originally obtainable at law or equity.

However, this section applies only where a period of limitation is prescribed by the Act⁹⁶.

The proviso to S 32 states very clearly that both for fraud and mistake the plaintiff to succeed must show reasonable diligence on his part.

6.4 CONCLUSION

The Limitation Act recognises that in cases of acknowledgment or part-payment or cases of fraud or mistake the operation of the Act is effectively postponed. In all cases of acknowledgment and part-payment whether it be in monetary claims, redemption actions, foreclosures or actions to recover land, time starts to run afresh from the date of acknowledgment or part-payment.

Under the Limitation Act, fraud as well as fraudulent concealment and mistake will postpone the running of time until such time the plaintiff actually discovers the fraud or fraudulent concealment or mistake, or could with reasonable diligence have discovered it. However, a bona fide purchaser for value, who is unaware of the fraud or mistake would have his property protected. For a plaintiff to succeed on the grounds of fraud or mistake he would have to show reasonable diligence on his part in prosecuting the claim.

NOTES

1. (1929) 42 CLR 91
2. (1963) 1 QB 1 at P.6
3. Limitation Act, 1974, s 29(1)(a)
4. Ibid s 29(1)(b)
5. Ibid s 29(3)
6. Ibid s 29(4)
7. Ibid s 29(4)
8. See Dias RWM, "Acknowledgment of Statute Barred Debt Waiver of Procedural Bar" (1962) CLJ 160
9. (1930) 2 Ch 44
10. See In re Transplanters (Holding Co) Ltd (1958) 1 WLR 822; See also 'Company's acknowledgment of Statute barred debt' by LWM, (1958) 102 Sol Jo p. 718
11. (1949) KB 700; See also "Limitation of Action - Acknowledgment of Debt" Notes & Comments 23 ALJ 480:
12. Limitation Act 1974 s.18
13. Ibid s.21
14. (1922) 2 AC 507 at p.571
15. 108 ER 573; (1827) 6 B & C 603
16. 67 ER 388 at p.396; (1843) 3 Hare 281
17. LR 6 Ch App at p.824
18. See Limitation of Actions: Acknowledgment by NDM 1 ALJ 266.
19. (1918) 25 CLR 199
20. 9 Geo IV C 14, this Act provided that acknowledgments not in writing should be of no effect.
21. (1937) 58 CLR 155.
22. Limitation Act, 1974 ss. 29 - 31
23. Ibid s.30 (2)
24. Ibid s.29 (4) (5)
25. Ibid s.23 & 25
26. Ibid s.29 (1) (a)
27. Ibid s.29 (2)
28. (1880) 15 Ch D.339
29. (1977) 2 All E R 481
30. Limitation Act, 1974 s.30 (1)

31. Ibid s.30 (2)
32. 156 ER 472; (1854), 10 Exch. 333
33. (1886) 33 Ch D. 127
34. (1954) 2 All E R 52 at p.55; See "Limitation and the Acknowledgment of General Indebtedness" by EBS, 110 Sol Jo 81, where the writer states the position under the old law which required a promise to pay but all that is now needed is the admission of the existence of the debt, expressly or implicitly.
35. (1963) 2 All E R 59 at p.61
36. (1977) 2 All E R at p.488
37. (1965) 3 All E R 818 at p.820
38. (1963) 2 All E R at p.61
39. Limitation Act, 1974 ss.31 (7) & (8)
40. Ibid s.29 (1) (b)
41. Ibid s.29 (3)
42. Ibid s.29 (4)
43. Ibid s.29 (5)
44. (1937) Ch. 675
45. (1867) LR 2 EX 153
46. (1862) LR 31 EX 423
47. These headings are used in Preston & Newsom on Limitation of Actions 3rd Edn. G.H. Newsom & Lionel Abel-Smith 1953.
48. 152 ER 599; (1842), 10 M & W. 572
49. (1847) 11 Jr L R 8
50. 151 ER 421; (1840) 6 M & W 295
51. Limitation Act, 1974 s.31 (1)
52. Ibid s.29 (1); See also Brunyate J. "Fraud and the Statute of Limitation" 4 CLJ 174, where the author argues that in any case of fraudulent concealment in which the common law courts were bound by the statute the courts of Equity would have granted relief, the Court of Appeal should extend the equitable rule to all actions without unduly straining the law.
53. (1895) 1 Ch 219 at p.224
54. Limitation Act, 1974 s.29 (3)
55. Ibid s.31 (3)

56. Ibid s.31 (4)
57. Ibid s.32 (2)
58. For a full discussion on common law fraud see Clerk & Lindsell on Torts (15th Edn) Sweet & Maxwell, 1982, pp.834-858.
59. Limitation Act, s 4(1)(a)
60. Beaman v ARTS Ltd (1949) 1 KB 550
61. For a full discussion on fraud in equity, see Equity, Doctrine & Practices - Meagher, Gummow & Lehane (2nd Edn), Butterworths, 1984, pp.323-338.
62. (1971) 1 QB 406
63. See King v Victor Parsons & Co (1972) 1 WLR 801.
64. (1965) 1 WLR 650
65. (1958) 2 All E R 241 at p.249
66. Baker v Medway Building (1958) 1 WLR 1216: For a discussion of the concept of criminal fraud, see Arlidge A.J. & Parry J., Fraud, (1st Edn) Waterlow Publishers Ltd, 1985 pp.1-30;
67. Eddis v Chichester Constable (1969) 2 Ch. 345.
68. See Halsbury's Laws of England 4th Edn Vol 31 para 1058-1059.
69. 61 ER 493 at p.504; (1853) 1 Drew 371 at 397
70. (1901) 27 VLR 175
71. S.26 "In every case of concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit at equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed."

72. S.26; The present position in England is governed by s.32 of the Limitation Act, 1980 (Imp) which is similar to s.26 of the earlier Act.
73. Limitation Act 1974 s.32
74. (1973) 1 WLR 29 at p.33
75. Limitation Act, 1974 s.32 (a)
76. Ibid s.32 (b)
77. Delkers v Ellis (1914) 2 KB 139
78. (1969) 2 All E R 912 at 915
79. Limitation Act, 1974 s.32 (2)
80. Ibid s.32 (1) (c)
81. See Halsburys Laws of England vol 28 para 916
82. This section is similar to s.32 of the English Limitation Act, 1980 and s.32 of the Tasmanian Limitation Act, 1974.
83. (1949) 1 KB 550 at p.558
84. See Hanbury & Maudsley, Modern Equity (12th Edn) by J.E. Martin 1985 pp.790-793
85. Hartog v Collin & Shields (1939) 3 All E R 566
86. Ingram v Little (1961) 1 QB 31
87. (1932) AC 161
88. See McRae v Commonwealth Disposals Commission (1951) 84 CLR 377
89. "Couturier v Hastie and the sale of non-existent goods" 73 LQR 340
90. [1974] 3 WLR 564
91. Oscar Chess Ltd v. Williams [1957] 1 WLR 370, 373-374
92. Solle v Butcher (1950) 1KB 671
93. Brooksbank v Smith (1836) 2 Y & C Exch. 58; 160 ER 411; Denys v Shuckburgh 160 ER 912; (1840) 4 Y & C Ex. 42
94. (1950) 1 All E R 693
95. Ibid p 696
96. Similar provision in the Limitation Act, 1974 (Tas) s.32 (1) (c).

CHAPTER 7. LAW REFORM IN TASMANIA IN RELATION TO STATUTES OF LIMITATION

A study of the Statute of Limitation in the United Kingdom and its subsequent developments reveal that in many instances the time provisions in the statute of limitation were fixed on the basis of ad hoc decisions which were made from time to time and often there was not much principle in the actual periods chosen. The English Act has been copied by many countries around the world. Tasmania indeed was one such British colony to adopt the English Statutes of Limitation and as such the Tasmanian Limitation Act is similar to the English Act in that there is not much principle underlying the actual time periods chosen.

7.1 Principles behind Reform

Before proposing any reforms to the Tasmanian Act, I would discuss some principles which should form the basis of any reform.

- (i) **Fairness** A Limitation Act should in limiting the time available for a claimant to bring an action and giving a defence to a defendant for any action not brought within a certain specific limitation period, strike a fair balance between the interests of both parties that is the interests of the claimants and the interests of the defendants.
- (ii) **Unambiguous** The provisions of the Act should be clear and concise and set out the scope and method of operation in clear language.
- (iii) **Simple** The provisions of the Act should have fundamental principles which could be applicable to most cases across the board and not contain technical solutions to some rare cases.
- (iv) **Plain Language** The language of the Act should be modern and plain and not technical. Further, the language should

be easily understood by laymen and lawyers alike.

7.2 Problems with the Present Tasmanian Act

The present Tasmanian Act, it is submitted, is very complex and legalistic and is really difficult for ordinary laymen to comprehend. Moreover, the act does not operate with sufficient fairness for either claimants or defendants. We have seen that the present Act has grouped different types of possible claims into various categories and different periods of limitation apply to different categories of claim. For example, for most claims based on contract the prescribed time period is six years from the date of accrual of the claim and for most claims in tort the limitation period is three years from the date of the accrual of the cause of action. Experience in other jurisdiction has shown that in many of the so-called "toxic torts" cases, before a claimant could reasonably discover that he has a good claim, the limitation period could have expired and this would certainly be unfair to claimants, who could be left with no redress.

On the other hand, claimants with clear-cut claims who have obtained all the relevant information to prosecute a claim and nevertheless sit on their claims in the knowledge that the Act has given them a long period of time, say 3 years or 6 years as the case may be, to prosecute a claim and thus delay commencing any action until just before the time period is about to run out, will cause unfairness to defendants.

Under the present Act, the time of accrual of a cause of action is vital, as time starts to run from the time of accrual of that cause of action. However, to ascertain when the cause of action arose in many cases is a technical legal issue and could be unnecessarily complex and legalistic. Further, to find out which fixed limitation period is applicable to a particular claim, one would have to see which category the claim falls into and furthermore many different methods can be used to describe a type of claim and it is not uncommon to use several of these methods

to describe a particular claim. Solicitors can often argue that a claim arising from a same set of facts fall into one category of claim, subject to a three year limitation period or into another category of claim which is subject to a six year limitation period, or to a third category where no limitation period applies. This whole process of characterising the type of the claim is very often complex and legalistic and difficult to be understood by claimants. Defendants too are not sure when they have a valid defence as that will be entirely dependant on how the claim is characterised in a Court of law.

These problems would need to be addressed in any attempt to reform the limitation Act.

7.3 Proposals for Reform

The need for reform in the area of limitation in Tasmania cannot be overemphasised and is certainly long overdue but the question is should any reform be merely cosmetic. In other words should the present Act be retained and various changes made to the existing Act as for instance by granting judges an absolute or limited discretion to extend time in appropriate cases etc, or should we repeal the whole existing Act and in its place enact a new Act which is fair to both the claimants and the defendants, unambiguous, simple and drafted in plain ordinary language. To suggest the latter would indeed be a very bold proposal, even though the proposal for a completely new Act is justified solely on the grounds that the Tasmanian Act is based on a limitation strategy formulated in England over three hundred years ago and which may not be relevant to the modern day needs of Tasmania and further that there is not much principle behind the actual time periods in the present Act.

My proposal for reform in the area of limitation in Tasmania is presented in the alternative. The first proposal is that certain immediate changes be made to the existing Act in the areas of discretion and in the custody of a parent rule. Alternatively,

the present act be totally repealed and in its place a new act be formulated which is much more fairer and simpler and which I submit is the preferred option.

7.3.1 First Proposal

In dealing with extension of time in the previous chapter, it was noted that the Tasmanian Act only provides for a limited discretion to judges to extend the limitation period. Currently under s.5(3) of the Tasmanian Limitation Act a judge can grant an extension, if it is just and reasonable to do so up to a maximum of six years from the date on which the cause of action accrues.

In tracing the development of the current limitation law in the United Kingdom however, we noted that the legislature in their wisdom have given unfettered discretion to the courts in the United Kingdom to extend the limitation period in a case in which it is equitable to do so and if there is no prejudice to any party.

Although limitation legislation were aimed at the prevention of avoidable delay and retain justice in the public interest, its operation has given rise to particular instances of hardship and injustice to plaintiffs. Usually the Limitation statutes provide time for commencing action which normally runs from the date on which the plaintiffs cause of action is complete or said "to accrue". However, in cases of personal injury, although the plaintiff will be aware of the wrong at the time of occurrence or soon after, there may be a length of time before the full extent of the injury or any complications are known. In many cases, however, the diagnosis of a disease may not be possible until several years after the date of "injury", by which time the limitation period may well have expired.

Similarly, a person suffering from a particular disease may not be aware of a casual link between the disease and a particular

activity until after the expiration of the limitation period. Furthermore, a person may be ignorant as to his right or have received misleading advice as a result of which no action was commenced before the expiry of the limitation period.

As a result of injustices which could arise in such cases, attempts have been made in several jurisdictions to obtain a new balance between the principle that there must be certainty and an end to litigation on the one hand and on the other hand that innocent litigants go uncompensated as a result of the operation of strict technical rules. In the English case of Cartledge v Jopling¹ the plaintiff contracted pneumoconiosis whilst in the employ of the defendant. The inhalation of noxious dust caused pneumoconiosis, which resulted in the victim suffering substantial injury to the lungs which were not apparent symptoms for many years. By the time the plaintiff discovered his plight, the limitation period had expired. The House of Lords held that the limitation period ran from the date of "accrual", that is, from the date when the plaintiff suffered damage or injury which could be termed as "real" or not negligible. The fact that the plaintiff did not and could not have known that such damage had occurred was considered irrelevant. However, their Lordships unanimously expressed their concern for victims of latent disease. Unlike the Wright committee which in its 1936 Report argued that the hardship suffered by such plaintiffs was justified in what it considered to be the primary object of limitation statute, namely to put a certain end to litigation, Lord Reid in Cartledge's case, found it, "unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury"².

The current position in the United Kingdom is that the court now has a discretion to extend the limitation period in a case in which it is equitable to do so and if there is no prejudice to any party³.

In assessing the current extension provisions in Tasmania, the

questions that have to be considered here are firstly, whether the present provisions dealing with extension in Tasmania are adequate and, secondly, if not, should the legislation be amended to grant the Tasmanian Courts with unfettered judicial discretion similar to those in the United Kingdom to extend time in appropriate cases.

7.3.1(i) Adequacy of the present extension provisions

It is submitted that the present limited discretion given to judges to extend limitation periods in Tasmania is inadequate as grave injustice may be experienced by claimants who suffer latent injury where the symptoms of the disease may lie dormant for several years and manifest itself well after the limitation period has expired, leaving the claimant with no remedy at all.

It was in order to overcome such injustice that the legislature in the United Kingdom gave the judges an unfettered discretion to grant extensions in suitable cases.

Both the states of Victoria and New South Wales have conferred on the court a general discretion to extend the limitation period if the Court considers it just and reasonable to do so. In Victoria, the Limitation of Actions (Personal Injuries Claims) Act 1983 extended the primary limitation period to six years and the period is subject to the "discovery" extension, being the date on which the plaintiff first knows:

- (a) that he has suffered those personal injuries; and
- (b) that those personal injuries were caused by the act or omission of some person.

This Act further conferred on the Court a general discretion to extend the limitation period if it considered it just and reasonable so to do and sets out guidelines for the assistance of the Court in exercising its discretion.

In New South Wales, the Limitation Act (1969) was amended in

September, 1990 by implementing the recommendations of the New South Wales Law Reform Commission⁴. The Amending Act inserted provisions allowing for discretionary extension of the limitation period for latent injury⁵. Besides reducing the primary limitation period from six years to three years, the Act now allows a discretionary extension of the limitation period if the Court decides that it is just and reasonable to do so. The "discovery rule" extension was rejected in the Bill and instead the courts were granted an unlimited discretion to give extension having considered all the circumstances of the case and applying certain statutory guidelines.

The recommendation to grant discretionary powers to the court to extend time is absolutely necessary in view of problems created by certain latent injuries which do not manifest themselves until several years have elapsed by which time the claim could very well be statute-barred.

The granting of judicial discretion to the courts will also bring the Tasmanian Limitation Act in line with the limitation legislation in the United Kingdom, Victoria and New South Wales, where the need for such judicial discretion has been clearly argued and analysed, before its adoption.

Recently, the Law Reform Commission of Tasmania has recommended a scheme⁶ "whereby the limitation period can be extended by exercise of the Courts' discretion to ensure that justice is not denied by the operation of strict legal rules in meritorious cases". In his report⁷ the Law Reform Commissioner highlights the problems faced by claimants in the so-called "toxic torts" cases.

"... In these cases, the claimant sustains injury or contracts a disease as a result of contact with substances which, by their nature, are toxic if handled without caution. The characteristics of these latent injuries are frequently the same; the injury sustained as a result of repeated exposure to the

toxic substance, the exposure is over many years and the exposure occurred many years before and outside the limitation period. Common amongst this class of Plaintiffs are people suffering from diseases caused by inhalation of toxic types of dust, asbestos, silicosis, pneumoconiosis, and mesothelioma. These insidious diseases have a long latency period, sometimes more than thirty years from the date of the inhalation. Other toxic substances such as radioactive minerals and dangerous chemicals have also given rise to instances in which claims have been statute barred.

The problem of latent injury may be further compounded by the standard of medical diagnosis at a given time. In some cases, a person may be examined and according to the prevailing standard and level of medical knowledge may manifest no adverse symptoms but the latent injury may be discovered later with improved diagnostic techniques".

Another disease specifically referred to in the Law Reform Commissioners Report is Aids.

"Aids is yet another notable disease whose symptoms may lie dormant until after the expiry of the traditional limitation period. The prevalence of AIDS and the HIV virus in the modern day needs no emphasis, except to say that there are no doubt instances in which the disease is transmitted in tortious circumstances".

In order not to defeat legitimate claims of claimants who suffer from such latent injuries which only manifest themselves several years later and which might well be after the limitation period has expired, the existing Tasmanian laws, it is submitted should be amended to accommodate such claims.

But should the amendments to the Tasmanian Act be in the form of granting unfettered discretion to the judges?

7.3.1(ii) Should the Courts be given a general discretion

Having considered the various disabilities in the Act and some of the problems associated with the limited discretion given to judges for extending the limitation period, one possible solution to overcome these problems is to grant to the courts a general discretion. However, the question that has often been asked is whether judges should be endowed with unfettered discretion to extend time.

As early as 1936, the English Law Revision committee considered a proposal to grant unfettered discretion to judges, but rejected it⁸. Again, the Edmund-Davies Committee considered and rejected the proposal⁹. Yet again, it was considered by Orr L.J. in 1974 and his committee and rejected by them as well¹⁰. The reason for rejection was that if an unfettered discretion were given to judges, it would lead to too much uncertainty. The proposal was condemned by Orr L.J.'s committee in the interim report in these words;

"To make the plaintiff entirely dependent on the court's discretion would, in our view, be a retrograde step and we do not recommend it".

However, Orr L.J.'s committee did recommend that the court should have a discretion in some "exceptional cases" to extend time. They described these cases as a "residual class of case" and the discretion as a "residual discretionary power". The committee however did not define this residual class but probably had in mind cases where a person contracted certain disabilities while at work but did not know his legal rights.

In Finch v Francis¹¹, Griffiths J. who was a member of Orr L.J.'s committee said,

"...the object of the discretion to override the time limit was to provide for the occasional hard case. I cannot

believe that it was the intention of Parliament that Section 2D should be applied to a case such as this, where a person in the hands of a solicitor allows time to run out in a straightforward running down action. If the court were to exercise its powers in a case such as this the value to the defendant of the three year time limit in personal injury cases would be completely swept aside. Furthermore, the courts would be flooded with applications. In my view the court should be circumspect in its approach to the application of section 2D and it should be reserved for cases of an unusual nature.

It was a straightforward running down case in which time should never have been allowed to expire. I can see no reason to extend it".

Although the various committees did not accept the proposal for a general discretion, Parliament in passing the Limitation Act of 1975 did give the court a general discretion in terms of section 2D.

Referring to the purpose of Section 2D, Griffiths J., said¹²,

"Section 2D empowers the court to direct that the primary limitation period shall not apply to a particular action or cause of action. This is by way of exception, for unless the court does make a direction the primary limitation period will continue to apply. The effect of such a direction, and its only effect, is to deprive the defendant of what would otherwise be a complete defence to the action, viz that the writ was issued too late. A direction under the section must therefore always be highly prejudicial to the defendant, for even if he also has a good defence on the merits he is put to the expenditure of time and energy and money in establishing it, while if, as in the instant case, he has no defence as to liability he has everything to lose if a direction is given under the

section. On the other hand if, as in the instant case, the time elapsed after the expiration of the primary limitation is very short, what the defendant lost in consequence of a direction might be regarded as being in the nature of windfall".

Lord Denning M.R. in Fireman v Ellis¹³ said,

"In former times it was thought that judges should not be given discretionary powers. It would lead to too much uncertainty. The law should define with precision the circumstances in which judges should do this or that. Those days are now passed. In statute after statute, Parliament has given powers to the judges and entrusted them with a discretion as to the manner in which those powers should be exercised. In many of these statutes, Parliament sets out "guide lines" indicating some of the considerations to which the judges should have regard. A notable example is the Matrimonial Proceedings and Property Act 1970, Section 5, regarding the division of matrimonial property. A recent example is the Unfair Contract Terms Act 1977, which sets out "guide lines" for application of the reasonable test. Sometimes Parliament has entrusted the judge with a discretion without setting out any guide lines, as in trial by jury under the Administration of Justice (Miscellaneous Provisions) Act 1933: and then the judges themselves set out the guide lines: see Ward v James (1966) 1 QB 273. In all such cases the judges can forecast the likely result in any given set of circumstances: see Bickel v Duke of Westminster (1977) QB 517, 524. So a sufficient degree of certainty is achieved - as much certainty as is possible consistently with justice".

It is submitted that the move to give the court a general discretion is a move in the right direction as Parliament cannot foresee every possible situation that may arise and as such

cannot legislate to cover every such situation. The judges having considered all the facts presented in a given case would be in a better position to dispense justice if they had a certain amount of discretion within the broad framework of the legislation. Without any discretion the judges would be required to apply the strict provision of the law and this could cause injustice in certain instances. However, the discretion should not be an absolute discretion but a qualified one. Coupled with a discretion, the judges could be given certain guidelines for the exercise of this discretion. In fact as Orr L.J.'s committee recommend the discretion should be for 'exceptional' cases and not unfettered discretion in terms of S.2D.

An absolute discretion (as Lord Denning referred to of S.2D), would lead to the consequences shown in the three cases Fireman v Ellis, Down v Harvey & O Nicklin & Sons Ltd and Ince v Roberts, where the benefit of the extension provision was extended to clients because of negligent solicitors. The plaintiff's solicitors failed to renew the writs in time while negotiations for settlement were going on. In each of the three cases the judges exercised their discretion in favour of the plaintiffs, although the delay was due to the plaintiff's solicitors having overlooked the fact that the validity of the writ had to be maintained by renewing the writ. Surely in such cases, the solicitors should bear the consequences and the plaintiffs should be denied an extension and thus made to claim against their solicitors. It is submitted that Griffith J. is correct in saying that the object of this extension provision was to provide for the occasional hard case and not in cases where the plaintiff's solicitor is at fault in failing to take action within the prescribed time.

It is submitted that the Tasmanian limitation Act should therefore be amended to grant judges discretion to extend time and that the current 6 year maximum period be removed. In deciding whether to grant the extension, the judges should inter alia take into consideration the following factors:

1. Whether the defendant would be substantially prejudiced by the granting of the extension.
2. Whether there is evidence to substantiate the applicant's claim.
3. The applicant's conduct in the prosecution of the claim and his explanation for the delay.

7.3.1(iii) "Custody of a Parent" Rule

Section 26(6) of the Act is normally referred to as the "Custody of a Parent" rule. The Act provides specifically¹⁴ that the operation of the relevant limitation period is suspended whilst a person is under a legal disability¹⁵ which is defined inter alia to include an infant.

The policy behind this is, a person whilst under a legal disability as for example infancy, should not be disadvantaged by his/her tender age. The "Custody of a Parent" rule however operates to negate what the Act bestows on an infant by virtue of S.26(1). What the "Custody of a Parent" rule does is that it allows the normal limitation period to run, notwithstanding that a person is under a legal disability, if that person happened to be in the custody of a parent at the time when the right of action accrued to him. The reason for this is that a conscientious and well meaning parent will or should have the interest of his child at heart and do all that is necessary to prosecute a claim on behalf of the child expeditiously, so that the child is not disadvantaged although under a legal disability and thus has no need of special protection under the law.

Although there may be some truth in that reasoning, there would no doubt be several instances where the parent or guardian of the infant may have failed to institute proceedings within the limitation period because of inadvertence, ignorance or lack of intellectual capacity. In such cases the infant unjustifiably pays for the omission of his parent or guardian.

In this regard, it should be noted that in Victoria the Court has held that the word "knowledge" refers the personal knowledge of the applicant, which alone is material, and not that of his parent, solicitor or agent¹⁶.

It is interesting to note that in England, from where Tasmania obtained this provision, the Law Reform Committee chaired by Lord Justice Orr recommended its abolition, which was subsequently given effect to by the Limitation Act 1975 (U.K.).

The Law Reform Commissioner of Tasmania has recommended the abolition of the "Custody of a Parent" rule in his report¹⁷ and it is submitted that this should be given effect to as soon as possible.

7.3.2 Alternate Proposal

If we are to give effect to all or most of the principles for reform discussed in paragraph 7.1, it would be necessary to enact a completely new limitation statute. To begin with, the present Tasmanian Act is very long, complex and legalistic and is contained in 40 sections in 25 pages.

The starting point for a new statute it is submitted, would be to adopt a modern model statute from another jurisdiction which is simple, fair, unambiguous and plain, and then perhaps to improve on that.

Having considered various limitation statutes from several jurisdictions, it would appear that the British Columbia Limitation Act 1975 which is reproduced in Appendix III appears to be one suitable model for Tasmania to consider. Unlike the Tasmanian Act, the British Columbia Act is relatively short consisting 15 sections in 9 pages, is well drafted, organised and is relatively easy to understand.

The British Columbia Act provides in S.3(i) a 2 year limitation

period for 8 causes of action; a 10 year limitation period for 6 causes of action enumerated in S.3(2); and S.3(4) provides a 6 year limitation period for any other action not specifically mentioned in the limitation Act or any other act.

S.3(3) enumerates 10 instances where a person is not governed by a limitation period and thus a claimant may bring an action at any time, as there is no time limitation period.

The Act also provides in S.8 that notwithstanding a confirmation, postponement or suspension of the running of time there is an ultimate limitation period of 30 years from the date on which the right arose, after which a claimant would not be able to bring any action. The ultimate period is reduced to 25 years if the claim is under their Hospitals Act.

However, despite the fact the British Columbia Act in its format is relatively much shorter than the Tasmanian Act and is better drafted and organised, it still maintains different periods of limitation for different causes of action and the problem of characterisation and categorisation of a claim still continues to exist. This is so because the British Columbia Act just like the Tasmanian Act has adopted the two divergent strategies for a limitation act which was developed by the English system.

On the one hand there was the strategy at law and on the other the strategy in equity. The primary objective of both these strategies was to provide a limitation system which was fair and efficient to all parties concerned.

For an operation of the strategy at law it was necessary firstly to categorise a claim as being a tort, contract, property etc. Secondly, a fixed period of limitation of different duration applied to each category of claim. Thirdly, it was necessary to determine when the cause of action accrued and this is often a technical legal issue, depending on how the claim is characterised.

The strategy at equity on the other hand is not statutory and was developed by the English equity judges and is known as the doctrine of laches. The doctrine of laches involves two main elements. The first is that the limitation period is discretionary and secondly the limitation period commences at the time of discovery.

For so long as the strategy at law forms the basis of any limitation act, the problem of characterisation and categorisation will continue to exist. One way to get rid of the problem of characterisation and categorisation is to introduce one standard limitation period for all causes of action coming within the ambit of the limitation act.

Worthy of serious consideration in this regard is a report by the Alberta Law Reform Institute¹⁸ in which they recommend a completely new limitation Act for Alberta which "should rely to a much more significant degree on the equitable strategy"¹⁹. Their recommendation is to "recombine the two basis limitation strategies into a distinctly new limitations strategy based on the strategy in equity"²⁰.

The principle recommendation of the Institute is that all claims be governed by two limitation periods, one known as the "discovery period" and the other known as the "ultimate period"²¹. The discovery period will only begin when the claimant "discovered" or "ought to have discovered" (i) that the injury had occurred; (ii) that it was to some degree attributable to the conduct of the defendant, and (iii) that it was sufficiently serious to have warranted commencing a proceeding. From the time of discovery, the claimant has 2 years within which to institute proceedings. This 2 year period is referred to as the "discovery limitation period". The principle behind the initial discovery period is knowledge and is derived from the limitation strategy in equity. Thus the discovery limitation period will certainly serve the interest of claimants as it is knowledge which sets the limitation clock ticking.

language, logically organized and easy to understand.

The Act uses words in a generic, non-technical sense as for instance it talks about a "claim" rather than a "cause of action" which is normally used in limitation statutes, and a "claimant" rather than the conventional "plaintiff".

The 2 year discovery period, it is submitted is more reasonable and much fairer to a claimant as it will not begin to run until the claimant knew or should have known the three basic facts which trigger its operation. From that point in time the claimant will have 2 years to consult his solicitor and institute proceedings should a settlement be not reached.

Another notable feature is that the discovery period is not limited to certain category of cases but to all cases governed by the Act. This, it is submitted simplifies the Act, makes it comprehensible and does away with the categorisation and characterisation problem.

The discovery rule will also benefit defendants as under this scheme many of the claimants would have to institute proceedings much sooner than the existing Act, if they have acquired the necessary knowledge.

The ultimate period will benefit defendants as they can rest in the certainty that after 15 years no action could be instituted against them.

Although at first 15 years may appear to be a long time for a defendant to wait, and thus work unfairly on defendants, in actual fact the number of cases that reach the 15 year period would be extremely small as the 2 year discovery period would have dealt with a great majority of cases, which would have been either abandoned, settled, or litigated well before the ultimate limitation period of 15 years.

Thus the ultimate period will benefit defendants.

Having suggested two options for reform, my preferred option for reform of the law relating to limitation in Tasmania is the latter, that is the present Act be repealed and in its place a simplified new act be formulated using the British Columbia Act and the Alberta Law Reform Institutes model limitation Act.

Like both these Acts, the Tasmanian Act should be drafted in simple language, avoid technical terminology and kept brief. As far as possible words in a generic, non-technical sense should be adopted, so that a layman would be able to understand and comprehend the Act.

To avoid problems of characterisation and categorisation, a fixed discovery period should be introduced to all actions falling within the Act and similarly to protect defendants, an ultimate period should be introduced.

Such an Act, it is submitted will be much fairer to claimant's because all claims to which the Act applies will be subject to the discovery rule.

A new Act for Tasmania incorporating the above proposals will, it is submitted, achieve the principles behind reform discussed in paragraph 7.1 namely, it would be fair to claimants and defendants, unambiguous, simple and plain.

A new Act, moreover will give an opportunity to take into consideration various changes in the characteristics of the Tasmanian society and with it the consequential enlargement of legal rights and remedies considering the fact that the present Act was adopted from England, where the limitation law had been growing piecemeal for over three and a half centuries and is inadequate to meet the modern day needs of Tasmania.

NOTES

1. (1963) 1 QB 189.
2. (1963) AC 758 at 773.
3. See para 5.3.3 *infra*.
4. 9th Report of the NSW Law Reform Commission (LRC 50).
5. ss.60F-60J.
6. Law Reform Commissioner of Tasmania, Report No. 69, 1992.
7. Ibid p.9.
8. Cmnd 5334 para. 7.
9. Report of the Committee of limitation of Actions in cases of Personal Injury; 1962 (Cmnd 1829); paras 30 - 33.
10. Cmnd 5630, paras 34 and 35.
11. QBD (Unreported judgment), July 21, 1977.
12. Ibid p.301.
13. (1978) QB 886 at p.905.
14. Limitation Act, 1974 s.26(1).
15. Ibid s.2(2).
16. See discussion on S.23A of the Victorian Limitation of Actions Act, 1958 para 5.32(*infra*).
17. Law Reform Commissioner of Tasmania, Report No. 69, 1992 p.24.
18. Alberta Law Reform Institute "Limitations" Report no. 55, December, 1989.
19. Ibid p.30.
20. Ibid p.30.
21. Ibid p32. one exception to this is a claim based on judgment or order for the payment of money.

CHAPTER 8. CONCLUSION

The overall aims of limitations is to ensure that the claims of plaintiffs who have good causes of actions are not defeated and that defendants on the other hand should be protected from being vexed by stale claims.

In developing appropriate statutory time periods, a fair balance had to be struck between the need to protect the legitimate claims of plaintiffs on the one hand and affording protection to defendants from having stale claims against them from being resurrected on the other hand.

History has shown that it is difficult to develop appropriate statutory time periods to balance the policies of the Statute of Limitation, namely that of resurrecting stale claims against the undue injustice to a claimant which may result if he is barred from prosecuting his claim. Because the early fixed statutory periods did not adequately cater for plaintiffs with injuries and diseases which manifested several years later, well after the statutory period had expired, it was necessary to overcome such problems with the introduction of the Discovery rule in England. The Discovery rule enabled plaintiffs to institute proceedings within 3 years from the date of the plaintiffs discovery.

Subsequently, in addition to the discovery rule, the courts in England were granted a residual discretion to extend the limitation period where the strict application of the discovery rule would cause injustice. With the granting of a residual discretion, a plaintiff with latent injuries and diseases was able to derive some comfort in that their claim would not be statute barred for failing to institute proceedings within the initial time period.

As the early statutory time periods worked unjustly on plaintiffs with latent injuries and diseases, there was a need to introduce the discovery rule and to endow the courts with a discretion to

extend the initial time periods in appropriate cases in England.

Unfortunately, Tasmania has still not introduced anything like the "discovery rule". As far as extensions are concerned, the Tasmanian Act provides for a judge to extend time for the commencement of an action if it is just and reasonable to do so but the Act places a maximum period of extension to six years from the date on which the cause of action accrued.

In comparison, the state of Victoria has adopted the "discovery rule" and also conferred on the courts a general discretion to extend the limitation periods if it considered just and reasonable to do so.

New South Wales, on the other hand has rejected the "discovery rule" extension but given the courts the power to grant unlimited extension of the limitation period.

These progressive developments in the area of discretion in other jurisdictions has yet to be adopted in Tasmania. The Tasmanian Act as it stands now, would defeat the legitimate claims of victims of certain latent injuries and diseases if such victims could not have discovered their rights within the maximum 6 year currently provided under the present Tasmanian Act. Hence, there is an urgent need to address this defect in the Tasmanian Act.

As the legitimate claims of plaintiffs with latent injuries and diseases could be defeated under the present Tasmanian Act, the Act does not operate fairly on such claimants.

Rather than make cosmetic changes to the Tasmanian Act it is submitted that the whole Act should be repealed and in its place a new Act formulated using as a basis the Model Limitation Act, which was translated from the recommendations by the Alberta Law Reform Institute. The Model Act is written in plain language, uses words in a generic, non-technical sense and does away with the problems of characterisation and categorisation.

All claims are subjected to two limitation periods, one being the "discovery period" and the other known as the "ultimate period".

The discovery limitation period will not defeat the claims of victims of latent injuries and defects as it is knowledge that will set the limitation clock ticking.

The discovery rule will also benefit defendants as most of the claimants would have to institute proceedings much sooner than under the present existing Act.

The ultimate limitation period would benefit defendants as that period operates as an absolute cutoff date, after which time no action could be brought against the defendant.

A limitation Act for Tasmania based on the Model Act will not only simplify the limitation law by doing away with the problems of categorisation and characterisation and make it unambiguous but as importantly it will operate fairly on claimants and defendants alike, and thus fulfil the aims of having a limitation law.

APPENDIX I

TIME PERIOD FOR VARIOUS CAUSES OF ACTION UNDER
THE LIMITATION ACT 1974
(TASMANIA)

PART II DIVISION II

<u>Relevant Section</u>	<u>Cause of Action</u>	<u>Time Period</u>
Section 4(1)(a)	Simple contract, tort including action for damages for breach of statutory duty	6 years
Section 4(1)(b)	Action to enforce a recognisance where the submission is not by instrument under seal.	6 years
Section 4(1)(d)	Action to recover any sum recoverable by virtue of an enactment, other than a penalty or forfeiture.	6 years
Section 4(2)	Action for account.	6 years
Section 4(3)	Action upon speciality.	12 years
Section 4(4)	Action upon Judgment.	12 years
Section 4(5)	Action to recover arrears of interest.	6 years
Section 4(6)	Action to recover penalty or forfeiture.	2 years
Section 5(1)	Action for damages for negligence, nuisance or breach of duty (personal injuries).	3 years
Section 5(2)	Actions under the Fatal Accidents Act, 1934.	1 year
Section 6(1)	Action for conversion or wrongful detention of a chattel.	6 years
Section 8(2)	Action to enforce claim or lien against a vessel.	2 years

Section 8(3)	Action to enforce claim or lien in respect of salvage services.	2 years
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PART II DIVISION III

<u>Relevant Section</u>	<u>Cause of Action</u>	<u>Time Period</u>
Section 10(1)	Adverse possession of land - action by crown.	30 years
Section 10(2)	Adverse possession - in all other cases.	12 years
Section 12(2)	Action to recover land.	12 years
Section 17	Action to recover land by crown.	30 years
Section 17	Cure of defective disentailing assurance.	12 years
Section 18	Redemption of mortgaged land in possession of mortgagee.	12 years
Section 22	Action to recover rent or damages	6 years
Section 23	Action to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.	12 years
Section 24(2)	Action by beneficiary to recover trust property where no other provision prescribed by Act.	6 years
Section 25	Action in respect of any claim to the personal estate of deceased.	12 years
Section 25	Action to recover arrears of interest in respect of any legacy or damages in respect of such arrears.	6 years

APPENDIX II

<u>TAS</u>	<u>VIC</u>	<u>Q'LAND</u>	<u>NSW</u>	<u>SA</u>	<u>WA</u>
S.1	S.1	S.1,2	S.1	S.1	S.1
S.2(1)	S.3(1)	S.5(1)	S.11(1)	S.3(1)	S.3
S.2(2)	S.3(2)	S.5(2)	S.11(3)	S.45(2)	
S.2(3)	S.3(3)	S.5(3)			
S.2(4)	S.3(4)	S.5(4)	S.11(2)(a)		
S.2(5)	S.3(4)	S.5(4)			
S.2(6)	S.3(5)	S.5(5)	S.11(2)(b)		
S.2(7)	S.3(6)	S.5(6)	S.11(4)		
S.2(8)	S.3(73)	S.5(7)			
S.3	S.4	S.9			
S.4(1)	S.5(1)	S.10(1)	S.14(1)	S.35	S.38(1)
S.4(2)	S.5(2)	S.10(2)	S.15	S.35(b)	S.38(1)(c)(iii)
S.4(3)	S.5(3)	S.10(3)	S.16	S.34	
S.4(4)	S.5(4)	S.10(4)	S.17	S.34	
S.4(5)	S.5(7)		S.24(2)	S.35(e)(f)	
S.4(6)	S.5(5)	S.10(5)	S.18	S.37	
S.5(1)	S.5(6)	S.11	S.58	S.36(1)	
S.5(2)			S.19		
S.6(1)	S.6(1)	S.12(1)	S.21		
S.6(2)	S.6(2)	S.12(20)			
S.7		S.40(4)	S.26		
S.8(1)		S.10(6)(a)	S.22(1)	S.35(g)	
S.8(2)		S.22(2)			
S.8(3)			S.22(3)		
S.8(4)			S.22(4)		
S.8(5)					
S.8(6)			S.22(5)		
S.8(7)			S.22(6)		
S.9	S.5(8)	S.10(6)(b)	S.23		
S.10(1)	S.7		S.27(1)		
S.10(2)	S.8		S.27(2)	S.4	S.4
S.10(3)					
S.10(4)			S.27(3)		

<u>TAS</u>	<u>VIC</u>	<u>Q'LAND</u>	<u>NSW</u>	<u>SA</u>	<u>WA</u>
S.11(1)	S.9(1)	S.14(1)	S.28	2.6	S.5(a)
S.11(2)	S.9(2)	S.14(2)	S.29	S.7	S.5(b)
S.11(3)	S.9(3)	S.14(3)	S.30	S.8	S.5(c)
S.12(1)	S.10(1)	S.15(1)	S.31	S.9	S.5(d)
S.12(2)	S.10(2)	S.15(2)			
S.12(3)					
S.12(4)					
S.12(5)	S.10(3)	S.15(3)			
S.12	S.10(4)	S.15(4)		S.22	
S.13(1)	S.11(1)	S.16(1)	S.37		
S.13(2)	S.11(2)	S.16(3)			
S.13(3)	S.11(3)	S.13(4)			
S.13(4)	S.11(4)	S.13(5)			
S.13(5)	S.11(5)				
S.14(1)	S.12	S.17	S.32(1)	S.10	S.6
S.14(2)	S.12	S.17	S.32(2)	S.11	
S.15(1)	S.13(1)	S.18(1)	S.34(1)	S.15	S.9
S.15(2)	S.12(3)	S.18(2)	S.34(2)	S.16	S.10
S.15(3)	S.13(3)	S.18(3)		S.17	S.11
S.16(1)	S.14(1)	S.19(1)	S.38(3)		
S.16(3)	S.14(3)	S.19(3)	S.18(4)		
S.16(4)	S.14(4)	S.22		S.20	S.14
S.16A				S.25	S.27
S.17					
S.18	S.15	S.20	S.41		S.29
S.19	S.16	S.21	S.39	S.18 & 19	S.12 & 13
S.20	S.17	S.23	S.29	S.14	S.8
S.21	S.18	S.24	S.65	S.28	S.30
S.22	S.19	S.35		S.4	S.34
S.23(1)	S.20	S.26	S.42(1)	S.33(1)	S.32
S.23(2)	S.20(2)	S.26(2)			
S.23(3)	S.20(2)	S.26(2)			
S.23(4)	S.20(3)	S.26(3)			
S.23(5)	S.20(4)	S.26(4)			

<u>TAS</u>	<u>VIC</u>	<u>O'LAND</u>	<u>NSW</u>	<u>SA</u>	<u>WA</u>
S.23	S.20(4)	S.26(4)			
S.23(7)	S.20(5)	S.26(5)			
S.23(8)		S.42(2)			
S.24(1)	S.21	S.27	S.27(1)	S.31	
S.24(2)	S.21	S.24(2)(3)	S.48		
S.24(3)	S.21	S.24(4)	S.49	S.32(1)(b)	
S.24(4)			S.32(2)		
S.25	S.22	S.28	S.29		S.33
S.26(1)	S.23(1)	S.29	S.52	S.41(1)	S.16
S.26(2)	S.23(1)	S.29			
S.26(3)	S.23(1)	S.29			S.19
S.26(4)	S.23(1)	S.29		S.45(3)	
S.26(5)	S.23(1)	S.29	S.52(3)		
S.26(5)	S.23(1)	S.29	S.52(3)		
S.26(6)	S.23(1)	S.29			
S.27			S.53		
S.28	S.23(2)				
S.29(1)	S.24(1)	S.35(1)	S.54	S.21	S.44
S.29(2)	S.24(1)				
S.29(3)	S.24(2)	S.35(2)			
S.29(4)	S.24(3)	S.25(3)			
S.29(5)	S.24(3)	S.35(3)			
S.30	S.25	S.36	S.54(4) & S.42(1)		S.44(3)
S.31	S.26(1)	S.37(1)	S.54(6)(b) & S.45		
			S.54(7)(a)		
			(i)(ii)		
S.31(2)	S.26(2)	S.37(2)	S.54(7)(a)		
			(iii)		
S.31(3)	S.26(3)	S.37(3)	S.54(3)	S.27(4)	
S.31(4)	S.26(4)	S.37(4)	S.54(7)(a)	S.27(3)	
			(vi)		
S.31(5)	S.26(5)	S.37(5)			
S.31(6)	S.26(5)	S.37(5)			
S.31(7)	S.26(6)	S.37(6)			

<u>TAS</u>	<u>VIC</u>	<u>O'LAND</u>	<u>NSW</u>	<u>SA</u>	<u>WA</u>
S.31(8)	S.26(6)	S.37(6)			
S.31(9)	S.26(7)	S.36(7)			
S.31(10)	S.26(8)	S.37(8)			
S.32	S.27	S.38	S.55 & 56	S.25	
S.33	S.28	S.41	S.70-72		
S.34	S.29			S.4(3)	
S.35	S.30	S.42	S.74	S.44	S.46
S.36	S.31	S.43	S.9	S.49	S.28
S.37	S.32	S.6	S.10		S.48
S.38	S.33	S.7	S.7		
S.39	S.35	S.8			
S.40	S.2(1)			S.2	

THE BRITISH COLUMBIA ACT

LIMITATION ACT

CHAPTER 236

Definitions

1. In this Act

"action" includes any proceeding in a court and any exercise of a self help remedy;

"collateral" means land, goods, documents of title, instruments, securities or other property that is subject to a security interest;

"judgment" means a judgment, order or award of

(a) the Supreme Court of Canada relating to an appeal from a British Columbia court;

(b) the British Columbia Court of Appeal;

(c) the Supreme Court of British Columbia;

(d) a County Court of British Columbia;

(e) the Provincial Court of British Columbia; and

(f) an arbitration under a submission to which the *Arbitration Act* applies;

"secured party" means a person who has a security interest;

"security agreement" means an agreement that creates or provides for a security interest;

"security interest" means an interest in collateral that secures payment or performance of an obligation;

"trust" includes express, implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a secured party in collateral.

1975-37-1.

Application of Act

2. Nothing in this Act interferes with

(a) a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;

(b) a rule of equity that refuses relief, on the ground of laches, to a person claiming equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act; or

(c) any rule or law that establishes a limitation period, or otherwise refuses relief, with respect to proceedings by way of judicial review of the exercise of statutory powers.

1975-37-2.

Limitation periods

3. (1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action

(a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

- (b) for trespass to property not included in paragraph (a);
 - (c) for defamation;
 - (d) for false imprisonment;
 - (e) for malicious prosecution;
 - (f) for tort under the *Privacy Act*;
 - (g) under the *Family Compensation Act*;
 - (h) for seduction.
- (2) After the expiration of 10 years after the date on which the right to do so arose a person shall not bring an action
- (a) against the personal representatives of a deceased person for a share of the estate;
 - (b) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;
 - (c) against a trustee for the conversion of trust property to the trustee's own use;
 - (d) to recover trust property or property into which trust property can be traced against a trustee or any other person;
 - (e) to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor;
 - (f) on a judgment for the payment of money or the return of personal property.
- (3) A person is not governed by a limitation period and may at any time bring an action
- (a) for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass;
 - (b) for possession of land by a life tenant or remainderman;
 - (c) on a judgment for the possession of land;
 - (d) by a debtor in possession of collateral to redeem that collateral;
 - (e) by a secured party in possession of collateral to realize on that collateral;
 - (f) by a landlord to recover possession of land from a tenant who is in default or over holding;
 - (g) relating to the enforcement of an injunction or a restraining order;
 - (h) to enforce an easement, restrictive covenant or profit à prendre;
 - (i) for a declaration as to personal status;
 - (j) for or declaration as to the title to property by any person in possession of that property.
- (4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.
- (5) Without limiting the generality of subsection (4) and notwithstanding subsections (1) and (3), after the expiration of 6 years after the date on which right to do so arose an action shall not be brought
- (a) by a secured party not in possession of collateral to realize on that collateral;
 - (b) by a debtor not in possession of collateral to redeem that collateral;
 - (c) for damages for conversion or detention of goods;
 - (d) for the recovery of goods wrongfully taken or detained;
 - (e) by a tenant against a landlord for the possession of land, whether or not the tenant was dispossessed in circumstances amounting to trespass;

(f) for the possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under possibility of reverter of a determinable estate.

(6) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding and this section had been pleaded.

(7) In subsections (3) and (5) "debtor" means a person who owes payment or other performance of an obligation secured, whether or not he owns or has rights in the collateral.

1975-37-3.

Courterclaim, etc.

4. (1) Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim;

(b) third party proceedings;

(c) claims by way of set off; or

(d) adding or substituting of a new party as plaintiff or defendant.

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person where a claim by that other person

(a) against the first mentioned person; and

(b) relating to or connected with the subject matter of the action,

is or will be defeated by pleading a provision of this Act as a defence by the first mentioned person.

(3) Subsection (1) does not operate so as to interfere with any judicial discretion to refuse relief on grounds unrelated to the lapse of time limited for bringing an action.

(4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, notwithstanding that between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

1975-37-4.

Confirmation of cause of action

5. (1) Where, after time has commenced to run with respect to a limitation period fixed by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section,

(a) a person confirms a cause of action only if he

(i) acknowledges a cause of action, right or title of another; or

(ii) makes a payment in respect of a cause of action, right or title of another.

- (b) an acknowledgment of a judgment or debt has effect
 - (i) whether or not a promise to pay can be implied from it; and
 - (ii) whether or not it is accompanied by a refusal to pay;
 - (c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and
 - (d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same amount.
- (3) Where a secured party has a cause of action to realize on collateral.
- (a) a payment to him of principal or interest secured by the collateral; or
 - (b) any other payment to him in respect of his right to realize on the collateral, or any other performance by the other person of the obligation secured.
- is a confirmation by the payer or performer of the cause of action.
- (4) Where a secured party is in possession of collateral,
- (a) his acceptance of a payment to him of principal or interest secured by the collateral; or
 - (b) his acceptance of
 - (i) payment to him in respect of his right to realize on the collateral; or
 - (ii) any other performance by the other person of the obligation secured.
- is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the collateral.
- (5) For the purposes of this section, an acknowledgment must be in writing and signed by the maker.
- (6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation is made to him or to a person through whom he claims, or if made in the course of proceedings or a transaction purporting to be under the *Bankruptcy Act* (Canada).
- (7) For the purposes of this section, a person is bound by a confirmation only if
- (a) he is a maker of the confirmation;
 - (b) after the making of the confirmation, he becomes, in relation to the cause of action, a successor of the maker;
 - (c) the maker is, at the time when he makes the confirmation, a trustee, and the first mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee; or
 - (d) he is bound under subsection (8).
- (8) Where a person who confirms a cause of action to
- (a) recover property;
 - (b) enforce an equitable estate or interest in property;
 - (c) realize on collateral;
 - (d) redeem collateral;
 - (e) recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of collateral or of the income or profits of collateral or by way of sale, lease or other disposition of collateral or by way of other remedy affecting collateral; or

(f) recover trust property or property into which trust property can be traced, is on the date of the confirmation in possession of the property or collateral, the confirmation binds any person in possession during the ensuing period of limitation, not being, or claiming through, a person other than the maker who is, on the date of the confirmation, in possession of the property or collateral.

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

(10) Except as specifically provided, this section does not operate to make any right, title or cause of action capable of being confirmed which was not capable of being confirmed before July 1, 1975.

1975-37-5.

Running of time postponed

6. (1) The running of time with respect to the limitation period fixed by this Act for an action

- (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or
- (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods fixed by this Act for an action

- (a) for personal injury;
- (b) for damage to property;
- (c) for professional negligence;
- (d) based on fraud or deceit;
- (e) in which material facts relating to the cause of action have been wilfully concealed;
- (f) for relief from the consequences of a mistake;
- (g) brought under the *Family Compensation Act*; or
- (h) for breach of trust not within subsection (1)

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

- (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
- (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) For the purpose of subsection (3),

- (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require:

- (b) "facts" include
 - (i) the existence of a duty owed to the plaintiff by the defendant; and
 - (ii) that a breach of a duty caused injury, damage or loss to the plaintiff;
 - (c) where a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person;
 - (d) where a question arises as to the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.
- (5) The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.
- (6) Subsection (3) does not operate to the detriment of a bona fide purchaser for value.
- (7) The limitation period fixed by this Act with respect to an action relating to a future interest in trust property does not commence to run against a beneficiary until the interest becomes a present interest.

1975-37-6.

Persons under disability

7. (1) Where, at the time the right to bring an action arises, a person is under a disability, the running of time with respect to a limitation period fixed by this Act is postponed so long as that person is under a disability.
- (2) Where the running of time against a person with respect to a cause of action has been postponed by subsection (1) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of either
- (a) the period which that person would have had to bring the action had that person not been under a disability, running from the time that the cause of action arose; or
 - (b) such period running from the time that the disability ceased, but in no case shall that period extend more than 6 years beyond the cessation of disability.
- (3) Where, after time has commenced to run with respect to a limitation period fixed by this Act, but before the expiration of the limitation period, a person having a cause of action comes under a disability, the running of time against that person is suspended so long as that person is under a disability.
- (4) Where the running of time against a person with respect to a cause of action has been suspended by subsection (3) and that person ceases to be under a disability, the limitation period governing that cause of action is the longer of either
- (a) the length of time remaining to bring an action at the time the person came under the disability; or
 - (b) one year from the time that the disability ceased.
- (5) For the purposes of this section,
- (a) a person is under a disability while he is
 - (i) a minor; or
 - (ii) in fact incapable of or substantially impeded in the management of his affairs; and
 - (b) "guardian" means a parent or guardian having actual care and control of a minor or a committee appointed under the *Patient's Property Act*.

(6) Notwithstanding subsections (1) and (3), where a person under a disability has a guardian and anyone against whom that person may have a cause of action causes a notice to proceed to be delivered to the guardian and to the Public Trustee in accordance with this section, time commences to run against that person as if he had ceased to be under a disability on the date the notice is delivered.

(7) A notice to proceed delivered under this section must

- (a) be in writing;
- (b) be addressed to the guardian and to the Public Trustee;
- (c) specify the name of the person under a disability;
- (d) specify 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 guardian to investigate 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;
- (f) specify the name of the person on whose behalf the notice is delivered; and
- (g) be signed by the person delivering the notice, or his solicitor.

(8) Subsection (6) operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(9) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

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

(11) The Attorney General may make regulations prescribing the form, content and mode of delivery of a notice to proceed.

1975-37-7.

Ultimate limitation

8. (1) Subject to section 3 (3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7 or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose, or in the case of an action against a hospital, as defined in section 1 or 25 of the *Hospital Act*, or hospital employee acting in the course of employment as a hospital employee, based on negligence, or against a medical practitioner based on professional negligence or malpractice, after the expiration of 6 years from the date on which the right to do so arose.

(2) Subject to subsection (1), the effect of sections 6 and 7 is cumulative.

1975-37-8: 1977-76-19.

Cause of action extinguished

9. (1) On the expiration of a limitation period fixed by this Act for a cause of action to recover any debt, damages or other money, or for an accounting 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) On the expiration of a limitation period fixed by this Act for a cause of action specified in column 1 of the following table, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of the table and of a person claiming through him in respect of that property is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

Column 1	Column 2
<i>Cause of action</i>	<i>Property</i>
For conversion or detention of goods.	The goods.
To enforce an equitable estate or interest in land.	The equitable estate or interest.
To redeem collateral, in the possession of the secured party.	The collateral.
To realize on collateral in the possession of the debtor.	The collateral.
To recover trust property or property into which trust property can be traced.	The trust property or the property into which the trust property can be traced, as the case may be.
For the possession of land by a person having a right to enter for a condition subsequent broken or a possibility of reverter of a determinable estate.	The land.

(3) A cause of action, whenever arising, to recover costs on a judgment or to recover arrears of interest on principal money is extinguished by the expiration of the limitation period fixed by this Act for an action between the same parties on the judgment or to recover the principal money.

1975-37-9.

Conversion or detention of goods

10. Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him,

(a) a further cause of action for the conversion or detention of the goods;
 (b) a new cause of action for damage to the goods; or
 (c) a new cause of action to recover the proceeds of a sale of the goods,
 accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of 6 years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

1975-37-10.

Completion of enforcement process

11. (1) Notwithstanding section 3 or 9, where, on the expiration of the limitation period fixed by this Act with respect to actions on judgment, there is an enforcement process outstanding, the judgment creditor or his successors may

(a) continue proceedings on an unexpired writ of execution, but no renewal of the writ shall be permitted;

(b) commence or continue proceedings against land on a judgment registered under the *Court Order Enforcement Act*, Part 3, but no renewal of the registration shall be permitted unless those proceedings have been commenced; or

(c) continue proceedings in which a charging order is claimed.

(2) Where a court makes an order staying execution on a judgment, the running of time with respect to the limitation period fixed by this Act for actions on that judgment is postponed or suspended for so long as that order is in force.

1975-37-11.

Adverse possession

12. Except as specifically provided by this or any other Act, no right or title in or to land may be acquired by adverse possession.

1975-37-12.

Foreign limitation law

13. Where it is determined in an action that the law of a jurisdiction other than British Columbia is applicable and the limitation law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced.

1975-37-13.

Transitional provisions

14. (1) Nothing in this Act revives any cause of action that is statute barred on July 1, 1975.

(2) Subject to subsections (1) and (3), this Act applies to actions that arose before July 1, 1975.

(3) If, with respect to a cause of action that arose before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before July 1, 1977, the limitation period governing that cause of action shall be the shorter of

(a) 2 years from July 1, 1975; or

(b) the limitation period that formerly governed the cause of action.

(4) Subject to subsection (1), a confirmation effective under section 5 is effective, whether given before, on or after July 1, 1975.

(5) Nothing in this Act interferes with any right or title to land acquired by adverse possession before July 1, 1975.

1975-37-14; 1977-76-19.

Repeal of special limitations

15. (1) Where an Act that incorporates or constitutes a private or public body contains a provision that would have the effect of limiting the time in which an action

(a) within section 3 (1), (2) and (3); or

(b) to enforce any right or obligation not specifically created by that Act, may be brought against that body, that provision is repealed to the extent that it is inconsistent with this Act.

(2) Subsection (1) does not apply to a limitation provision that specifically provides that it operates notwithstanding this Act.

1975-37-16

MODEL LIMITATIONS ACT

[Definitions]

1 In this Act,

- (a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;
- (b) "claimant" means the person who seeks a remedial order;
- (c) "defendant" means a person against whom a remedial order is sought;
- (d) "enforcement order" means an order or writ made by a court for the enforcement of a remedial order;
- (e) "injury" means
 - (i) personal injury,
 - (ii) property damage,
 - (iii) economic loss,
 - (iv) non-performance of an obligation, or
 - (v) in the absence of any of the above, the breach of a duty;
- (f) "law" means the law in force in the Province, and includes
 - (i) statutes,
 - (ii) judicial precedents, and
 - (iii) regulations;
- (g) "limitation provision" includes a limitation period or notice provision that has the effect of a limitation period;
- (h) "person under disability" means
 - (i) a minor, or
 - (ii) an adult who is unable to make reasonable judgments in respect of matters relating to the claim;
- (i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, and excludes

- (i) a declaration of rights and duties, legal relations or personal status,
- (ii) the enforcement of a remedial order,
- (iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute, or
- (iv) *habeas corpus*;
- (j) "right" means any right under the law and "duty" has a correlative meaning;
- (k) "security interest" means an interest in property that secures the payment or other performance of an obligation.

[Application]

- 2(1) Except as provided in subsection (2), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if
 - (a) the remedial order is sought in a proceeding before a court created by the Province, or
 - (b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.
- (2) This Act does not apply where a claimant seeks:
 - (a) a remedial order based on adverse possession of real property owned by the Crown, or
 - (b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.
- (3) The Crown is bound by this Act.

[Limitation Periods]

- 3(1) Subject to section 11, if a claimant does not seek a remedial order within
 - (a) 2 years after the date on which the claimant first knew, or in his circumstances ought to have known,

- (i) that the injury for which he seeks a remedial order had occurred,
 - (ii) that the injury was to some degree attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, was sufficiently serious to have warranted bringing a proceeding,
- or

- (b) 15 years after the claim arose,

whichever period expires first, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

- (2) The limitation period provided by clause (1)(a) begins

- (a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in clause (1)(a);

- (b) against a principal when either

- (i) the principal first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), or
- (ii) an agent with a duty to communicate the knowledge prescribed in clause (1)(a) to the principal first actually acquired that knowledge;

and

- (c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

- (i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if he acquired the knowledge more than 2 years before his death,
- (ii) when the representative was appointed, if he had the knowledge prescribed in clause (1)(a) at that time, or
- (iii) when the representative first acquired or ought to have acquired the knowledge prescribed in clause (1)(a), if he acquired the knowledge after his appointment.

- (3) For the purposes of clause (1)(b),
- (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions arises when the conduct terminated or the last act or omission occurred;
 - (b) a claim based on a breach of a duty arises when the conduct, act or omission occurred;
 - (c) a claim based on a demand obligation arises when a default in performance occurred after a demand for performance was made;
 - (d) a claim in respect of a proceeding under the Fatal Accidents Act arises when the conduct which caused the death, upon which the claim is based, occurred;
 - (e) a claim for contribution arises when the claimant for contribution was made a defendant in respect of, or incurred a liability through the settlement of, a claim seeking to impose a liability upon which the claim for contribution could be based, whichever first occurs.
- (4) The limitation period provided by clause 3(1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 60 of the *Law of Property Act*.
- (5) Under this section,
- (a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by clause (1)(a), and
 - (b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by clause (1)(b).

[Acquiescence or Laches]

- 4 Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches, notwithstanding that the defendant would not be entitled to immunity pursuant to this Act.

[Concealment]

- 5(1) The operation of the limitation period provided by clause 3(1)(b) is suspended during any period of time that the defendant fraudulently concealed the fact that the injury for which a remedial order is sought had occurred.
- (2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by clause 3(1)(b) was suspended.

[Persons under Disability]

- 6(1) The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant was a person under disability.
- (2) Under this section, the claimant has the burden of proving that the operation of the limitation periods provided by this Act was suspended.

[Claims Added to a Proceeding]

- 7(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of either subsection (2), (3) or (4) are satisfied.
- (2) When the added claim
 - (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
 - (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.
- (3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
 - (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
 - (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim

that he will not be prejudiced in maintaining a defence to it on the merits, and

- (c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.
- (4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,
- (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
 - (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that he will not be prejudiced in maintaining a defence to it on the merits.
- (5) Under this section,
- (a) the claimant has the burden of proving
 - (i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and
 - (ii) that the requirement of clause (3)(c), if in issue, has been satisfied,
 - and
 - (b) the defendant has the burden of proving that the requirement of clause (3)(b) or 4(b), if in issue, was not satisfied.

[Agreement]

- 8 Subject to section 10, if an agreement provides for the reduction or extension of a limitation period provided by this Act, the limitation period is altered in accordance with the agreement.

[Acknowledgment and Part Payment]

- 9(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income, a share of estate property, and interest on any of the foregoing.

- (2) Subject to subsections (3) and (4) and section 10, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation periods begins anew at the time of the acknowledgment or part payment.
- (3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective
 - (a) whether or not a promise to pay can be implied from it, and
 - (b) whether or not it is accompanied by a refusal to pay.
- (4) When a claim is for the recovery of both a primary sum and interest thereon, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.

[Persons Affected by Exceptions for Agreement, Acknowledgment and Part Payment]

- 10(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.
- (2)
 - (a) An agreement made by or with an agent has the same effect as if made by or with the principal, and
 - (b) an acknowledgment or a part payment made by or to an agent has the same effect as if made by or to the principal.
- (3) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made
 - (a) with or to him,
 - (b) with or to a person through whom he derives a claim, or
 - (c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).
- (4) A person is bound by an agreement, an acknowledgment or a part payment only if
 - (a) he is a maker of it, or
 - (b) he is liable in respect of a claim
 - (i) as a successor of a maker, or

- (ii) through the acquisition of an interest in property from or through a maker

who was liable in respect of the claim.

[Judgment for Payment of Money]

- 11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, upon pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[Conflict of Laws]

- 12 The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

[Transitional]

- 13(1) *Subject to subsection (2), this Act applies where a claimant seeks a remedial order in a proceeding commenced after the date the Act comes into force.*
- (2) *A defendant is not entitled to immunity from liability in respect of a claim of which the claimant knew, or in his circumstances ought to have known before this Act came into force and in respect of which a remedial order is sought*
- (a) *in time to satisfy the provisions of law governing the commencement of actions which would have been applicable but for this Act, and*
- (b) *within 2 years after the date this Act comes into force.*

[Consequential]

- 14(1) *Section 60 of the Law of Property Act is amended by adding the following:*

(3) *No right to the access and use of light or any other easement, right in gross or *profir a prendre* shall be acquired by a person by prescription, and it shall be deemed that no such right has ever been so acquired.*

- (2) *The Limitation of Actions Act is repealed.*