

1967

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PARLIAMENT OF NEW SOUTH WALES

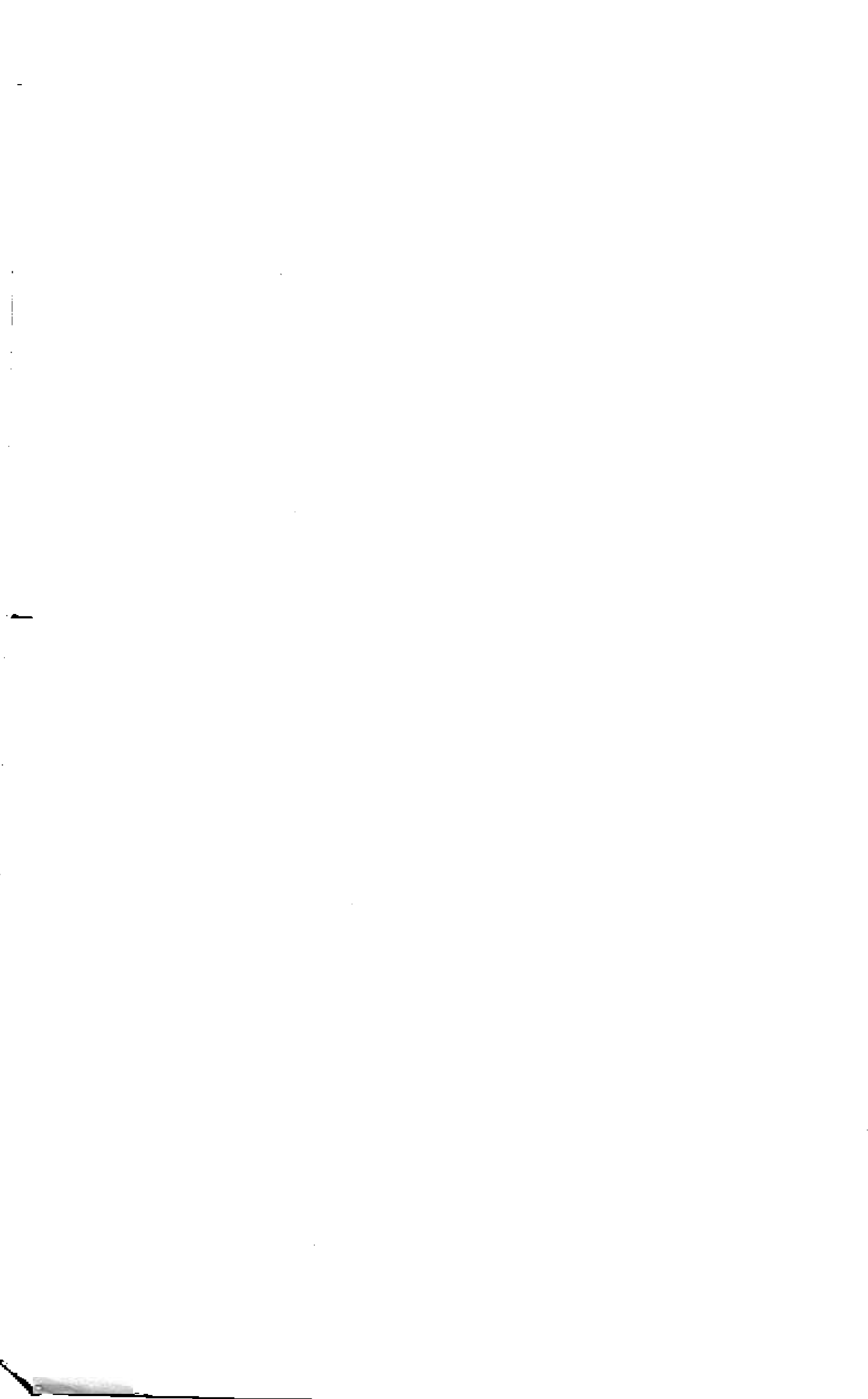
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REPORT  
OF THE  
LAW REFORM COMMISSION  
BEING THE FIRST REPORT  
ON THE  
LIMITATION OF ACTIONS  
(L.R.C. 3)  
OCTOBER, 1967

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## PREFACE

The Law Reform Commission has been functioning since the beginning of 1966 and has been constituted by the Law Reform Commission Act, 1967. The Commissioners are—

The Honourable Mr Justice Manning, Chairman.

Professor D. G. Benjafield.

Mr R. D. Conacher.

Mr H. M. Scott.

The Executive Member of the Commission is Mr R. E. Walker. The offices of the Commission are at Park House, 187 Macquarie Street, Sydney.

This report is the third report of the Commission made to the Attorney-General pursuant to a reference by him to the Commission. The short citation for this report is L.R.C. 3.

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LAW REFORM COMMISSION  
FIRST REPORT ON THE  
LIMITATION OF ACTIONS

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To the Honourable K. M. McCaw, M.L.A.,  
Attorney-General for New South Wales.

1. You have made a reference to this Commission in the following terms:

"To review the law relating to the limitation of actions, notice of action, and incidental matters."

2. We have approached our task by dividing it into two parts. The first part concerns the general law of the limitation of actions. The second part concerns particular matters which will require consultation with numerous persons and authorities affected. These particular matters include the large number of special provisions for the limitation of actions against public authorities, persons in public offices, and other persons, and for notice of action; also the question of fixing limitation periods for the enforcement of statutory charges on land, for example, rates under the Local Government Act, 1919; and further consideration of the limitation period for an action by the Crown to recover land. Appendix A to this report is a list of statutory provisions for consideration in the second part of our work under this reference: the list Appendix A ought not to be treated as exhaustive.

3. We do not read our terms of reference as requiring us to consider limitation periods for criminal proceedings.

4. It is convenient to deal first, as this report does deal, with the general law of the limitation of actions. There are two reasons. First, it is not practicable to recommend legislation on the particular matters mentioned in paragraph 2 of this report except on the basis of knowing what the general law is to be. Second, we would like to have, before recommending anything concerning these particular matters, the views of the persons affected. It must take time if a proper opportunity is to be given for those views to be furnished to us.

5. Our terms of reference are broadly similar to the terms of reference of a subcommittee of the Law Reform Committee set up by your predecessor. The latter terms of reference were "to revise the law relating to limitation of actions (including notice of action) and to submit a draft Bill in that behalf for the consideration of the Government." The subcommittee, under the chairmanship at first of The Honourable Mr Justice Else Mitchell and later of The Honourable Mr Justice Asprey, have carried their work a considerable distance and we have had the advantage of seeing papers prepared in the course of their work. In particular we should like to mention the work of Mr R. P. Meagher, barrister, who prepared the first working draft of a limitation Bill.

6. The general law of the limitation of actions in force in New South Wales today is in general the same as it was in England when Queen Victoria came to the throne in 1837. The law rests, in the main, on Imperial Acts passed before the first settlement of this country, together with some later English legislation adopted, or copied, by New South Wales legislation passed over 100 years ago. For the limitation rules of most common application, it is necessary to go back to a statute passed in 1623 and it may possibly be necessary to go back to a statute of 1588.

7. The text of these old statutes is inaccessible except in a few textbooks now out of print or in sets of old Imperial statutes also out of print and held only by the largest legal libraries. Further, the statutes are cast in a language explicable only by reference to court procedures, and forms of landholding, and institutions, which otherwise are rarely of any but antiquarian interest to the practising lawyer, or to the citizen, of today.

8. Since New South Wales became self-governing, two major episodes in the history of the general law of the limitation of actions have happened in England. The first episode was in 1874. It concerned the twenty-year limitation period which governed (and in New South Wales still does govern) an action on a covenant in a deed, an action to recover land, and other actions which we need not specify here. This period was cut down to twelve years. The change must have led to the relief of countless people from the anxiety of stale claims and it has not led to protest on a significant scale that the period is too short. We think that the change was a wise one and we recommend it for adoption here.

9. The second episode was the passing in England of the Limitation Act, 1939, based on the fifth interim report of the Law Revision Committee (the Wright Committee) in 1936 (Cmd. 5334). The Imperial Act of 1939 repealed all the old general statutes of limitation and stated the law in more coherent and modern terms. The Imperial Act of 1939 was amended in 1954, in 1959, and in 1963, but its main provisions have been in force for upwards of twenty-five years and have been tested in the courts on many occasions. It is the basis of the present law in New Zealand, Victoria, Queensland, and Western Australia.

10. We think, and we say it with respect, that the Imperial Act of 1939 makes sound provision for the general law of limitation of actions. We have used it as the starting point in framing the Bill which we present with this report as Appendix B. We have, however, departed in many ways from the wording, and in some ways from the principles, of the Imperial Act of 1939. Indeed, the passages in the Bill are few which are taken *verbatim* from the Imperial Act. We shall attempt, in this report and in its appendices, to show the reasons which have led us to depart from the terms of the Imperial Act.

11. We have already spoken of one major change which we recommend: the general reduction of the present limitation period of twenty years to twelve years. It may be safe to make a general reduction to a period less than twelve years, but we are not convinced that such a further reduction can be made without unduly shortening the time within which the claims in question may be litigated and, indeed, without sacrificing the respite which a creditor or other claimant may be content to allow in the hope that claims can, in time, be settled without recourse to the courts. We recommend a general reduction of the present twenty year period to twelve years, but no further.

12. As regards the recovery of land, although the ordinary period within which an action may be brought is now twenty years and would, under our Bill, be twelve years, the period now allowed for an action by the Crown is sixty years. In England this period is, under the Imperial Act of 1939, thirty years. The reason given by the Wright Committee for the reduction was that a purchaser could investigate a title to land only back to a root of title at least thirty years old. The thirty year period was forty years before 1926 and before 1874 it was sixty years. The position is similar for old system titles in New South Wales: the period was sixty years until 1920; forty years from 1920 to 1931; and has been thirty years thenceforward; we recommend that the thirty year period for an action by the Crown to recover land be adopted here and the Bill so provides.

13. A major change which we recommend is the adoption of the substance of provisions introduced in England by the Imperial Limitation Act, 1963. These provisions would allow an extension of the limitation period for bringing an action for damages for personal injuries in cases where the injured person does not know, and could not reasonably be expected to know, the material facts relating to his cause of action until the limitation period has almost expired or until after the expiry of the limitation period. This provision would apply, for



example, to the case where a factory worker contracts pneumoconiosis by reason of the negligence or breach of statutory duty of his employer. Such a disease may in fact be contracted (so that the cause of action of the injured worker accrues) many years before there is any outward sign of the disease and, under the present law, the cause of action may be statute-barred before the injured man knows or could be reasonably expected to know that he has the cause of action.

14. Another change which we recommend, rarely important in practice, but of basic importance to the principles of the law of the limitation of actions, concerns the extinction of rights and titles on the expiration of the limitation periods for actions for their enforcement. Before 1833 in England and 1837 in New South Wales, the expiration of the limitation period only barred the remedy by court action and not the right, whether the right was a debt, a claim for damages, a title to land, or any other right. By the Acts of the 1830's, the expiration of the limitation period for an action to recover land worked an extinction of the title of the claimant to the land, but the law in this respect was otherwise unchanged. The Imperial Act of 1939 extinguishes a title to goods on the expiration of the limitation period for an action for the conversion or detention of the goods, but leaves the law otherwise unchanged. The Wright Committee, indeed, considered the problem and did not recommend that any change be made. We think, however, that the extinction of the claim or title should be made the general rule. Leaving the claim or title in existence without the support of a remedy by action is to leave settled expectations open for ever afterwards to disturbance by accident or by contrivance. We discuss the matter in more detail in paragraphs 306 to 330 of the notes which are appendix C to this report. Of those whom we consulted on the effect of the Bill generally, a substantial majority were in accord with our proposals for the general extinction of rights and titles on the expiration of the relevant limitation periods.

15. It has for centuries been the law that an acknowledgment or part payment of a debt gives a fresh start to the running of the limitation period. The rules on this subject were at first developed by the courts but were later modified and extended by statute. Probably because of the rules of pleading and procedure of the courts at the time when the doctrines of acknowledgment and part payment were developed, the doctrine has been confined to liquidated claims, as distinct from claims to damages. Thus, if a man breaks his contract to pay the value of a car, there is a claim for a liquidated sum which is susceptible of acknowledgment; but if a man breaks his contract to deliver the car, there is only a claim for damages for which an acknowledgment is inoperative, even though the measure of damages may be the value of the car. We think that distinctions of this kind are mischievous and we recommend a provision covering acknowledgments and part payments relating to all the causes of action to which the Bill applies.

16. An innovation for which there is, so far as we know, no precedent in a Limitation Act is made by the Bill in the case of disability through mental illness. It often happens that the affairs of a mentally ill person are under the control of the Master in the Protective Jurisdiction of the Supreme Court or of a committee or manager appointed under the Mental Health Act, 1958. In such a case, section 53 of the Bill would enable a person who apprehends that the mentally ill person may have a claim against him to give to the Master, committee or manager a notice to proceed, stating the circumstances in which the claim may be alleged to arise. On the notice being given, the Master, committee, or manager would have at least three years within which to bring any action which he may think justified, but the mental illness would give no further postponement of the running of the limitation period. This provision would, we think, promote the main purpose of a statute of limitations without injustice to the mentally ill.

17. At present, the extensions of time for disability do not apply to actions under the Compensation to Relatives Act. By putting the general limitation provisions for those actions in this Bill, we would make them subject to extensions in case of disability and in other cases.

18. The limitation period for proceedings for contribution between tortfeasors has recently had some consideration in the High Court of Australia (*Brambles Constructions Pty. Ltd. v. Helmers* (1966) 114 C.L.R. 213). The Bill makes express provision on this subject, a modification of provision made in England by the Imperial Limitation Act 1963.

19. Appendix C to this report contains more detailed notes on the provisions of the Bill which is Appendix B. Appendix D to this report contains comparative tables showing the relationship of the provisions of the statutes now in force to the provisions of the Bill and showing the relationship of provisions of the Imperial Act of 1939 and the amending Act of 1963 to the provisions of the Bill.

20. We have received valuable help from the following:

Mr E. S. Bishop, the Parliamentary Draftsman.

Mr E. N. Dawes, the Master in the Protective Jurisdiction of the Supreme Court.

Mr P. J. Grimes, an Examiner of Titles.

The Law Society of New South Wales and, in particular:

Mr E. A. Francis.

Mr K. N. Austin.

Mr D. C. Moore.

Mr R. J. McKay, the Crown Solicitor.

Professor W. L. Morison, of the Faculty of Law in the University of Sydney.

The New South Wales Bar Association and, in particular:

Mr F. J. D. Officer, Q.C.

Mr H. J. H. Henchman.

Mr C. R. Allen.

Mr R. P. Meagher.

Mr T. L. Willis, Assistant Parliamentary Draftsman.

We gratefully acknowledge the help that they have given us. There are necessarily differences in opinion on such a complex technical subject and probably few, if any, of those who have helped us would agree in every respect with our proposals. There has, however, been an extraordinary measure of either agreement with, or understanding of, the reasons for, our proposals. The responsibility for our proposals is, nevertheless, ours alone.

21. We recommend a Bill in the terms of Appendix B to this report.

27th October, 1967.

J. K. Manning,  
Chairman.

David G. Benjafield,  
Member.

**APPENDIX A**  
**Special Limitation, etc., Enactments**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Agricultural Holdings Act, 1941 (No. 55).	15 (7) (b) ..	.....	Claim for compensation for disturbance.	One month before termination of tenancy.	.....
Ambulance Transport Service Act, 1919-1962 (No. 5).	23 ..	Twelve months after injury or death.	Actions against New South Wales Ambulance Transport Service Board for damages for negligence.	Eleven months after injury.	No notice required if in respect of death.
Anatomy Act, 1901 (No. 9)...	20 (1) ..	Six months ..	Action for suit for anything done in pursuance of the Act.	.....	.....
Annual Holidays Act, 1944-1964 (No. 31).	13 (1) ..	Eighteen months ..	Proceedings for arrears for holiday pay.	.....	.....
Auctioneers, Stock and Station, Real Estate, and Business Agents Act, 1941-1965 (No. 28).	42A (1) ..	.....	Action for commission and expenses.	Statement of claim two months before action.	Except for proceedings under Arrest on Mesne Process Act, 1902.
	74 (3) ..	Six months after becoming aware of offence or two years after commission of offence whichever is shorter.	Application to fidelity guarantee fund.	.....	.....
Balranald Irrigation Act, 1902 (No. 78).	19 ..	Six months ..	Claim for compensation against Balranald Irrigation Trust for loss, etc. caused by person employed by it.	.....	.....

**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Broken Hill Water and Sewerage Act, 1938-1958 (No. 20).	26 (5) 126 (3)	Six months .. .. .	Compensation for damage ..	One month ..	Notice of action is general in respect of anything done under Act.
Child Welfare Act, 1939-1966 (No. 17).	158 (2)	Six months; or six months from discharge if plaintiff is a ward.	Action against Minister or any officer of Child Welfare Department.	.....	Bona fide acts with reasonable care exempt; provision for staying actions—see section.
City and Suburban Electric Railways Act, 1915-1947 (No. 29).	12 (2)	.....	Claim for compensation for damage done under the Act.	Within twelve months of cause of action and carrying out of work.	.....
Commercial Agents and Private Enquiry Agents Act, 1963 (No. 4).	37 (3)	Two years .. .. .	Claim agents fidelity bond ..	.....	.....
Companies Act, 1961-1966 (No. 71).	48 (6)	Two years .. .. .	Action against director for irregular allotment of shares.	.....	.....
Contractors' Debts Act of 1897 (No. 29).	6 .. .. .	Three months .. .. .	Actions for debts due for material or labour.	.....	.....
Crimes Act, 1900 (No. 40) ..	469 (1)	Six months .. .. .	Sequestration of offender's estate after conviction for felony.	.....	.....
	563 (1)	Six months .. .. .	Anything done under Act ..	One month ..	.....

**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Crown Lands Consolidation Act, 1913 (No. 7).	16 (1)	.. Six years ..	Certain complaints before a Local Board.	.....	.....
	235B	.....	No. possessory title to certain Crown Lands.	.....	.....
District Courts Act, 1912-1965 (No. 23).	249..	.. Twelve months ..	Actions against officers acting under Crown Lands Acts.	One month	.....
	148 (2)	.. One year ..	Money paid into Court to use of a suitor and unclaimed for one year.	.....	.....
Drainage Act, 1939-1965 (No. 29). Electricity Commission Act, 1950-1961 (No. 22).	33 (2)	.. Six months ..	Claim for compensation	.....	Local Land Board sole tribunal.
	100..	.. Twelve months ..	Actions for damage to person or property.	One month	Defects in notice may be amended at trial and Court may excuse non-compliance; limitation period may be extended within 12 months after expiry.
Fire Brigades Act, 1909-1965 (No. 9). Fisheries and Oyster Farms Act, 1935-1963 (No. 58).	47 ..	.. Six months ..	Actions against Board or person acting under Act.	One month	.....
	108..	.. None ..	Anything done in pursuance of the Act.	One month	.....

**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Friendly Societies Act, 1912-1963 (No. 46).	102 ..	.....	Recovery of subscriptions due to registered society.	One month	.....
Gaming and Betting Act, 1912-1967 (No. 25).	58 ..	Three months	Anything done or omitted in pursuance of the Act.	One month before action.	.....
Government Railways Act, 1912-1965 (No. 30).	143, 144 (1)	One year	Actions against Commissioner or other persons for things done or omitted under the Act.	One month	.....
Grain Elevators Act, 1954-1967 (No. 36).	56 ..	Twelve months	Actions against the Board or members or servants for acts or omissions under the Act.	One month	Notice may be amended or insufficient, etc. excused. Limitation period may be extended within 12 months after expiry.
Hawkers and Peddlers Act, 1901 (No. 28).	26 ..	Six months	Actions for anything done under the Act.	One month	.....
Hunter District Water, Sewerage and Drainage Act, 1938-1965 (No. 11).	32 (5)	Six months	Compensation for damage	.....	.....
Inclosed Lands Protection Act, 1901-1964 (No. 33).	135 (2)	.....	Anything done under the Act.	One month	.....
	9 ..	Two months	Actions for anything done in pursuance of the Act.	One month	.....

**APPENDIX A—continued**  
**Special Limitations, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Industrial Arbitration Act, 1940-1966 (No. 2).	92 (2)	Twelve months after termination of employment.	Applications by ex-employees to recover balance of award wages.	.....	In respect of period 12 months prior to application or last 12 months of employment.
Inebriates Act, 1912-1965 (No. 24).	31 (2)	Three months	Action or suit for anything done under the Act.	.....	Extension to six months.
Irrigation Act, 1912-1964 (No. 73).	17b, 17c	Three years	Actions against officers for anything done under Act or other Act under which Commission has duties.	One month	Defect or inaccuracy not to invalidate unless prejudicial.
Justices Act, 1902-1967 (No. 27)	139 ..	Six months	Actions against justices	One month	.....
Land Tax Management Act, 1956-1964 (No. 26).	35 (1)	Thirty days	Objection to assessment	.....	Commissioner may extend.
Landlord and Tenant Act, 1899-1964.	8 (3)	Six months	Suit for relief against forfeiture of lease.	.....	.....
Legal Practitioners Act, 1898-1967 (No. 22).	13 (3)	Six months	Action on recognizance on security against waste, etc.	.....	.....
	21 ..	One month	Action by solicitor for costs	.....	.....
	56 (2) (b)	Three months	Claim on solicitor's fidelity guarantee fund.	.....	This is minimum not maximum period.
Limitation of Actions (Recovery of Imposts) Act, 1963 (No. 21).	2 ..	Twelve months	Actions for recovery of taxes imposts, etc.	.....	Court or judge may extend time.

**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Liquor Act, 1912 (No. 42) ..	110..	Six months ..	Actions in relation to adulteration of liquors.	One month ..	.....
	171..	Three months ..	Actions against chairman, etc. for anything done under Act.	.....	.....
Local Government Act, 1919 (No. 41).	43 (2) (3) ..	Three months after election etc.	Ouster of office ..	21 days ..	.....
	34AC (1) ..	Time prescribed ..	Injurious affection (Town and Country Planning).	.....	.....
Local Government Act, 1919	580..	Twelve months ..	General ..	One month ..	Limitation period may be extended within 12 months thereafter.
Local Government Act, 1919	596..	Twenty years ..	Recovery of rates	.....	.....
Local Government Act, 1919	615 (2) ..	Six years ..	Recovery of fees	.....	.....
Long Service Leave Act, 1955-1963 (No. 38).	12 ..	Two years before action brought.	Order for payment of long service leave.	.....	.....
Main Roads Act, 1924-1965 (No. 24).	27c (5) (e) ..	Twelve months ..	Compensation for proclamation of a motorway.	.....	.....
Maritime Services Act, 1935-1966 (No. 47).	40 ..	Twelve months ..	Actions against Board, etc. for anything done or omitted.	One month ..	Extension within 12 months.
Matrimonial Causes Act, 1899-1965 (No. 14).	54 ..	Three years prior to petition.	Damages for adultery..	.....	.....
Medical Practitioners Act, 1938-1964 (No. 37).	35 (2) ..	Three months ..	Action by registered medical practitioner to recover fees.	.....	This is a minimum not a maximum period.



**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Metropolitan Water, Sewerage and Drainage Act, 1924-1965 (No. 50).	32 (5)	Three months	Claim for damages	.....	.....
Milk Act, 1931-1964 (No. 59)	132 (3)	None	Writs or process for anything done or omitted under the Act.	One month	.....
Mine Subsidence Compensation Act, 1961-1967 (No. 22).	81	None	Actions against Board, member, servant or other person for acts and omissions under Act.	One month	.....
Ministry of Transport Act, 1932-1950 (No. 3).	12 (2)	.....	Compensation for subsidence caused by extraction of minerals.	As prescribed	.....
Motor Vehicles Taxation Management Act, 1949-1962 (No. 34).	16, 17	One year	Actions against Board or person for anything done under Act.	One month	.....
Motor Vehicles (Third Party Insurance) Act, 1942-1963 (No. 15).	12	Three years	Application for refund of tax...	.....	.....
	15 (2) (b) (i)	.....	Action against authorized insurer, etc. where insured person is dead, etc.	} 30 days } Three months	} Extension of time on sufficient cause.
	15 (2) (b) (ii)	.....	Action for hospital expenses, etc.		
	26 (3) (a) (iii)	No action until six months after occurrence.			

**APPENDIX A—continued**  
**Special Limitations, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Motor Vehicles (Third Party Insurance) Act, 1942-1965—continued.	25 (2) 26 (2) 30 (1) (a) (b) 30 (2) (b) 38 ..	..... ..... ..... ..... Twelve months ..	Actions against nominal defendant and authorized insurer. Actions against Council or officers for anything done under Act. Actions for compensation ..	30 days .. 30 days .. 30 days or 3 months .. 30 days or 3 months .. One month ..	Court may extend. ..... ..... Court may extend. .....
Municipal Council of Sydney Electric Lighting Act, 1896-1935 (60 Vic. No. 23).	17 ..	Unreasonable delay ..	Actions against persons for anything done under Act.	Within six months ..	.....
New South Wales—Queensland Border Rivers Act, 1947 (No. 10).	17 ..	Three months ..	Actions against persons for anything done under Act.	One month ..	.....
Obscene and Indecent Publications Act, 1901-1955 (No. 12).	38 (3) ..	Three months ..	Action by pawnbroker to recover goods after order of justices for delivery.	.....	.....
Pawnbrokers Act, 1902 (No. 66).	45 ..	Three months ..	Action against any person for thing done under Act.	.....	.....
Police Offences Act, 1901-1967 (No. 5).	32 (5) ..	Six months ..	Action for recovery of goods or paid under order of justice.	.....	See <i>Skoppee v. Coxon &amp; Co.</i> (1907) 7 S.R. 608.

**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Police Offences Act, 1901-1967 (No. 5).	114 (1) (2) .. 33 ..	Two months .. One month ..	Actions and prosecutions for anything done under Act. Compensation for wilful damage by tenants.	One month .. .....	..... Period commences— (1) at time of damage; or (2) at end of tenancy or occupation. .....
Prevention of Cruelty to Animals Act, 1901-1953 (No. 64).	12 (1) ..	Three months ..	Action for anything done pursuant to Act.	One month ..	.....
Printing Act, 1899-1934 (No. 16).	8 ..	Three months ..	Prosecution or suit for penalty	.....	.....
Prisons Act, 1952-1966 (No. 9).	47 ..	One year ..	Action against any person for thing done under Act.	One month ..	.....
Public Roads Act, 1902 (No. 95).	26 (13) ..	Three months ..	Actions against person acting under section 26.	.....	.....
Public Works Act, 1912 (No. 45).	102..	.....	Claim for compensation for land resumed.	Ninety days ..	Power in Supreme Court to extend. .....
Quarantine Act, 1897 (No. 25).	37 (iii) ..	Six months ..	Action against pilot, etc. for thing done in pursuance of Act.	.....	.....

**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Real Property Act, 1900-1967 (No. 25).	128 (1) ..	.....	Action against Registrar-General for error, etc. in register book.	One month ..	.....
River Murray Waters Act, 1915-1964 (No. 8).	130 (1), (2) ..	Six years ..	Action against Registrar-General or Assurance Fund.	.....	.....
Rivers and Foreshores Improvement Act, 1948-1965 (No. 20).	19 ..	Unreasonable delay ..	Action for compensation ..	Within six months	.....
Seamen's Act, 1898 (No. 46)	14 ..	5 years ..	Appeal to Land and Valuation Court as to lands.	.....	.....
Small Debts Recovery Act, 1912-1965 (No. 33).	111 (1) ..	Three months ..	Action against officer for anything done under Act.	.....	.....
Stage-carriages Act, 1899 (No. 24).	11 (3) ..	Six years ..	Action for debt or claim	.....	.....
	72 ..	Six months ..	Actions for anything done under Act.	One month ..	.....
Stamp Duties Act, 1920-1967 (No. 47).	14 (1) ..	Three months ..	Anything done in pursuance of the Act.	.....	.....
	140 (4) ..	Three years ..	Action for refund of duty ..	.....	.....

**APPENDIX A—continued**  
**Special Limitation, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Swine Compensation Act, 1928-1938 (No. 36).	8 (3)	Twenty-one days	Compensation for destruction of pig or condemnation of carcass.	.....	.....
Sydney Collieries, Limited, Enabling Act, 1924 (No. 23).	4 (4)	None	Damage	90 days of first becoming aware of damage.	.....
Sydney Harbour Bridge Act, 1922-1937 (No. 28).	19 (2) (3)	Twelve months	Actions for damages for anything done under Act.	Twelve months	.....
Sydney Harbour Transport Act, 1951-1952 (No. 11).	34 (1), (5)	Twelve months	Actions for damages to person or property.	One month	Defects in notice may be amended at trial and Court may excuse non-compliance; limitation period may be extended within 12 months thereafter.
Sydney Harbour Trust Act, 1900-1960 (No. 1 of 1901).	26	Twelve months	Actions against Maritime Services Board.	One month	Defect in notice not to invalidate it unless prejudice.

**APPENDIX A—continued**  
**Special Limitations, etc., Enactments—continued**

Title	Section	Period of limitation	Subject matter	Notice of action	Comments
Testator's Family Maintenance and Guardianship of Infants Act, 1916-1954 (No. 41). Transport Act, 1930-1965 (No. 18).	5 .. 232 (2), 233	Twelve months after grant or resealing of Probate or letters of Administration. One year ..	Application for maintenance out of estate of testator or intestate. Actions against Commissioner ..	..... One month ..	Period may be extended at any time.  Defect in notice not to invalidate it unless defendant prejudiced.
Transport (Division of Functions) Act, 1932-1964 (No. 31). Vagrancy Act, 1902 (No. 74)	27, 28 .. 15 ..	One year .. Three months ..	Actions for anything done or omitted to be done under the Act (including recovery of moneys). Actions against persons for things done in execution of duty under the Act. Actions against trustee for damage upon entry to land. Action against estate after notice by executor to institute proceedings. Action against employer after workers' compensation received.	One month .. .....	Defect in notice not to invalidate it unless defendant prejudiced. .....
Water Act, 1912-1966 (No. 44). Wills, Probate and Administration Act, 1898-1965 (No. 13). Workers' Compensation Act, 1926-1966 (No. 15).	54 (1) .. 93 (1) .. 63 (3) ..	Three months .. Three months .. Three years ..	.....	..... ..... .....	..... ..... Application for extension of time within prescribed period or 12 months thereafter.

**APPENDIX B**  
**Arrangement of Limitation Bill**  
*Limitation Bill*

APPENDIX B—*continued*

## LIMITATION BILL 1967

## ARRANGEMENT

## PART I—PRELIMINARY.

1. Short title.
2. Construction.
3. Division.
4. Repeal, amendment, and citation.
5. Saving.
6. Transition.
7. Other limitations.
8. Saving of specified enactments.
9. Acquiescence etc.
10. The Crown.
11. Interpretation.

## PART II—PERIODS OF LIMITATION AND RELATED MATTERS

DIVISION 1—*Preliminary.*

12. Relationship to Part III.
13. More than one bar.

DIVISION 2—*General.*

14. General.
15. Account.
16. Deed.
17. Judgment.
18. Penalty and forfeiture.
19. Compensation to relatives.
20. Arbitral award.
21. Successive wrongs to goods.
22. Shipping.
23. Equitable relief.
24. Arrears of income.
25. Relief against forfeiture of lease.
26. Contribution between tortfeasors.

DIVISION 3—*Land.*

27. General.
28. Accrual—dispossession or discontinuance.
29. Accrual—deceased in possession.
30. Accrual—grantor in possession.
31. Accrual—future interests.
32. Forfeiture and breach of condition.
33. Rent wrongly paid.
34. Tenancies.
35. Landlord and Tenant (Amendment) Act, 1948.
36. Equitable interest.
37. Settled land.
38. Adverse possession.
39. Formal entry and claim.

DIVISION 4—*Mortgages.*

40. Mortgage under Real Property Act.
41. Redemption.
42. Action for principal possession or foreclosure.
43. Action for interest.
44. Adjustment of interest.
45. Power of sale etc.
46. Mortgage of ship.

DIVISION 5—*Trusts.*

47. Fraud and conversion; trust property.
48. Breach of trust.
49. Accrual—future interest.
50. Beneficiaries other than the plaintiff.



**APPENDIX B—continued****PART III—POSTPONEMENT OF THE BAR****DIVISION 1—General.**

51. Ultimate bar.

**DIVISION 2—Disability, confirmation, fraud, and mistake.**

- 52. Disability.
- 53. Notice to proceed.
- 54. Confirmation.
- 55. Fraud and deceit.
- 56. Mistake.

**DIVISION 3—Personal injury cases.**

- 57. Interpretation.
- 58. Ordinary action.
- 59. Surviving action.
- 60. Compensation to relatives.
- 61. Prior bar ineffective.
- 62. Evidence.

**PART IV—MISCELLANEOUS****DIVISION 1—Extinction of right and title.**

- 63. Debt, damages etc.
- 64. Account.
- 65. Property.
- 66. Instrument under Real Property Act.
- 67. Future interest in land.
- 68. Possessory lien.

**DIVISION 2—Arbitration.**

- 69. Interpretation.
- 70. Application of this Act.
- 71. Accrual.
- 72. Commencement.
- 73. Extension of limitation period.

**DIVISION 3—General.**

- 74. Set off etc.
- 75. Joint right.
- 76. Joint liability.
- 77. Rules of court.

**SCHEDULE ONE—Repeal of enactments.**

**SCHEDULE TWO—Amendment of Acts.**

**SCHEDULE THREE—Citation of Acts.**

**SCHEDULE FOUR—Extinction of right and title.**

*Proposed Limitation Bill*

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**A BILL**

To amend and consolidate the law relating to the limitation of actions; to repeal section 5 of the Imperial Act known as the Common Informers Act, 1588, and certain other Imperial enactments; to repeal the unrepealed portion of the Act passed in the fourth year of the reign of William the Fourth number seventeen and certain other enactments; to amend the Compensation to Relatives Act of 1897, as amended by subsequent Acts, and certain other enactments; to make further provision concerning estates tail; and for purposes connected therewith.

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*Limitation.*

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(Part I,  
ss. 1-3)

**B**E it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

1. (1) This Act may be cited as the "Limitation Act, 1967". Short title and commencement.
- 10 (2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

2. This Act is to be read and construed subject to the Commonwealth of Australia Constitution Act and so as not to exceed the legislative power of the State, to the intent that where any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to other persons or circumstances is not to be affected. Construction.

- 20 3. This Act is divided into Parts and Divisions as follows :— Division.

PART I.—PRELIMINARY—ss. 1-11.

PART II.—PERIODS OF LIMITATION AND RELATED MATTERS—ss. 12-50.

- 25 DIVISION 1.—*Preliminary*—ss. 12, 13.
- DIVISION 2.—*General*—ss. 14-26.
- DIVISION 3.—*Land*—ss. 27-39.
- DIVISION 4.—*Mortgages*—ss. 40-46.
- DIVISION 5.—*Trusts*—ss. 47-50.

PART

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*Limitation.*

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(Part I,  
ss. 3, 4)PART III.—POSTPONEMENT OF THE BAR—*ss.* 51–62.DIVISION 1.—*General*—*s.* 51.DIVISION 2.—*Disability, confirmation, fraud and mistake*—*ss.* 52–56.5 DIVISION 3.—*Personal injury cases*—*ss.* 57–62.PART IV.—MISCELLANEOUS—*ss.* 63–77.DIVISION 1.—*Extinction of right and title*—*ss.* 63–68.DIVISION 2.—*Arbitration*—*ss.* 69–73.DIVISION 3.—*General*—*ss.* 74–77.

## 10 SCHEDULES.

4. (1) Each Imperial Act specified in Part A of Schedule One to this Act is, to the extent therein expressed, repealed so far as it applies to New South Wales.

Repeal,  
amendment  
and citation.Schedule  
One  
Part A.

15 (2) Each Act specified in Part B of Schedule One to this Act is, to the extent therein expressed, repealed.

Schedule  
One  
Part B.

(3) Each Act specified in column 1 of Schedule Two to this Act is amended as specified opposite that Act in column 2 of that Schedule.

Schedule  
Two.

20 (4) The Conveyancing Act, 1919, is amended by inserting next after section 19 the following new section :—

25 19A. (1) Where at or after the commencement of the Limitation Act, 1967, any person is entitled, or would, but for section nineteen of this Act, be entitled, to an estate tail (legal or equitable) and whether in possession, reversion, or remainder, in any land, such person shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in such land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail and to the exclusion of all estates or

30 interests in reversion on any such estate tail.

Estates  
tail—  
further  
provisions.

(2)

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*Limitation.*

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(Part I,  
ss. 4-6)

5 (2) In this section the expression "estate tail" includes that estate in fee into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; also an estate in fee voidable or determinable by the entry of the issue in tail; but does not include the estate of a tenant in tail after possibility of issue extinct.

10 (3) This section applies to land under the provisions of the Real Property Act, 1900, as amended by subsequent Acts, and the Registrar-General is hereby authorised on the prescribed application to make all such entries in the register book as may be necessary to give effect thereto.

15 (5) Each Act specified in column 1 of Schedule Three to this Act, as amended by this Act, may be cited in the manner specified opposite that Act in column 2 of that Schedule.

20 5. (1) Section 8 of the Interpretation Act of 1897 applies to the repeal by this Act in whole or in part of an Imperial Act in the manner in which that section applies to the repeal in whole or in part of an Act.

(2) The repeal or amendment of an Imperial enactment by this Act does not revive anything not in force or existing at the commencement of this Act.

cf. 52 & 53  
Vict. c. 63,  
s. 38 (2)  
(a).

25 6. Subject to section 26 and to Division 3 of Part III of this Act, nothing in this Act—

(a) affects an action brought or arbitration commenced before the commencement of this Act;

cf. 2 & 3  
Geo. 6,  
c. 21, s. 33  
(b).

30 (b) enables an action or arbitration to be commenced or maintained which is barred at the commencement of this Act by an enactment or an Imperial enactment repealed or amended by this Act;

cf. 2 & 3  
Geo. 6,  
c. 21, s. 33  
(a).

(c)

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*Limitation.*

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(Part I,  
ss, 6-8)

- 5 (c) affects the extinction of the title of a person to land under section 34 of the Imperial Act shortly entitled the Real Property Limitation Act, 1833, as adopted and applied by the Act passed in the eighth year of the reign of King William the Fourth, number three, where the period limited by that Imperial Act, as so adopted and applied, to that person for making an entry or distress or bringing any action or suit to recover the land has commenced to run before the commencement of this Act; or
- 10 (d) prevents the commencement and maintenance of an action or arbitration within the time allowed by an enactment or an Imperial enactment repealed or amended by this Act on a cause of action which accrued before the commencement of this Act, but this paragraph has effect subject to paragraphs (b) and (c) of this section.
7. Nothing in this Act—
- 20 (a) applies to an action or arbitration for which a limitation period is fixed by or under an enactment other than this Act or by or under an Imperial enactment (not being an enactment or an Imperial enactment repealed or omitted by this Act); or
- 25 (b) applies to an action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be fixed by or under an enactment other than this Act or by or under an Imperial enactment (not being an enactment or an Imperial enactment repealed or omitted by this Act).
- 30
8. Nothing in this Act affects the operation of—
- (a) section 45 of the Real Property Act, 1900;
- (b) section 235B of the Crown Lands Consolidation Act, 1913; or
- 35 (c) subsection (2) of section 50 of the Conveyancing Act, 1919.

Other limitations.  
cf. 2 & 3  
Geo. 6,  
c. 21, s. 32.

cf. 2 & 3  
Geo. 6,  
c. 21, s. 32.

Saving of  
specified  
enactments.

<i>Limitation.</i>		(Part I, Acquiescence, etc.
9.	Nothing in this Act affects the rules of equity concerning the refusal of relief on the ground of laches acquiescence or otherwise.	cf. 2 & 3 Geo. 6, c. 21, s. 29.
10.	(1) Subject to subsections (3) and (4) of this section, this Act binds the Crown and the Crown has the benefit of this Act.	The Crown. cf. 2 & 3 Geo. 6, c. 21, s. 30 (1).
	(2) For the purposes of this Act an action by an officer of the Crown as such or a person acting on behalf of the Crown is an action by the Crown.	cf. 2 & 3 Geo. 6, c. 21, s. 30 (2).
10	(3) This Act does not apply to an action by the Crown—	cf. 2 & 3 Geo. 6, c. 21, s. 30 (1) proviso.
	(a) for the recovery of a tax or duty or of interest on a tax or duty; or	
	(b) in respect of the forfeiture of a ship.	cf. 2 & 3 Geo. 6, c. 21, s. 30 (4).
15	(4) This Act does not affect the prerogative right of the Crown to gold and silver.	
		Interpre- tation.
	11. (1) In this Act, unless the context or subject matter otherwise indicates or requires—	cf. 2 & 3 Geo. 6, c. 21, 31 (1).
	“Action” includes any proceeding in a court.	
20	“Crown” includes not only the Crown in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.	
25	“Deed” includes an instrument having the effect of a deed under the law of New South Wales or, in the case of an instrument executed pursuant to the law of—	
	(a) the United Kingdom of Great Britain and Northern Ireland;	
30	(b) another State of the Commonwealth;	
	(c) the Commonwealth;	
	(d)	

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*Limitation.*

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(Part I,  
s. 11)

(d) a Territory of the Commonwealth; or

(e) New Zealand,

having the effect of a deed under the law pursuant to which it is executed.

5     “Income” includes interest on a judgment and other interest, and includes rent annuities and dividends, but does not include arrears of interest secured by a mortgage and lawfully treated as principal. cf. Act No. 6, 1919, s. 144 (1).

10     “Judgment” includes not only a judgment of a court of New South Wales but also a judgment of a court of the United Kingdom of Great Britain and Northern Ireland, a court of another State of the Commonwealth, a court of the Commonwealth, a court of a Territory of the Commonwealth, or a court of any other place.

15     “Land” includes—

20         (a) corporeal hereditaments and rentcharges and any estate or interest therein whether freehold or leasehold and whether at law or in equity; and

       (b) the interest pending sale of land (including incorporeal hereditaments) held on trust for sale of a person having an interest in the proceeds of sale;

25     but does not include easements or profits à prendre nor, subject to paragraphs (a) and (b) of this definition, other incorporeal hereditaments.

“Landlord” means a person entitled to land subject to a lease.

30     “Mortgage” does not include a possessory lien on goods nor any binding effect on property arising under a writ of execution against the property but otherwise includes a charge or lien on any property for securing money or money’s worth. cf. Act No. 6, 1919, s. 7 (1).

“Mortgagee”



	<i>Limitation.</i>	(Part I, s. 11)
	"Mortgagee" includes a person claiming a mortgage through an original mortgagee.	cf. Act No. 6, 1919, s. 7 (1).
	"Mortgagor" includes a person claiming property subject to a mortgage through an original mortgagor.	cf. Act No. 6, 1919, s. 7 (1).
5	"Personal representative" means an executor to whom probate has been granted, including an executor by right of representation, or an administrator within the meaning of the Wills, Probate and Administration Act, 1898, and includes the Public	
10	Trustee acting under section 23 of the Public Trustee Act, 1913.	
	"Plaintiff" means a person bringing an action.	
	"Principal money", in relation to a mortgage, means all money secured by the mortgage, including arrears of interest lawfully treated as principal, but does not	
15	include other interest.	
	"Rent" includes a rent payable under a lease and any other rent service and a rentcharge.	
	"Rentcharge" means an annuity or other periodical sum of money, being an annuity or sum charged on or payable out of land, but does not include a rent payable under a lease nor any other rent service nor interest under a mortgage.	
20		
	"Successor", in relation to a person liable on a cause of action, means a person on whom the liability of the firstmentioned person devolves, whether as personal representative or otherwise on death, or on bankruptcy, disposition of property, or determination of a limited estate or interest, or otherwise.	cf. 2 & 3 Geo. 6, c. 21, s. 25 (8).
25		
	"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	cf. Act No. 14, 1925, s. 5. cf. <i>Taylor v. Davies</i> [1920] A.C. 636, at p. 653.
30	duties incident to the estate or interest of a mortgagee in mortgaged property.	
35		

"Trustee"

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*Limitation.*

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(Part I,  
s. 11)

“Trustee” has a meaning corresponding to the meaning of “trust”.

(2) For the purposes of this Act—

- 5 (a) a person claims through another person in respect of any property or right if he is entitled to the property or right by through under or by the act of that other person, but a person entitled to property or a right by virtue of an appointment under a special power of appointment does not, by reason of the appointment, claim the property or right through the appointor; cf. 2 & 3  
Geo. 6,  
c. 21, s. 31  
(4).
- 10 (b) a reference to a cause of action to recover land includes a reference to a right to enter into possession of the land; cf. 2 & 3  
Geo. 6,  
c. 21, s. 31  
(5).
- 15 (c) a thing done to or by or suffered by an agent is done to or by or suffered by his principal; and cf. 2 & 3  
Geo. 6,  
c. 21, ss. 24  
(2), 26 (a).
- 20 (d) a cause of action to which any of the provisions of Division 4 of Part II of this Act applies is not a cause of action to recover land or a cause of action to enforce an equitable estate or interest in land. cf. 2 & 3  
Geo. 6,  
c. 21, s. 18  
(4).

(3) For the purposes of this Act a person is under a disability— Disability.  
cf. 2 & 3  
Geo. 6,  
c. 21, s. 31  
(2), (3).

- (a) while he is an infant; or
- 25 (b) while he is, for a continuous period of twenty-eight days or upwards, incapable of, or substantially impeded in, the management of his affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of—
- 30 (i) any disease or any impairment of his physical or mental condition;
- (ii) restraint of his person, lawful or unlawful, including detention or custody under the Mental Health Act, 1958;

(iii)

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- Limitation.*
- 
- (iii) war or warlike operations; or
  - (iv) circumstances arising out of war or warlike operations.
- (4) In this Act, in respect of land which is a rent-charge—
- (a) a reference to the possession of land is a reference to the receipt of the rent; and
  - (b) a reference to the date of dispossession or discontinuance of possession of land is a reference to the date when rent first becomes overdue.
- (5) The provisions of this Act as to the date of accrual of a cause of action have effect for the purposes of this Act but not for any other purpose.
- (6) In this Act, a reference to an Act includes amendments of that Act by subsequent Acts.

(Part I, s. 11, Part II, Div. 1, ss. 12, 13)

cf. 2 & 3 Geo. 6, c. 21, s. 31 (6).

10

15

PART II.

PERIODS OF LIMITATION AND RELATED MATTERS.

DIVISION 1.—*Preliminary.*

12. The provisions of this Part have effect subject to the provisions of Part III of this Act.

Relation-ship to Part III. cf. 2 & 3 Geo. 6, c. 21, s. 1.

13. Where, under each of two or more provisions of this Part, an action is not maintainable if brought after a specified time, the action is not maintainable if brought after the earlier or earliest of those times.

More than one bar. cf. 2 & 3 Geo. 6, c. 21, s. 2 (3) proviso.

DIVISION

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*Limitation.*

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(Part II,  
Div. 2,  
ss. 14, 15)

DIVISION 2.—*General.*

14. (1) An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims—

- (a) a cause of action founded on contract (including quasi contract) not being a cause of action founded on a deed; cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (1) (a).
- 10 (b) a cause of action founded on tort, including a cause of action for damages for breach of statutory duty; cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (1) (a).
- (c) a cause of action to enforce a recognizance; cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (1) (b).
- 15 (d) a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture. cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (1) (d).

(2) This section does not apply to—

- (a) a cause of action to which section 19 of this Act applies; or
- 20 (b) a cause of action for contribution to which section 26 of this Act applies.

(3) For the purposes of paragraph (d) of subsection (1) of this section, "enactment" includes not only an enactment of New South Wales but also an enactment of the Imperial Parliament, an enactment of another State of the Commonwealth, an enactment of the Commonwealth, an enactment of a Territory of the Commonwealth and an enactment of any other country.

15. An action on a cause of action for an account founded on a liability at law to account is not maintainable in respect of any matter if brought after the expiration of a limitation period of six years running from the date on which the matter arises. Accounts.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (2).

16.

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*Limitation.*

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- (Part II,  
Div. 2,  
ss. 16-19)
16. An action on a cause of action founded on a deed is not maintainable if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims.
- Deed.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (3).
17. (1) An action on a cause of action on a judgment is not maintainable if brought after the expiration of a limitation period of twelve years running from the date on which the judgment first becomes enforceable by the plaintiff or by a person through whom he claims.
- Judgment.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (4).
- (2) A judgment of a court of a place outside New South Wales becomes enforceable for the purposes of this section on the date on which the judgment becomes enforceable in the place where the judgment is given.
- 15 (3) Subsection (2) of this section does not apply to a judgment of a court of the Commonwealth, not being a court of a Territory of the Commonwealth.
18. (1) An action on a cause of action to recover a penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of an enactment, is not maintainable if brought after the expiration of a limitation period of two years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims.
- Penalty and  
forfeiture.  
cf. 2 & 3  
Geo. 6, c.  
21, s. 2 (5).
- 20 (2) In this section "penalty" does not include a fine to which a person is liable on conviction for a criminal offence.
- cf. 2 & 3  
Geo. 6, c.  
21, s. 2 (5)  
proviso.
19. An action on a cause of action arising under section 3 or section 6B of the Compensation to Relatives Act of 1897, by virtue of a death, is not maintainable if brought after the expiration of a limitation period of six years running from the date of the death.
- Compensation to  
relatives.  
cf. Act No.  
31, 1897,  
s. 5.

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*Limitation.*

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(Part II,  
Div. 2,  
ss. 20-21)

20. (1) An action on a cause of action to enforce an award of an arbitrator is not maintainable if brought after the expiration of the limitation period fixed by subsection (2) of this section running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims.

Arbitral  
award.  
cf. 2 & 3  
Geo. 6, c.  
21, s. 2 (1)  
(c), (d),  
(3).

(2) The limitation period for the purposes of subsection (1) of this section is—

10 (a) where the award is made under an arbitration agreement and the arbitration agreement is made by deed—twelve years; and

(b) in any other case—six years.

(3) For the purposes of this section a cause of action to enforce an award of an arbitrator accrues on the date on which default first happens in observance of the award, being the default in respect of which the action is brought.

(4) In this section, “arbitration agreement” means an agreement to submit present or future differences to arbitration, whether an arbitrator is named in the agreement or not.

cf. Act No.  
29, 1902,  
s. 3.

(5) This section applies to an award of an arbitrator under any Act regulations rules by-laws order or scheme, but applies to such an award subject to the provisions of the Act regulations rules by-laws order or scheme.

25 21. Where—

(a) a cause of action for the conversion or detention of goods accrues to a person; and

Successive  
wrongs to  
goods.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 3 (1).

30 (b) afterwards, possession of the goods not having been recovered by him or by a person claiming through him, a further cause of action for the conversion or detention of the goods or a cause of action to recover the proceeds of sale of the goods accrues to him or to a person claiming through him,

an

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*Limitation.*

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(Part II,  
Div. 2,  
ss. 21, 22)

an action on the further cause of action for conversion or detention or on the cause of action to recover the proceeds of sale is not maintainable if brought after the expiration of a limitation period of six years running from the date when the first cause of action first accrues to the plaintiff or to a person through whom he claims.

22. (1) Paragraph (a) of subsection (1) of section 14 of this Act applies to a cause of action to recover a seaman's wages, but otherwise sections 14 to 21 inclusive of this Act do not apply to a cause of action in rem in Admiralty.

Shipping.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 2 (6).

(2) An action on a cause of action to enforce a claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damage 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, is not maintainable if brought after the expiration of a limitation period of two years running from the date when the damage loss or injury is caused.

cf. Com-  
monwealth  
Act No. 4,  
1913, s. 396  
(1).

(3) An action on a cause of action to enforce a claim or lien in respect of any salvage services is not maintainable if brought after the expiration of a limitation period of two years running from the date when the salvage services are rendered.

cf. Com-  
monwealth  
Act No. 4,  
1913, s. 396  
(1).

(4) For the purposes of an action in a court, the court—

cf. Com-  
monwealth  
Act No. 4,  
1913, s. 396  
(3).

(a) may extend the limitation period mentioned in subsection (2) or subsection (3) of this section to such an extent and on such terms as it thinks fit; and

(b) shall, if satisfied that there has not during the limitation period been a 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 vessel belongs or in which the plaintiff resides or has his principal place

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*Limitation.*

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(Part II,  
Div. 2,  
ss. 22-24)

place of business, extend the limitation period to an extent sufficient to give a reasonable opportunity of so arresting the defendant vessel.

- (5) For the purposes of this section—
- 5 (a) “freight” includes passage money and hire; cf. Commonwealth Act No. 4, 1913, s. 396 (4).
- (b) “vessel” means a vessel used in navigation, other than air navigation, and includes a barge lighter or like vessel; and cf. Commonwealth Act No. 4, 1913, s. 6 (1).
- 10 (c) reference to damage or loss caused by the fault of a vessel extends to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages. cf. Commonwealth Act No. 4, 1913, s. 396 (4).

(6) Part III of this Act does not apply to a cause of action to which subsection (2) or subsection (3) of this section applies.

15

**23.** Sections 14, 16, 17, 18, 20 and 21 of this Act do not apply, except so far as they may be applied by analogy, to a cause of action for specific performance of a contract or for an injunction or for other equitable relief. Equitable relief.  
cf. 2 & 3  
Geo. 6, c.  
21, s. 2 (7).

20 **24.** (1) Subject to subsection (2) of this section an action on a cause of action to recover arrears of income is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims. Arrears of income.  
cf. 2 & 3  
Geo. 6, c.  
21, ss. 2 (4),  
17, 20.

25

(2) An action on a cause of action to recover arrears of interest on principal money is not maintainable if brought after the expiration of the limitation period fixed by or under this Act for an action between the same parties to recover the principal money.

30

(3)



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*Limitation.*

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(Part II,  
Div. 2,  
ss. 24-26)

(3) Subsections (1) and (2) of this section do not apply to a cause of action to which section 43 of this Act applies.

5 (4) For the purposes of this section a cause of action to recover arrears of income includes a cause of action to recover the arrears from any person, whether as principal surety or otherwise.

10 **25.** In an action in which any party to the action seeks relief against forfeiture of a lease, the party seeking the relief against forfeiture of lease is not to be required, as a term of relief against forfeiture, to pay rent for the recovery of which, by reason of the expiration of a limitation period fixed by or under this Act, an action would not be maintainable if brought on the date on which the firstmentioned action is brought.

15 **26.** (1) An action on a cause of action for contribution under subsection (1) of section 5 of the Law Reform (Miscellaneous Provisions) Act, 1946, is not maintainable if brought after the first to expire of— Contribution between tortfeasors.  
cf. 1963 c. 47, s. 4.

20 (a) a limitation period of two years running from the date on which the cause of action for contribution first accrues to the plaintiff or to a person through whom he claims; and

25 (b) a limitation period of four years running from the date of the expiration of the limitation period for the principal cause of action.

(2) For the purposes of paragraph (a) of subsection (1) of this section, the date on which a cause of action for contribution first accrues is— cf. 1963 c. 47, s. 4 (2).

30 (a) if the plaintiff in the action for contribution or a person through whom he claims is liable in respect of the damage for which contribution is claimed by judgment in a civil action or by arbitral award—the date on which the judgment is given or the award is made, whether or not, in the case of a judgment, the judgment is afterwards varied as to quantum of damages; or

35

(b)

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*Limitation.*

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(Part II,  
Div. 2,  
ss. 26,  
Div. 3, s. 27)

5 (b) if, in a case to which paragraph (a) of this sub-  
section does not apply, the plaintiff in the action for  
contribution or a person through whom he claims  
makes an agreement with a person having a cause  
of action for the damage for which the cause of  
action for contribution arises, which agreement  
fixes, as between the parties to the agreement, the  
amount of the liability in respect of that damage  
10 of the plaintiff in the action for contribution or a  
person through whom he claims—the date on which  
the agreement is made.

(3) In paragraph (b) of subsection (1) of this sec-  
tion, the expression “the limitation period for the principal  
cause of action” means the limitation period fixed by or under  
15 this Act or by or under any other enactment (including an  
enactment repealed or omitted by this Act) for the cause of  
action for the liability in respect of which contribution is  
sought.

(4) Nothing in this section affects the construction  
20 of section 5 of the Law Reform (Miscellaneous Provisions)  
Act, 1946.

DIVISION 3.—*Land.*

27. (1) An action on a cause of action to recover land  
is not maintainable by the Crown if brought after the expira-  
25 tion of a limitation period of thirty years running from the  
date on which the cause of action first accrues to the Crown  
or to a person through whom the Crown claims.

General.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 4 (1).

(2) Subject to subsection (3) of this section an  
action on a cause of action to recover land is not maintainable  
30 by a person other than the Crown if brought after the expira-  
tion of a limitation period of twelve years running from the  
date on which the cause of action first accrues to the plaintiff  
or to a person through whom he claims.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 4 (3).

(3) Subsection (2) of this section does not apply to  
35 an action brought by a person claiming through the Crown  
and brought on a cause of action which accrues to the Crown.

cf. 2 & 3  
Geo. 6, c.  
21, s. 4 (3)  
proviso.

(4)

<i>Limitation.</i>		(Part II, Div. 3, ss. 27-29)
	(4) Where a cause of action to recover land accrues to the Crown, an action on that cause of action is not maintainable by a person claiming through the Crown if brought after the expiration of the first to expire of—	cf. 2 & 3 Geo. 6, c. 21, s. 4 (3) proviso.
5	(a) the limitation period fixed by or under this Act for an action on that cause of action by the Crown; and	
	(b) a limitation period of twelve years running from the date on which the cause of action first accrues (on or after the date of accrual to the Crown) to a	
10	person claiming through the Crown.	
	<b>28.</b> Where the plaintiff in an action on a cause of action to recover land or a person through whom he claims—	Accrual— dispossession or discontinuance.
	(a) has been in possession of the land; and	cf. 2 & 3
15	(b) while entitled to the land, is dispossessed or discontinues his possession,	Geo. 6, c. 21, s. 5 (1).
	the cause of action accrues on the date of dispossession or discontinuance.	
	<b>29.</b> Where—	Accrual— deceased in possession.
20	(a) the estate or interest claimed in an action on a cause of action to recover land is an estate or interest—	cf. 2 & 3 Geo. 6, c. 21, s. 5 (2).
	(i) assured as an estate or interest in possession by the will of a deceased person; or	
	(ii) passing on intestacy,	
25	to the plaintiff or to a person through whom he claims;	
	(b) the deceased is, at the date of his death, in possession by virtue of the estate or interest claimed or by virtue of an estate or interest out of which the assurance is made; and	
30	(c) no person is, after the date of the death of the deceased and before the date on which the action is brought, in possession—	
35	(i) by virtue of the estate or interest claimed and under the assurance or intestacy; or	
	(ii)	

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*Limitation.*

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(Part II,  
Div. 3,  
ss. 29-31)

(ii) as personal representative of the deceased,  
the cause of action accrues on the date of the death  
of the deceased.

**30. Where—**

- 5 (a) the estate or interest claimed in an action on a  
cause of action to recover land is an estate or  
interest assured as an estate or interest in posses-  
sion (otherwise than by will) to the plaintiff or to a  
person through whom he claims;
- 10 (b) the person making the assurance is, on the date  
when the assurance takes effect, in possession by  
virtue of the estate or interest claimed or by virtue  
of an estate or interest out of which the assurance  
is made; and
- 15 (c) no person is, after the date on which the assurance  
takes effect and before the date on which the action  
is brought, in possession by virtue of the estate or  
interest claimed and by virtue of the assurance,  
the cause of action accrues on the date on which the assur-  
20 ance takes effect.

Accrual—  
grantor in  
possession.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 5 (3).

**31. Subject to section 67 of this Act, where—**

- 25 (a) the estate or interest claimed in an action on a  
cause of action to recover land is at any time an  
estate or interest in reversion or remainder or any  
other future estate or interest; and
- 30 (b) no person is, at any time after the date on which  
the estate or interest claimed becomes a present  
estate or interest and before the date on which the  
action is brought, in possession by virtue of the  
estate or interest claimed,  
the cause of action accrues on the date on which the estate  
or interest claimed becomes a present estate or interest.

Accrual—  
future  
interests.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 6 (1).

**32.**

*Limitation.*

(Part II,  
Div. 3,  
ss. 32, 33)

32. (1) Subject to subsection (2) of this section, a cause of action to recover land by virtue of a forfeiture or breach of condition accrues on the date on which the plaintiff or a person through whom he claims first discovers or may with reasonable diligence discover the facts giving the right of forfeiture or showing that the condition is broken.

Forfeiture and breach of condition.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 8.

(2) Subject to section 33 of this Act, if a cause of action to recover land by virtue of a forfeiture or breach of condition accrues to a person entitled to an estate or interest in reversion or remainder or any other future estate or interest and neither he nor a person claiming under him recovers the land by virtue of the forfeiture or breach of condition, a fresh cause of action to recover the land accrues, on the date on which that estate or interest becomes a present estate or interest, to the person entitled on that date to that estate or interest.

cf. 2 & 3  
Geo. 6, c.  
21, s. 8  
proviso.

33. Where—

- (a) a tenant is in possession of land under a lease for a term reserving a rent amounting to a yearly sum of not less than two dollars;
- (b) the rent is received by a person wrongfully claiming to be entitled to the land subject to the lease; and
- (c) no rent is afterwards received by the landlord and in consequence the term becomes liable to determination by virtue of a forfeiture or breach of condition,

Rent wrongfully paid.  
cf. 2 & 3  
Geo. 6, c.  
21, s. 9 (3).

the cause of action of the landlord to recover the land from the tenant or from the person receiving the rent and wrongfully claiming to be entitled to the land subject to the lease or from a person claiming under either of them accrues on the date on which the term first becomes liable to determination as mentioned in paragraph (c) of this section.

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*Limitation.*

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(Part II,  
Div. 3,  
ss. 34, 35)  
Tenancies.  
cf. 2 & 3  
Geo. 6, c.  
21, s. 9 (1),  
(2).

34. (1) This section applies to—

- (a) a tenancy from year to year or other periodical tenancy;
- (b) a tenancy at will; and
- 5 (c) a tenancy to which section 127 of the Conveyancing Act, 1919, applies.

(2) The cause of action of a person entitled to land subject to a tenancy to which this section applies to recover the land from the tenant or from a person claiming under the  
10 tenant accrues on the only or later or latest of such of the following dates as are applicable—

- (a) in the case of a tenancy from year to year or other periodical tenancy—the date of the expiration of the first year or other period of the tenancy;
- 15 (b) in the case of a tenancy at will or a tenancy to which section 127 of the Conveyancing Act, 1919, applies—the date of the expiration of one year after the commencement of the tenancy; and
- 20 (c) in any case where the tenancy is at a rent—the date on which rent payable to the person having the cause of action or a person through whom he claims first becomes overdue,

unless the cause of action accrues on an earlier date by virtue of a demand of possession, forfeiture or breach of condition,  
25 or otherwise.

35. Where a landlord is forbidden by the Landlord and Tenant (Amendment) Act, 1948, to take proceedings to recover possession of land from any person, the cause of action of the landlord to recover the land from that person  
30 accrues on the date on which the landlord ceases to be so forbidden or on the date on which, but for this section, the cause of action would accrue, whichever date is the later.

36.

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*Limitation.*

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(Part II,  
Div. 3,  
ss. 36, 37)

36. (1) Subject to section 23 of this Act, this Act applies to an action on a cause of action to enforce an equitable estate or interest in land in like manner as it applies to an action on a cause of action to recover land by virtue of a legal estate or interest in land.

Equitable  
interest.  
cf. 2 & 3  
Geo. 6,  
c. 21, s. 7  
(1).

(2) For the purposes of this Act, but without limiting the generality of subsection (1) of this section, a cause of action to enforce an equitable estate or interest in land accrues in the like manner and circumstances and on the same date as a cause of action to recover the land would accrue if the estate or interest were a legal estate or interest.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 7 (1).

37. (1) Where land is held on trust under a settlement—

Settled  
land.

(a) while there is in existence or there may come into existence a beneficiary whose cause of action to enforce his estate or interest in the land under the settlement has not accrued or has not been barred by this Act, nothing in this Act bars a cause of action of the trustee to recover the land or to enforce an equitable estate or interest in the land, so far as the cause of action is necessary to support or give effect to the estate or interest of the beneficiary in the land under the settlement; but

cf. 2 & 3  
Geo. 6, c. 21,  
s. 7 (4).

(b) when the cause of action of every possible beneficiary to enforce his estate or interest in the land under the settlement is barred by this Act, and the cause of action of the trustee to recover the land or to enforce an equitable estate or interest in the land would, but for paragraph (a) of this subsection, be barred by this Act, an action on a cause of action to recover the land or to enforce an equitable estate or interest in the land is not maintainable by the trustee.

(2) Subject to subsection (3) of this section, where land is held on trust under a settlement and a person entitled to a present estate or interest in the land under the settlement is in possession of the land, a cause of action to recover the land

cf. 2 & 3  
Geo. 6, c. 21,  
s. 7 (5).

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*Limitation.*

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(Part II,  
Div. 3,  
ss. 37, 38)

land or to enforce an equitable estate or interest in the land does not, for the purposes of this Act, accrue to the trustee or to any person entitled to an estate or interest in the land under the settlement against the person in possession of the  
5 land while the latter person is entitled to the firstmentioned estate or interest and is in possession of the land.

(3) Subsection (2) of this section does not apply to a cause of action against— cf. 2 & 3  
Geo. 6, c. 21,  
s. 7 (5).

- 10 (a) a person in possession who is solely and absolutely entitled under the settlement to the land; or
- (b) two or more persons in possession who are absolutely entitled under the settlement to the land as joint tenants or as tenants in common.

15 (4) In this section, "settlement" means a disposition, inter vivos or by will, of property upon trust, where no person is, immediately after the disposition takes effect, beneficially entitled to the trust property absolutely.

38. (1) Where, on the date on which, under this Act, a cause of action would, but for this section, accrue, the land <sup>Adverse</sup> is not in adverse possession, the accrual is postponed so that <sup>possession.</sup> the cause of action does not accrue until the date on which cf. 2 & 3  
Geo. 6, c. 21,  
s. 10 (1). the land is first in adverse possession.

25 (2) Subject to subsection (3) of this section, where a cause of action accrues to recover land from a person in adverse possession of the land, and the land is afterwards in the adverse possession of a second person, whether the second person claims through the first person or not, the cause of action to recover the land from the second person accrues on the date on which the cause of action to recover the land from  
30 the first person first accrues to the plaintiff or to a person through whom he claims.

(3)



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*Limitation.*

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(Part II,  
Div. 3,  
ss. 38, 39)

(3) Where a cause of action to recover land accrues and afterwards, but before the cause of action is barred by this Act, the land ceases to be in adverse possession, for the purposes of this Act—

cf. 2 & 3  
Geo. 6, c. 21,  
s. 10 (2).

5 (a) the former adverse possession has no effect; and

(b) a fresh cause of action accrues on, but not before, the date when the land is first again in adverse possession.

(4) For the purposes of this section—

10 (a) “adverse possession” is possession by a person in whose favour the limitation period can run;

cf. 2 & 3  
Geo. 6, c. 21,  
s. 10 (1).

(b) possession of land subject to a rentcharge by a person who does not pay the rent is possession by him of the rentcharge; and

cf. 2 & 3  
Geo. 6, c. 21,  
s. 10 (3)  
(a).

15 (c) in a case to which section 33 of this Act applies, receipt of the rent by a person wrongfully claiming to be entitled to the land subject to the lease is, as against the landlord, adverse possession of the land.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 10 (3)  
(b).

20 (5) Where land is held by joint tenants or tenants in common, possession by a tenant of more than his share, not for the benefit of the other tenant, is, as against the other tenant, adverse possession.

cf. 3 & 4  
Wm. IV,  
c. 27, s. 12.  
Vict. Act  
No. 6295,  
s. 14 (4).

39. For the purposes of this Act—

25 (a) a formal entry on land is not of itself possession or evidence of possession of the land; and

Formal  
entry and  
claim.

(b) a claim upon or near land does not preserve a cause of action to recover the land.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 13.

DIVISION

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*Limitation.*


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(Part II,  
Div. 4,  
ss. 40-42)DIVISION 4.—*Mortgages.*

40. This Act applies to an action on a cause of action founded on a mortgage registered under the Real Property Act, 1900, to recover from any person any debt damages or  
5 other money payable under the mortgage, but otherwise this Act does not affect the right title or remedies under a mortgage so registered of a registered proprietor under that Act of the mortgage or of the mortgaged land.

41. An action on a cause of action to redeem mortgaged  
10 property in the possession of a mortgagee is not maintainable against that mortgagee if brought after the expiration of a limitation period of twelve years running from the only or  
later of such of the following dates as are applicable—

- 15 (a) the date on which that mortgagee or a person through whom he claims last goes into possession of the property in respect of which the action is brought; and
- 20 (b) the date on which that mortgagee or a person through whom he claims last receives a payment of principal money or interest secured by the mortgage from the plaintiff or from a person through whom he claims.

42. (1) An action on a cause of action—
- 25 (a) to recover principal money secured by mortgage;
- (b) to recover possession of mortgaged property from a mortgagor; or
- (c) to foreclose the equity of redemption of mortgaged property,

30 is not maintainable by a mortgagee under the mortgage if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims.

(2)

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*Limitation.*

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(Part II,  
Div. 4,  
ss. 42, 43)

(2) Paragraph (a) of subsection (1) of this section applies to a cause of action—

- (a) to recover principal money from any person, whether as principal, surety or otherwise; or
- 5 (b) to recover principal money by way of—
  - (i) the appointment of a receiver of mortgaged property or of the income or profits of mortgaged property;
  - 10 (ii) the sale lease or other disposition or realization of mortgaged property; or
  - (iii) other remedy affecting mortgaged property.

**43.** (1) An action on a cause of action to recover interest secured by a mortgage is not maintainable by a mortgagee under the mortgage if brought after the expiration of—

Action for interest.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 18 (5).

- 15 (a) a limitation period of six years running from the only or later of such of the following dates as are applicable—
  - (i) the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims; and
  - 20 (ii) where a mortgagee under a prior mortgage is, on the date mentioned in subparagraph (i) of this paragraph, in possession of all or any of the property comprised in the mortgage securing the interest, and after that date discontinues his possession—the date of discontinuance; or
  - 25 (b) the limitation period fixed by or under this Act for an action between the same parties on a cause of action to recover the principal money bearing the interest,
  - 30

whichever limitation period first expires.

(2)

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*Limitation.*

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(Part II,  
Div. 4,  
ss. 43, 44)

(2) For the purposes of subsection (1) of this section, a cause of action to recover interest secured by a mortgage includes—

- 5 (a) a cause of action to recover the interest from any person, whether as principal surety or otherwise; and
- (b) a cause of action to recover the interest by way of—
- 10 (i) the appointment of a receiver of mortgaged property or of income or profits of mortgaged property;
- (ii) sale, lease or other disposition or realization of the mortgaged property; or
- (iii) other remedy affecting mortgaged property.

15 **44.** (1) In an action for redemption or otherwise in respect of a mortgage of property including an action in respect of the proceeds of sale or other realization of property subject to a mortgage—

Adjustment of interest.

- 20 (a) a mortgagor is not, as against a mortgagee, to be required to pay or bear interest which could not, by reason of a period of limitation fixed by or under this Act, be recovered in an action by that mortgagee against that mortgagor brought on the date on which the firstmentioned action is brought; and
- 25 (b) in adjusting the rights of a mortgagor and a mortgagee the mortgagee is not to be entitled to the interest mentioned in paragraph (a) of this subsection.

30 (2) Where—

- (a) interest becomes due under a mortgage; and

(b)

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*Limitation.*

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(Part II,  
Div. 4,  
ss. 44-46)

(b) a mortgagee—

- (i) holds money on the date on which the interest becomes due; or
- 5 (ii) after that date but before the expiration of the limitation period fixed by or under this Act for an action on a cause of action to recover that interest by that mortgagee against a mortgagor, receives money; and
- 10 (c) before or after the bringing of an action to which subsection (1) of this section applies, that mortgagee or a person claiming through him properly applies that money in or towards satisfaction of that interest,

subsection (1) of this section does not, as against the person  
15 so applying that money or a person claiming through him, apply to that interest to the extent to which it is so satisfied.

45. A mortgagee shall not, after the date on which an action on a cause of action to recover principal money secured by the mortgage within the meaning of section 42 of this Act  
20 by him against any person is barred by this Act, exercise, as against that person or a person claiming through him, a power—

- (a) of sale lease or other disposition or realization of the mortgaged property;
- 25 (b) to appoint a receiver; or
- (c) otherwise affecting the mortgaged property.

46. This Division does not apply to a mortgage registered under the Imperial Act known as the Merchant Shipping Act, 1894, as amended from time to time, being a mortgage of a  
30 registered ship or a share therein within the meaning of that Imperial Act as so amended.

Power of  
sale, etc.

Mortgage  
of ship.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 18 (6).

DIVISION

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*Limitation.*


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(Part II,  
Div. 5,  
s. 47)DIVISION 5.—*Trusts.*

47. (1) An action on a cause of action—
- Fraud and  
conversion;  
trust  
property.
- 5 (a) in respect of fraud or a fraudulent breach of trust, against a person who is, while a trustee, a party or privy to the fraud or the breach of trust or against his successor; cf. 2 & 3  
Geo. 6, c. 21,  
s. 19 (1)  
(a).
- 10 (b) for a remedy for the conversion to a person's own use of trust property received by him while a trustee, against that person or against his successor; cf. 2 & 3  
Geo. 6, c. 21,  
s. 19 (1)  
(b).
- (c) to recover trust property, or property into which trust property can be traced, against a trustee or against any other person; or cf. 2 & 3  
Geo. 6, c. 21,  
ss. 19 (1)  
(b), (2), 20.
- 15 (d) to recover money on account of a wrongful distribution of trust property, against the person to whom the property is distributed or against his successor, cf. 2 & 3  
Geo. 6, c. 21,  
s. 20.
- 20 is not maintainable by a trustee of the trust or by a beneficiary under the trust or by a person claiming through a beneficiary under the trust if brought after the expiration of the only or later to expire of such of the following limitation periods as are applicable—
- 25 (e) a limitation period of twelve years running from the date on which the plaintiff or a person through whom he claims first discovers or may with reasonable diligence discover the facts giving rise to the cause of action and that the cause of action has accrued; and
- 30 (f) the limitation period for the cause of action fixed by or under any provision of this Act other than this section.

(2) Except in the case of fraud or a fraudulent breach of trust, and except so far as concerns income converted by a trustee to his own use or income retained and still

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*Limitation.*

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(Part II,  
Div. 5,  
ss. 47-50)

still held by the trustee or his successor at the time when the action is brought, this section does not apply to an action on a cause of action to recover arrears of income.

5 **48.** An action on a cause of action in respect of a breach of trust is not maintainable if brought after the expiration of the only or later to expire of such of the following periods of limitation as are applicable—

Breach of trust.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 19 (2).

- 10 (a) a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims; and
- (b) the limitation period for the cause of action fixed by or under any provision of this Act other than this section.

15 **49.** For the purposes of this Division, a cause of action of a beneficiary in respect of a future estate or interest accrues on the date on which the estate or interest becomes a present estate or interest or on the date on which the cause of action would, but for this section, accrue, whichever date is

20 the later.

Accrual—  
future interest.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 19 (2)  
proviso.

**50.** Where a beneficiary under a trust brings an action in respect of the trust, another beneficiary under the trust is not entitled to derive from the action any benefit for which, by reason of this Act, an action by him is not maintainable if

25 brought on the date on which the firstmentioned action is brought.

Beneficiaries other than the plaintiff.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 19 (3).

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PART

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*Limitation.*


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(Part III,  
Div. 1,  
s. 51,  
Div. 2,  
s. 52)

## PART III.

## POSTPONEMENT OF THE BAR.

DIVISION 1.—*General.*

51. Notwithstanding the provisions of this Part, an action on a cause of action for which a limitation period is fixed by or under Part II of this Act is not maintainable if brought after the expiration of a limitation period of thirty years running from the date from which the limitation period for that cause of action fixed by or under Part II of this Act runs.

Ultimate  
bar.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 22 (1)  
proviso  
(c).

10 DIVISION 2.—*Disability, confirmation, fraud and mistake.*

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

Disability.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 22 (1).

(a) a person has a cause of action;

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

(c) the person is under a disability,

in that case—

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

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

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

25 (ii) the date of his death,

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

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

(3)



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*Limitation.*

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(Part III,  
Div. 2,  
ss. 52, 53)

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

cf. 2 & 3  
Geo. 6, c. 21,  
s. 22 (1)  
proviso (c).

- 5 **53.** (1) In this section, "curator" means—
- Notice to  
proceed.
- (a) in respect of a person—
- 10 (i) who is a patient within the meaning of the Mental Health Act, 1958, including a person detained in a mental hospital under Part VII of that Act;
- 15 (ii) who is a voluntary patient within the meaning of that Act whose property has been taken in charge under section 22 of that Act by the Master in the Protective Jurisdiction of the Supreme Court; or
- (iii) to whose property section 101 of that Act applies—
- the Master in the Protective Jurisdiction of the Supreme Court;
- 20 (b) in respect of a protected person within the meaning of that Act, where a committee of his estate is appointed under section 38 of that Act—the committee;
- 25 (c) in respect of an incapable person within the meaning of that Act, where a manager of his property is appointed under section 39 of that Act—the manager; and
- 30 (d) in respect of a person of whose estate a committee is appointed under section 48 of that Act—the committee.

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

3)

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*Limitation.*

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(Part III,  
Div. 2,  
s. 53)

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

- 5 (a) by the person under a disability or by his curator or by a person claiming under the person under a disability;
- (b) on a cause of action to which the notice to proceed relates; and
- 10 (c) against the person giving the notice to proceed or against his successor under a devolution happening after the notice to proceed is given,

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

- 15 (d) the person under a disability ceases, on the date of the giving of the notice, to be under any disability under which he is immediately before the giving of the notice; and
- (e) he does not, after the giving of the notice, come under that disability.

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

- 20 (a) be in writing;
- (b) be addressed to the curator;
- (c) show the name of the person under a disability;
- 25 (d) state the circumstances out of which the cause of action may arise or may be claimed to arise with such particularity as is necessary to enable the curator to investigate the question whether the person under a disability has the cause of action;
- 30 (e) give warning that a cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act; and
- (f) be signed by the person giving the notice.

(5)

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*Limitation.*

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(Part III,  
Div. 2,  
s. 53)

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

(6) A notice to proceed to be given to the Master  
5 in the Protective Jurisdiction of the Supreme Court shall be given by leaving it at the office of the Master.

(7) A notice to proceed to be given to a curator, other than the Master in the Protective Jurisdiction of the Supreme Court, may be given by—

- 10 (a) delivering the notice to proceed to the curator ;
- (b) leaving the notice to proceed at the usual or last-known place of business or of abode of the curator ;  
or
- 15 (c) posting the notice to proceed by the certified mail service to the curator at his usual or last-known place of business or of abode.

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

(9) Subsections (7) and (8) of this section do not prevent the giving of a notice to proceed to a curator, other than the Master in the Protective Jurisdiction of the Supreme Court, by any other means.

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

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*Limitation.*

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(Part III,  
Div. 2,  
s. 54)

54. (1) Where, after a limitation period fixed by or  
under this Act for a cause of action commences to run but  
before the expiration of the limitation period, a person against  
whom (either solely or with other persons) the cause of  
5 action lies confirms the cause of action, the time during  
which the limitation period runs before the date of the con-  
firmation does not count in the reckoning of the limitation  
period for an action on the cause of action by a person having  
the benefit of the confirmation against a person bound by  
10 the confirmation.

Confirmation.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 23 (1),  
(4).

(2) For the purposes of this section—

(a) a person confirms a cause of action if, but only  
if, he—

15 (i) acknowledges, to a person having (either  
solely or with other persons) the cause of  
action, the right or title of the person to  
whom the acknowledgment is made; or

20 (ii) makes, to a person having (either solely  
or with other persons) the cause of action,  
a payment in respect of the right or title  
of the person to whom the payment is  
made;

(b) a confirmation of a cause of action to recover  
25 interest on principal money operates also as a  
confirmation of a cause of action to recover the  
principal money; and

(c) a confirmation of a cause of action to recover  
30 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 account.

(3) Where a person has (either solely or with other  
persons) a cause of action to foreclose the equity of redemp-  
tion of mortgaged property or to recover possession of mort-  
gaged property, a payment to him of principal or interest  
35 secured by the mortgage or a payment to him otherwise in  
respect of his right or title to the mortgage is a confirma-  
tion by the payer of the cause of action.

(4) An acknowledgment for the purposes of this  
section must be in writing and signed by the maker.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 24 (1).

(5)

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*Limitation.*

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(Part III,  
Div. 2,  
s. 54)

(5) For the purposes of this section a person has the benefit of a confirmation if, but only if, the confirmation is made to him or to a person through whom he claims.

(6) For the purposes of this section a person is bound by a confirmation if, but only if—

cf. 2 & 3  
Geo. 6, c. 21,  
s. 25 (3),  
(5), (6),  
(7).

- (a) he is a maker of the confirmation ;
- (b) he is, in relation to the cause of action, a successor of a maker under a devolution from the maker occurring after the making of the confirmation ;
- 10 (c) where the maker is, at the time when he makes the confirmation, (either solely or with other persons) a trustee of the will or of the estate of a deceased person—the firstmentioned person is at the date of the confirmation or afterwards becomes a trustee of the will or of the estate ;
- 15 (d) where the maker is, at the time when he makes the confirmation, (either solely or with other persons) a trustee (other than a trustee of the will or of the estate of a deceased person)—the firstmentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee ; or
- 20 (e) he is bound under subsection (7) of this section.

(7) (a) Paragraph (b) of this subsection applies to a confirmation of a cause of action—

cf. 2 & 3  
Geo. 6, c. 21,  
s. 25 (1),  
(2).

- (i) to recover property, being goods ;
- (ii) to recover property, being land ;
- (iii) to enforce in respect of property an equitable estate or interest in land ;
- 30 (iv) to foreclose the equity of redemption of mortgaged property ;
- (v) to redeem mortgaged property ;
- 35 (vi) to recover principal money or interest secured by mortgage of property, by way of the appointment of a receiver of mortgaged property or of the income or profits of mortgaged property or by way of

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*Limitation.*

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(Part III,  
Div. 2,  
ss. 54, 55)

of sale, lease or other disposition of mortgaged property or by way of other remedy affecting mortgaged property; or

5 (vii) to recover trust property or property into which trust property can be traced.

(b) Where a maker of a confirmation to which this paragraph applies is, on the date of the confirmation, in possession of the property, the confirmation binds a person in possession during the ensuing period of limitation, not  
10 being, or claiming through, a person other than the maker who is, on the date of the confirmation, in possession of the property.

55. (1) Subject to subsection (3) of this section where—

- 15 (a) there is a cause of action based on fraud or deceit; or  
(b) a cause of action or the identity of a person against whom a cause of action lies is fraudulently concealed,

Fraud and  
deceit.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 26 (a),  
(b).

20 the time which elapses after a limitation period fixed by or under this Act for the cause of action commences to run and before the date on which a person having (either solely or with other persons) the cause of action first discovers, or may with reasonable diligence discover, the fraud deceit or concealment, as the case may be, does not count in the  
25 reckoning of the limitation period for an action on the cause of action by him or by a person claiming through him against a person answerable for the fraud deceit or concealment.

(2) Subsection (1) of this section has effect whether  
30 the limitation period for the cause of action would, but for this section, expire before or after the date mentioned in that subsection.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 26 (a),  
(b).

(3)

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*Limitation.*

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(Part III,  
Div. 2,  
ss. 55, 56)

(3) For the purposes of subsection (1) of this section, a person is answerable for fraud deceit or concealment if, but only if—

- 5 (a) he is a party to the fraud deceit or concealment;  
or
- (b) he is, in relation to the cause of action, a successor of a party to the fraud deceit or concealment under a devolution from the party occurring after the date on which the fraud deceit or concealment
- 10 first occurs.

(4) Where property is, after the first occurrence of fraud deceit or concealment, purchased for valuable consideration by a person who is not a party to the fraud deceit or concealment and does not, at the time of the purchase, know or have reason to believe that the fraud deceit or concealment has occurred, subsection (1) of this section does not, in relation to that fraud deceit or concealment, apply to a limitation period for a cause of action against the purchaser or a person claiming through him.

cf. 2 & 3  
Geo. 6, c. 21,  
s. 26  
proviso (i).

20 **56.** (1) Subject to subsection (3) of this section, where there is a cause of action for relief from the consequences of a mistake, the time which elapses after a limitation period fixed by or under this Act for the cause of action commences to run and before the date on which a person having (either

25 solely or with other persons) the cause of action first discovers, or may with reasonable diligence discover, the mistake does not count in the reckoning of the limitation period for an action on the cause of action by him or by a person claiming through him.

Mistake.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 26 (c).

30 (2) Subsection (1) of this section has effect whether the limitation period for the cause of action would, but for this section, expire before or after the date mentioned in that subsection.

(3)

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*Limitation.*

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(Part III,  
Div. 2,  
s. 56,  
Div. 3, s. 57)  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 26  
proviso (ii).

(3) Where property is, after a transaction in which a mistake is made, purchased for valuable consideration by a person who does not, at the time of the purchase, know or have reason to believe that the mistake has been made, subsection (1) of this section does not apply to a limitation period for a cause of action for relief from the consequences of the mistake against the purchaser or a person claiming through him.

DIVISION 3.—*Personal injury cases.*

- 10 57. (1) For the purposes of this Division—
- Interpreta-  
tion.
- (a) “personal injury” includes any disease and any impairment of the physical or mental condition of a person; cf. 2 & 3  
Geo. 6, c. 21,  
s. 31 (1).
- 15 (b) the material facts relating to a cause of action include the following— cf. 1963  
c. 47,  
s. 7 (3).
- (i) the fact of the occurrence of negligence nuisance or breach of duty on which the cause of action is founded;
- 20 (ii) the identity of the person against whom the cause of action lies;
- (iii) the fact that the negligence nuisance or breach of duty causes personal injury;
- (iv) the nature and extent of the personal injury so caused; and
- 25 (v) the extent to which the personal injury is caused by the negligence nuisance or breach of duty;
- (c) material facts relating to a cause of action are of a decisive character if, but only if, a reasonable man, knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing—
- 30 (i) that an action on the cause of action would (apart from the effect of the expiration of a limitation period) have a reasonable
- 35 prospect



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*Limitation.*

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(Part III,  
Div. 3,  
ss. 57, 58)

- prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the cause of action; and
- 5 (ii) that the person whose means of knowledge is in question ought, in his own interests, and taking his circumstances into account, to bring an action on the cause of action;
- 10 (d) "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; cf. 1963 c. 47, s. 7 (8).
- (e) a fact is not within the means of knowledge of a person at a particular time if, but only if— cf. 1963 c. 47, s. 7 (5).
- 15 (i) he does not, at that time, know the fact; and
- (ii) in so far as the fact is capable of being ascertained by him, he has, before that time, taken all reasonable steps to ascertain the fact; and
- 20 (f) "limitation period" means a limitation period fixed by an enactment repealed or omitted by this Act or fixed by or under this Act.
- (2) In this Division the expression "breach of duty" cf. 1963 c. 47, s. 1 (2). extends to the breach of any duty, whether arising by statute, contract or otherwise, and includes trespass to the person.

58. (1) This section applies to a cause of action founded on negligence nuisance or breach of duty, for damages for personal injury, not being a cause of action which has survived on the death of a person for the benefit of his estate Ordinary action. cf. 1963 c. 47, ss. 1, 2. under section 2 of the Law Reform (Miscellaneous Provisions) Act, 1944, and not being a cause of action which arises under section 3 of the Compensation to Relatives Act of 1897.

(2)

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*Limitation.*

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(Part III,  
Div. 3,  
ss. 58, 59)

(2) Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that—

- 5 (a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until a date after the commencement of the year preceding the expiration of the limitation period for the cause of action; and
- 10 (b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,

the court may order that the limitation period for the cause of action be extended so that it expires at the end of one 15 year after that date and thereupon, for the purposes of an action on that cause of action brought by the applicant in that court, and for the purposes of paragraph (b) of subsection (1) of section 26 of this Act, the limitation period is extended accordingly.

20 (3) This section applies to a cause of action whether cf. 1963 or not a limitation period for the cause of action has c. 47, s. 6. expired—

- (a) before the commencement of this Act; or
- 25 (b) before an application is made under this section in respect of the cause of action.

59. (1) This section applies to a cause of action founded Surviving on negligence nuisance or breach of duty, for damages for action. personal injury, which has survived on the death of a person cf. 1963 for the benefit of his estate under section 2 of the Law c. 47, ss. Reform (Miscellaneous Provisions) Act, 1944. 1, 2, 3.

(2) Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that—

- 35 (a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of either the deceased or the applicant

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*Limitation.*

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(Part III,  
Div. 3,  
ss. 59, 60)

applicant until a date after the commencement of the year next preceding the expiration of the limitation period for the cause of action; and

- 5 (b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,

the court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of an action  
10 on that cause of action brought by the applicant in that court, and for the purposes of paragraph (b) of subsection (1) of section 26 of this Act, the limitation period is extended accordingly.

(3) For the purposes of this section, the material  
15 facts of a decisive character do not include facts relating only to—

- (a) damages not recoverable by the applicant; or  
(b) funeral expenses of the deceased.

(4) This section applies to a cause of action whether *cf.* 1963  
20 or not a limitation period for the cause of action has *c.* 47, s. 6. expired—

- (a) before the commencement of this Act; or  
(b) before an application is made under this section in respect of the cause of action.

25 **60.** (1) This section applies to a cause of action for damages which arises (or which would arise, but for the expiration as against the deceased of a limitation period before or after the commencement of this Act) under section 3 of the Compensation to Relatives Act of 1897 by virtue of the  
30 death of a person caused by a wrongful act neglect or default. Compensation to relatives. *cf.* 1963 c. 47, ss. 1, 2, 3.

(2)

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*Limitation.*

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(Part III,  
Div. 3,  
ss. 60, 61)

(2) Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that—

- 5           (a) any of the material facts of a decisive character relating to the cause of action of the deceased in respect of the wrongful act neglect or default was not within the means of knowledge of the deceased at any time before the year next preceding the death of the deceased; and
- 10          (b) there is evidence to establish the cause of action which the applicant claims to have, apart from the expiration as against the deceased of a limitation period,

15          the court may order that the expiration as against the deceased of a limitation period for a cause of action by him in respect of the wrongful act neglect or default have no effect in relation to the cause of action which the applicant claims to have and thereupon, for the purposes of an action brought by the applicant in that court on the cause of action which he claims

20          to have, that expiration has no effect.

          (3) Where, by virtue of this section, the expiration as against the deceased of a limitation period for a cause of action by him in respect of a wrongful act neglect or default has no effect in relation to a cause of action to which this

25          section applies, and the person against whom the lastmentioned cause of action lies brings an action for contribution under subsection (1) of section 5 of the Law Reform (Miscellaneous Provisions) Act, 1946, the expiration as against the deceased of a limitation period for a cause of action by

30          the deceased in respect of a wrongful act neglect or default has no effect in relation to the action for contribution.

61. Where, after the expiration of a limitation period to which this Division applies, the limitation period is extended by order under this Division, the prior expiration of the limitation period has no effect for the purposes of this Act.

62.

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*Limitation.*

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(Part III,  
Div. 3,  
s. 62,  
Part IV,  
Div. 1,  
ss. 63, 64)

62. Where, under this Division, a question arises as to the means of knowledge of a deceased person, the court may have regard to the conduct and statements, oral or in writing, of the deceased person. Evidence.

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PART IV.

MISCELLANEOUS.

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

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

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

- (a) for the purposes of the action; or
- (b) so far as the right or title is established in the action.

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

64. (1) Subject to subsection (2) of this section, on the expiration of a limitation period fixed by or under this Act for a cause of action for an account founded on a liability at law to account in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming Account.

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*Limitation.*

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(Part IV,  
Div. 1,  
ss. 64, 65)

claiming through him in respect of that matter is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

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

- 10 (a) for the purposes of the action; or
- (b) so far as the right or title is established in the action.

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

15 **65.** (1) Subject to subsection (2) of this section, on the expiration of a limitation period fixed by or under this Act for a cause of action specified in column 1 of Schedule Four to this Act, the title of a person formerly having the cause of action to the property specified opposite the cause of action in column 2 of that Schedule is, as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

Property.  
cf. 2 & 3  
Geo. 6, c. 21,  
ss. 3 (2),  
7 (3), 16.  
Schedule  
Four.

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

- 30 (a) for the purposes of the action; or
- (b) so far as the right or title is established in the action.

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*Limitation.*

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(Part IV,  
Div. 1,  
ss. 66, 67)  
Instrument  
under Real  
Property  
Act.

66. (1) Where—

- (a) an instrument is executed which, if registered, would take effect as a deed;
- 5 (b) a cause of action founded on the instrument accrues; and
- (c) before the material date, the instrument is registered,

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

(2) For the purposes of this section—

- (a) the “material date” is the date of the expiration of the limitation period which would be fixed by or  
15 under this Act for the cause of action if the instrument were a deed; and
- (b) “registered” means registered under the Real Property Act, 1900.

67. (1) Where—

- 20 (a) the title of a person to land for an estate or interest in possession is extinguished by this Act;
- (b) at any time while he has that title he is also entitled to the same land for an estate or interest in remainder or reversion or any other future estate or  
25 interest; and
- (c) the land is not, before the estate or interest mentioned in paragraph (b) of this subsection becomes a present estate or interest, recovered by virtue of an intermediate estate or interest,

Future  
interest  
in land.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 6 (5).

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

(2)

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*Limitation.*

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(Part IV,  
Div. 1,  
ss. 67, 68,  
Div. 2,  
s. 69)

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

68. Notwithstanding this Division, where—

Possessory  
lien.

- (a) a person is in possession of goods; and
- (b) he has a lien on the goods for a debt or other money claim payable by a second person,

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

DIVISION 2.—*Arbitration.*

69. (1) In this Division, the expression “provisions for  
20 arbitration” means—

Interpre-  
tation.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 27 (6),  
(7).

- (a) the provisions of an agreement to submit present  
or future differences to arbitration, whether an  
arbitrator is named in the agreement or not; and

cf. Act No.  
29, 1902,  
s. 3.

25 (b) the provisions of any Act regulations rules by-laws order or scheme requiring or permitting the determination of any matter by arbitration or relating to such an arbitration.

(2) Where the provisions for arbitration are or include the provisions of any Act regulations by-laws order  
30 or scheme, this Division has effect subject to the latter provisions.



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*Limitation.*

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70. (1) This Act applies to an arbitration in like manner as it applies to an action.

(Part IV,  
Div. 2,  
ss. 70-72)

Applica-  
tion of  
this Act.

cf. 2 & 3

Geo. 6, c. 21,  
s. 27 (1).

(2) An arbitration for any difference or matter under any provisions for arbitration is not maintainable if commenced after the date of the expiration of the period of limitation fixed by or under this Act for a cause of action in respect of the same difference or matter.

71. Where, by a term of any provisions for arbitration, a cause of action with respect to any difference or matter refer-  
10 able to arbitration under the provisions does not accrue until the making of an award or the happening of some other event in or relating to the arbitration or does not accrue at all, the cause of action nevertheless accrues, for the purposes of the application of this Division to an arbitration under the provi-  
15 sions, on the date on which it would accrue but for that term.

Accrual.

cf. 2 & 3

Geo. 6, c. 21,  
s. 27 (2).

72. (1) For the purposes of this Division—

Commence-  
ment.

(a) where the provisions for arbitration require or permit a party to the arbitration to give notice in writing to another party—

cf. 2 & 3

Geo. 6, c. 21,  
s. 27 (3).

20 (i) requiring the other party to appoint or concur in appointing an arbitrator; or

(ii) requiring the other party to submit or concur in submitting a difference or matter to a person named or designated in the provisions for arbitration as arbitrator; or

25 (b) where, in a case to which paragraph (a) of this subsection does not apply, a party to the arbitration takes a step required or permitted by the provisions for arbitration for the purpose of bringing a difference or matter before an arbitrator and gives to another party notice in writing of the taking of the step,

the

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*Limitation.*

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(Part IV,  
Div. 2,  
ss. 72-73)

the arbitration is commenced, as between the party giving the notice and the party to whom the notice is given, on the date on which the notice is given.

(2) For the purpose of subsection (1) of this section, cf. 2 & 3  
Geo. 6, c. 21,  
s. 27 (4).  
5 the date on which a notice is given is the date, or the earlier or earliest of the dates, when the party giving the notice—

- (a) delivers it to the party to whom it is to be given;
- (b) leaves it at the usual or last-known place of business or of abode of the party to whom it is to be given;
- 10 (c) posts it by the certified mail service to the party to whom it is to be given at his usual or last-known place of business or of abode; or
- (d) gives the notice in a manner required or permitted by the provisions for arbitration.

15 73. (1) Where a court—

- (a) gives leave to revoke a submission under section 4 of the Arbitration Act, 1902;
- (b) removes an arbitrator or umpire under subsection (1) of section 13 of that Act; or
- 20 (c) sets aside an award under subsection (2) of section 13 of that Act,

Extension  
of limita-  
tion period.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 27 (5).

the court may at the same time or within six months afterwards, whether or not the limitation period fixed by or under this Act for the bringing of an action or for the commence-  
25 ment of an arbitration with respect to the difference or matter under arbitration has expired, order that the whole or any part of the time between the date of the commencement of the arbitration and the date of the order under this section do not count in the reckoning of the limitation period.

30 (2) Where, after the expiration of a limitation period fixed by or under this Act, a court makes an order under this section, the prior expiration of the limitation period has no effect for the purposes of this Act.

DIVISION

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*Limitation.*

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(Part IV,  
Div. 3,  
ss. 74-77)

DIVISION 3.—*General.*

74. Where, in an action (in this section called the principal action), a claim is made by way of set off, counterclaim or cross action, the claim, for the purposes of this Act—

Set off,  
etc.  
cf. 2 & 3  
Geo. 6, c. 21,  
s. 28.

- 5       (a) is a separate action; and
- (b) is, as against a person against whom the claim is made, brought on the only or earlier of such of the following dates as are applicable—
- 10           (i) the date on which he becomes a party to the principal action; and
- (ii) the date on which he becomes a party to the claim.

75. Where, were it not for this Act, two or more persons would have a cause of action jointly and, by this Act, an action on the cause of action is not maintainable by one or more of them, an action on the cause of action is nonetheless maintainable by the other or others of them and judgment may be given accordingly.

Joint right.

76. Where, were it not for this Act, two or more persons would be liable on a cause of action jointly and, by this Act, an action on the cause of action is not maintainable against one or more of them, an action on the cause of action is nonetheless maintainable against the other or others of them and judgment may be given accordingly.

Joint liability.

cf. 9 Geo. 4,  
c. 14, s. 1.  
Act No. 21,  
1899, s. 39.

25 77. (1) Rules of court not inconsistent with this Act may be made for the regulation of the practice and procedure of the court in proceedings under sections 22, 58, 59, 60 and 73 of this Act.

Rules of Court.

(2)

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*Limitation.*

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(Part IV,  
Div. 3,  
s. 77)

- (2) Rules so made shall—
- (a) be published in the Gazette;
  - (b) take effect from the date of publication or from a later date to be specified in the rules; and
  - 5 (c) be laid before both Houses of Parliament within fourteen sitting days after publication if Parliament is in session, and if not, then within fourteen sitting days after the commencement of the next session.
- (3) If either House of Parliament passes a resolution
- 10 of which notice has been given at any time within fifteen sitting days after the rules have been laid before that House disallowing any rule or part of a rule, that rule or part shall thereupon cease to have effect.
- (4) The power to make rules given by this section
- 15 may be exercised—
- (a) in relation to proceedings in the Supreme Court, by a majority of the judges of the Supreme Court or any five of them; and
  - (b) in relation to proceedings in the District Courts, by
  - 20 (c) in relation to proceedings in courts of petty sessions exercising jurisdiction under the Small Debts Recovery Act, 1912, by the Governor.
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SCHEDULES.

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*Limitation.*


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## SCHEDULES.

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SCHEDULE ONE.  
REPEAL OF ENACTMENTS.
Sec. 4 (1),  
(2).

5	Year and chapter or number.	Subject or title.	Extent of repeal.
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	31 Eliz. 1, c. 5 ..	The Common Informers Act, 1588.	Section 5.
10	21 Jac. 1, c. 16 ..	The Limitation Act, 1623 ..	Sections 3, 4 and 7.
	4 and 5 Anne, c. 3 (or 4 and 5 Anne, c. 16).	The Administration of Justice Act, 1705.	Sections 17, 18 and 19.
	9 Geo. 3, c. 16 ..	The Crown Suits Act, 1769 ..	The whole Act.
<i>Part B—New South Wales Acts.</i>			
15	4 Wm. 4, No. 17 ..	An Act for adopting and applying a certain Act of Parliament for rendering a written Memorandum necessary to the validity of certain Promises and Engagements.	The unrepealed portion.
20	8 Wm. 4, No. 3 ..	An Act for adopting a certain Act of Parliament passed in the Third and Fourth Years of the Reign of His present Majesty King William the Fourth and applying the same in the Administration of Justice in New South Wales in like manner as other Laws of England are applied therein.	The whole Act.
25	5 Vic. No. 9 ..	An Act for the further amendment of the Law and for the better advancement of Justice.	The unrepealed portion.
35	26 Vic. No. 12 ..	Trust Property Act of 1862 ..	The unrepealed portion.
	47 Vic. No. 7 ..	Limitation of Actions for Trespass Act of 1884.	The unrepealed portion.

SCHEDULE

*Limitation.*SCHEDULE TWO.  
AMENDMENT OF ACTS.

Sec. 4 (3).

Column 1.		Column 2.
5 Year and Number of Act.	Short title.	Amendment.
10 1897 No. 31.	Compensation to Relatives Act of 1897.	Section 5— Omit the words “, and every such action shall be commenced within six years after the death of such deceased person”. Section 6c— Subsection (2)— Omit the subsection.
15 1899 No. 18.	Landlord and Tenant Act of 1899.	Section 8— Subsection (3)— After the word “arrears” insert the words “the recovery of which by action is not, on the date on which the action in ejectment is brought, barred by the Limitation Act, 1967,”. Subsection (5)— After the word “arrear” insert the words “the recovery of which by action is not, on the date on which the action in ejectment is brought, barred by the Limitation Act, 1967,”. Section 9— Subsection (1)— After the word “arrear” insert the words “on account of rent the recovery of which by action is not, on the date on which the action in ejectment is brought, barred by the Limitation Act, 1967,”. Section 10— Subsection (1)— After the word “arrears” insert the words “the recovery of which by action is not, on the date on which the action is brought, barred by the Limitation Act, 1967,”.

SCHEDULE

*Limitation.*SCHEDULE TWO—*continued.*

Column 1.		Column 2.
Year and Number of Act.	Short title.	Amendment.
5	1899 No. 18..	Landlord and Tenant Act of 1899— <i>continued.</i>
10		Section 18— Subsection (2)— After the word "arrear" insert the words "the recovery of which by action is not, on the date on which the action is brought, barred by the Limitation Act, 1967,".
15	1925 No. 14..	Trustee Act, 1925.
	1940 No. 32..	Trustee and Wills (Emergency Provisions) Act, 1940.
20	1944 No. 28..	Law Reform (Miscellaneous Provisions) Act, 1944.

## SCHEDULE THREE.

Sec. 4 (5).

## CITATION OF ACTS.

Column 1.		Column 2.
Year and Number of Act.	Short title.	Citation.
25	1897 No. 31..	Compensation to Relatives Act of 1897.
30	1899 No. 18..	Landlord and Tenant Act of 1899.
	1919 No. 6 ..	Conveyancing Act, 1919.
	1925 No. 14..	Trustee Act, 1925.
35	1940 No. 32..	Trustee and Wills (Emergency Provisions) Act, 1940.
	1944 No. 28..	Law Reform (Miscellaneous Provisions) Act, 1944.

## SCHEDULE

*Limitation.*

## SCHEDULE FOUR.

Sec. 65.

## EXTINCTION OF RIGHT AND TITLE.

Column 1.	Column 2.
Cause of action.	Property.
<b>5</b> For conversion or detention of goods .. To recover land. To enforce an equitable estate or interest in land. To redeem mortgaged property.	The goods. The land. The equitable estate or interest. The mortgaged property.
<b>10</b> To recover principal money secured by mortgage or to recover possession of mortgaged property from a mortgagor or to foreclose the equity of redemption of mortgaged property, within the meaning of section 42 of this Act.	The mortgaged property.
<b>15</b> 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.



**APPENDIX C**

**Note on Limitation Bill**

Preceded by

*Table of Statutes Referred to*

and

*Table of Cases Referred to*

and followed by

*Index to Note*

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## NOTE ON LIMITATION BILL

## PART I—PRELIMINARY

## Section 1—Short title and commencement

1. This section needs no comment.

## Section 2—Construction

2. Problems of private international law and of the limits of the legislative power of the State are likely to arise, especially under Division 1 of Part IV of the Bill, which deals with the extinction of rights and titles. Section 2 will help to give the Bill the widest operation consistent with limits of legislative power. It seems better to have the problems to be dealt with as they arise, rather than expressly to exclude important classes of rights and titles arising under Commonwealth Acts from extinction under the Bill, for example, rights and titles arising under the Bankruptcy Act or under the Bills of Exchange Act.

## Section 3—Division

3. This section needs no comment.

## Section 4 (1)—Repeal of Imperial Acts

4. The first Imperial enactment in Schedule 1 is section 5 of the Common Informers Act, 1588 (31 Eliz. 1, c. 5). This section fixes limitation periods for "actions, suits, bills, indictments or informations" for any forfeiture upon any penal statute. In England this section was partly repealed by the Summary Jurisdiction Act, 1848 (11 & 12 Vic. c. 43), s. 36. The repeal was of so much of the Common Informers Act as related to the time limited for exhibiting an information for the forfeiture upon a penal statute. The Imperial Act of 1848 was adopted in New South Wales by the Justices Act, 1850 (14 Vic. No. 43), s. 1. Section 5 of the Common Informers Act fixes a limitation period of two years where the penalty goes to the Crown alone, and a limitation period of one year in other cases. It applies to an action by a common informer for a penalty under a statute, but not to an action by a party grieved. The limitation period for an action for a penalty by a party grieved is fixed at two years by section 39 of the Supreme Court Act, 1841 (5 Vic. No. 9). Statutory provisions giving a civil action to recover a penalty are obsolete and are extremely rare. There is an example in section 9 of the Printing Act, 1899–1934; but section 8 of the same Act fixes a limitation period of three months for an action for a penalty under the Act. The common informer procedure was abolished in England by the Common Informers Act, 1951, and the unrepealed portion of the Common Informers Act, 1588, was repealed in England by the Imperial Statute Law Revision Act, 1959. There is a case for their abolition in New South Wales. However, while the possibility of such an action remains, some limitation period should be fixed. This is done by section 18 of the Bill, which fixes a period of two years. This is the same period as that fixed for similar actions by section 2 (5) of the Imperial Limitation Act, 1939.

5. The second Imperial Act affected by the repeals is the Limitation Act, 1623 (21 Jas. 1, c. 16). Sections 3, 4 and 7 are repealed. Section 3 of the Act of 1623 is the main provision now in force fixing limitation periods for actions on simple contracts and for actions founded on tort. There is a two year limitation period for slander, a four-year period for trespass to the person, and a six-year period for actions on contracts and the common actions in tort, for example, actions for damages for negligence or for breach of statutory duty. Section 4 provides for cases of reversal of judgment on appeal and other matters; these provisions are unnecessary under current procedures. In general, sections 14, 15, 20 and 21 of the Bill take the place of section 3 of the Act of 1623. Section 4 of the Act of 1623 has no counterpart in the Bill.

6. Section 7 of the Act of 1623 provides for extension of the limitation period in cases of disability of the plaintiff. The provisions cover infants, married women, persons not of sound mind, prisoners and persons absent beyond the seas. There is no need to make special provision for married women; the Married Persons (Property and Torts) Act, 1901–1964, removes all relevant disabilities. To regard

absence beyond the seas as itself justifying an extension of the limitation period is to disregard the current ease of transport and communication: for a startling recent discussion of the law on the point, see *Societe Egyptienne Financiere pour le Commerce et l'Industrie S.A.E. v. Clyde Industries Ltd.* ([1960] S.R. 315). A conviction for felony no longer works an escheat or forfeiture of land or goods (Crimes Act, 1900, s. 465 (1)) and is no longer a legal disability. Section 52 of the Bill (read with section 11 (3)) provides for the disabilities of infancy and unsoundness of mind.

7. Sections 1 and 2 of the Act of 1623 dealt with limitation periods for actions to recover land. These sections were no doubt in force in New South Wales until 1837, but were impliedly repealed by the Real Estate (Limitation of Actions) Act, 1837 (8 Wm. 4, No. 3), which adopted the Imperial Real Property Limitation Act, 1833. It does not seem useful to repeal expressly sections 1 and 2 of the Act of 1623: they will be covered and dealt with in our general proposals for repeal of old Imperial Acts.

8. The third Imperial Act affected by the repeals is the Administration of Justice Act, 1705 (4 & 5 Anne c. 3). Sections 17, 18, and 19 would be repealed. Section 17 fixes a six year limitation period for the recovery in Admiralty of seamen's wages: see sections 14 (1) (a) and 22 (1) of the Bill. Section 18 deals with disabilities of the plaintiff in cases to which section 17 applies: see sections 52 and 53 of the Bill. Section 19 deals with the absence beyond the seas of the defendant in cases to which section 3 of the Imperial Limitation Act, 1623, applies, and in cases to which section 17 of the Act of 1705 applies: there is nothing in the Bill to replace section 19. See paragraph 6 above as to absence beyond the seas.

9. The fourth Imperial Act to be repealed is the Crown Suits Act, 1769 (9 Geo. 3, c. 16). It is this Act which at present puts a limitation period of sixty years on an action by the Crown to recover land. In section 27 (1), (3), (4) of the Bill a limitation period of thirty years takes the place of the present period of sixty years. In this we follow section 4 (1) of the Imperial Act of 1939. This provision of the Imperial Act of 1939 follows the recommendation made in the Fifth Interim Report of the Law Revision Committee (the Wright Committee) made in 1936 (Cmd. 5334). In making this recommendation the Committee said (at p. 13) that prior to the year 1874 a purchaser might require the vendor to show title back to a root of title at least sixty years old; this period had been reduced in 1874 to forty years and in 1926 to thirty years. The Committee suggested that it might cause hardship if claims could be enforced in respect of a cause of action which arose before the commencement of the period during which a purchaser was entitled to investigate title. The history has been similar in New South Wales. The minimum period for investigation of an old system title by a purchaser was sixty years until 1920 and forty years from 1920 to 1931; since 1931 the period has been thirty years. The changes were made by the Conveyancing Act, 1919, s. 53 (1), and the Conveyancing (Amendment) Act, 1930, s. 13 (a) (ii).

#### Section 4 (2)—Repeal of New South Wales Acts

10. The first New South Wales enactment which the Bill would repeal is the unrepealed portion of the Written Memorandum Act, 1834 (4 Wm. 4, No. 17). This Act adopted the Imperial Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14: Lord Tenterden's Act). Although the Imperial Act was passed on the 9th of May, 1828, section 10 postponed its commencement until the 1st of January, 1829, and it was therefore not applied in New South Wales by the Australian Courts Act, 1828 (9 Geo. 4, c. 83), s. 24.

11. The provisions of the Imperial Act of 1828 which have not already been repealed for New South Wales are sections 1, 3, and 4. Section 1 deals with the form of acknowledgments and with the case where less than all of a number of joint contractors are bound by an acknowledgment: sections 54 and 76 of the Bill take the place of these provisions.

12. Section 3 of the Imperial Act of 1828 abolished the former effect of an endorsement or memorandum of payment written on promissory notes or other writing: section 5 (2) of the Bill will prevent the revival of the abolished rules. Section 4 of the Imperial Act of 1828 deals with the application of the Imperial Limitation Act, 1623, to debts alleged by way of set-off: the ground is covered by section 74 of the Bill.

13. The next New South Wales Act which the Bill would repeal is the 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, c. 27). The Imperial Act of 1833 is a lengthy Act dealing generally with the limitation periods for actions to recover land and with much else besides. It would unduly lengthen this part of this note to compare at length the provisions of the Imperial Act of 1833 with those of the Bill. Reference may be made to the comparative tables which are Appendix D to our report and generally to the remainder of this note. Some provisions of the Imperial Act of 1833 have, however, no counterparts in the Bill and it will be useful to comment briefly on these.

14. Section 1 of the Act of 1833 contains interpretation provisions relating to the word "person" and to matters of number and gender: the general provisions of section 21 of the Interpretation Act of 1897 makes reproduction of these provisions unnecessary.

15. Section 6 of the Imperial Act of 1833 provides that for the purposes of the Act an administrator of the estate of a deceased person is to be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of his letters of administration. Section 44 of the Wills, Probate and Administration Act, 1898-1965, makes reproduction of this provision unnecessary.

16. Section 13 of the Imperial Act of 1833 abolished a doctrine whereby possession of land by a younger brother or other relation of the heir to the land might be treated as possession by the heir: the revival of this doctrine will be prevented by section 5 (2) of the Bill. Further, the abolition of the descent of land to heirs by the Real Estate of Intestates Distribution Act of 1862 (26 Vic. No. 20) makes the doctrine inapplicable at the present time.

17. Section 15 of the Imperial Act of 1833 is a transitional provision and there is no need to reproduce it.

18. Section 18 of the Imperial Act of 1833 provides for the case of the death under disability of a person with a cause of action to recover land, followed by a succession to the land of another person under a disability. This provision does not fit the provisions for disabilities in section 52 of the Bill and is not reproduced. Further, the event contemplated would be of extreme rarity today. Unless extraordinary conveyancing methods are used, the person entitled on the death of a landowner is his executor or administrator and a grant of probate or letters of administration would not be made to a person under the disabilities with which the Act of 1833 is concerned.

19. Section 19 of the Imperial Act of 1833 lists some places which are not to be taken to be beyond the seas within the meaning of the Act. Under the Bill, absence beyond the seas is not a disability and these provisions are not reproduced.

20. Sections 21, 22, and 23 of the Imperial Act of 1833 deal with estates tail. The amendment which section 4 (4) of the Bill would make to the Conveyancing Act, 1919-1967, should finally abolish estates tail. There is no need, therefore, for the Bill to fix limitation periods for estates tail or for estates in remainder or reversion on, or in defeasance of, estates tail. See paragraphs 42 to 49 of these notes.

21. The fourth limb of section 28 of the Imperial Act of 1833 deals with a problem which may arise where one of a number of mortgagees of land acknowledges a right of redemption but the other or others of the mortgagees do not acknowledge the right. The limb deals with the case of mortgagees being entitled to divided parts of the land but not to any ascertained part of the mortgage money and enables the mortgagor to redeem the land to which the acknowledging mortgagee is entitled on payment of a proportionate part of the mortgage money, the proportion being based on the values of the divided parts of the mortgaged property. The provision has never, so far as our searches have gone, been applied in any reported case and the factual situation on which it is to operate must in the nature of things be rare. Further, we doubt the policy of the provision: we think that the adjustment of the rights of the parties in such case is better left to the terms of the mortgage, express or implied, and the principles administered by courts of equity. The Bill contains no corresponding provision.

22. Sections 29 to 33, inclusive, of the Imperial Act of 1833 deal with matters concerning ecclesiastical or eleemosynary corporations sole and advowsons. These provisions are not required in New South Wales.

23. Section 35 of the Imperial Act of 1833 provides that the receipt of rent payable by a lessee is, as against the lessee (but subject to the lease) to be treated as the receipt of the profits of the land for the purposes of the Act. This "singular provision" (Sugden's Real Property Statutes 2nd edition (1862) p. 47) has been thought by the text writers to be unnecessary (Darby & Bosanquet on the Statutes of Limitation 2nd edition (1893) p. 505; Lightwood: The Time Limit on Actions (1909) p. 96) and has no counterpart in the Imperial Act of 1939. We think it unnecessary, especially in view of sections 34 and 54 of the Bill, under which the limitation period will not run against a cause of action to recover land from a tenant while the tenant pays the rent. The Bill therefore has no counterpart of section 35 of the Imperial Act of 1833.

24. Sections 36 to 38, inclusive, of the Imperial Act of 1833 deal with the abolition of real and mixed actions. Section 5 (2) of the Bill will prevent the revival of these actions notwithstanding the repeal which the Bill would make.

25. Section 39 of the Imperial Act of 1833 abolished rules relating to descents cast, discontinuances and warranties. There is some discussion of these matters in Challis's Law of Real Property, 3rd edition (1911), pp. 307, 308, 405-408. Section 22 of the Conveyancing Act, 1919-1964, depriving assurances of land of a tortious operation, has diminished the importance of these rules and in other respects they are quite obsolete. Section 5 (2) of the Bill will prevent any question of the rules being revived.

26. Section 41 of the Imperial Act of 1833 fixes a limitation period for the recovery of arrears of dower. Dower has been abolished: see now section 21 of the Conveyancing Act, 1919-1967.

27. Sections 43, 44, and 45, as to spiritual courts, Scotland and Ireland, and amendment of the Act respectively, do not call for reproduction in the Bill.

28. The third New South Wales Act which the Bill would repeal is the unrepealed portion of the Supreme Court Act, 1841 (5 Vic. No. 9). The portions of this Act not already repealed are sections 30, 39, 40, and 41. These sections reproduce the substance of sections 2, 3, 4 and 5 of the Imperial Civil Procedure Act, 1833 (3 & 4 Wm. 4 c. 42).

29. Section 30 of the Act of 1841 enables personal representatives to bring actions in tort for any injury to the land of the deceased committed in his lifetime and enables actions in tort to be maintained against personal representatives for wrongs committed by the deceased in respect of property of another person. In each case there is a proviso fixing a limitation period. The Imperial provision corresponding to section 30 was repealed by section 56 of the Administration of Estates Act, 1925, and a substituted provision was enacted by section 26 (2) of that Act. This substituted provision was itself repealed by section 1 (7) of the Imperial Law Reform (Miscellaneous Provisions) Act, 1934. Section 1 (1) of the Act of 1934 provided for the general survival of causes of action subsisting against or vested in a person at the time of his death: it is similar to section 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1944. Section 30 of the Act of 1841 may be impliedly repealed by section 2 of the Law Reform (Miscellaneous Provisions) Act, 1944, but, if it is not already repealed, we think that it should be repealed so as to let the provisions of the 1944 Act have their full effect. As will appear, we recommend the amendment of the Law Reform (Miscellaneous Provisions) Act, 1944, by the omission of section 2 (3), but it will be better to leave our reasons for this omission until we come to discuss section 4 (3) of the Bill. See paragraphs 39 to 41 of these notes.

30. Subject to an exception to be mentioned presently, the Bill has provisions to take the place of sections 39, 40, and 41 of the Act of 1841. The exception is the second limb of section 40, which postpones the barring of an action in case the defendant is absent beyond the sea. This provision has but one counterpart in the other statutes in force in New South Wales (the Administration of Justice Act, 1705, s. 19)

and has none in the Imperial Act of 1939. We see no justification for it in the circumstances of today and we think that the second limb of section 40 ought not to be reproduced in the Bill. The provisions of the Act of 1841 which are of the greatest importance at the present day are those in section 39 which fix a limitation period of twenty years for an action on a deed. Subject to a reduction of the period to twelve years, corresponding provision is made in section 16 of the Bill.

31. The fourth Act which the Bill would repeal is the Trust Property Act of 1862. The unrepealed portion of this Act comprises sections 24 and 36. Section 71, giving the short title, is also unrepealed. Section 24 enables a mortgagee of land to recover possession of the land or to foreclose at any time within twenty years after the last payment of principal or interest under the mortgage. The Bill deals with the matter in section 54 (3).

32. Section 36 of the Act of 1862 fixes a limitation period for claims to personal estate on intestacy. This is covered by section 47 of the Bill. Section 36 of the Act of 1862 also deals with payments or acknowledgments on account of claims to intestate personalty: See section 54 of the Bill.

33. The remaining Act which would be repealed by the Bill is the Limitation of Actions for Trespass Act of 1884. Section 2 is the operative provision of this short but curious Act. It provides that in an action for trespass to land where the plaintiff's title to or possession of the land is not disputed, the plaintiff is not to have damages for any act of trespass committed more than twelve months before the action is brought; there is a proviso saying that the provision is not to apply to a plaintiff who is beyond the seas or under disability at the time when the trespass is committed. The provisions are, so far as our searches have gone, unique. Some of the obscurities of the Act were explored by the High Court in *Bowtell v. Goldsbrough, Mort & Co.* ((1905) 3 C.L.R. 444). The Act no doubt dealt with a problem which was a real one at the time when the Act was passed but we do not think that the problem is a real one today and we think that the Act ought to be repealed without reproduction of its provisions in the Bill.

#### Section 4 (3)—Amendment of Acts

34. The first Act which section 4 (3) of the Bill would amend is the Compensation to Relatives Act of 1897. The Act enables an action for damages to be brought for the benefit of the relatives of a person whose death is caused by a wrongful act, neglect or default. Section 5 provides, by its first limb, that not more than one action shall lie for the same subject matter of complaint and, by its second limb, that every action shall be commenced within six years after the death of the deceased person. The Bill would omit the second limb of section 5. Section 19 of the Bill would fix a six-year limitation period in place of the similar period now fixed by section 5 of the Act of 1897. The purpose of this is to make applicable to such actions the provisions of Part III of the Bill which deal with the postponement of the bar in cases of disability and so on. At present, if a man were killed by the negligence of another, leaving only a two-year-old child surviving him, the action of the child would be irretrievably barred by the time the child was eight years old and there is no provision requiring anybody to see whether it would be for the benefit of the child that an action should be brought. This is wrong and the Bill would remedy it.

35. Section 6C (2) of the Compensation to Relatives Act enacts that, where the wrongdoer dies before action, an action is not maintainable against his representatives unless the cause of action arises not earlier than twelve months before the death of the wrongdoer and the action is brought not later than twelve months after the grant of representation in his estate. A proviso enables an action to be maintained in some circumstances notwithstanding that the cause of action arises earlier than twelve months before the death of the wrongdoer. We think that section 6C (2) is unnecessary, for reasons similar to those given in paragraphs 39 to 41 below for the proposed omission of section 2 (3) of the Law Reform (Miscellaneous Provisions) Act, 1944. The Bill would therefore omit section 6C (2) of the Compensation to Relatives Act.



36. The second Act which section 4 (3) of the Bill would amend is the Landlord and Tenant Act of 1899. The amendments are intended to produce the result that a tenant would not be required to pay more than six years arrears of rent as the price of relief under that Act against forfeiture of his lease. Our reasons are given in paragraphs 150 to 153 below in the discussion on section 25 of the Bill.

37. The third Act which section 4 (3) of the Bill would amend is the Trustee Act, 1925: the proposed amendment is the omission of section 69, which deals with the limitation of actions by beneficiaries against trustees or persons claiming through trustees. The ground would be covered by sections 47 to 50 of the Bill.

38. The fourth Act which section 4 (3) of the Bill would amend is the Trustee and Wills (Emergency Provisions) Act, 1940: the Bill would omit section 12. This section postponed the running of statutes of limitation against a cause of action of a person engaged on war service in the war which was in progress in 1940. The postponement was only until one year after the person ceased to be on war service in connection with that war. The provision is spent and it is convenient to repeal it. See the disability provisions in the Bill, sections 11 (3) and 52.

39. The last Act which section 4 (3) of the Bill would amend is the Law Reform (Miscellaneous Provisions) Act, 1944: the Bill would omit section 2 (3). Section 2 (1) of the Act of 1944 provides for the survival generally of causes of action subsisting against or vested in a deceased person. We have discussed the earlier legislation in England and in New South Wales in paragraph 29 above. Section 2 (3), which the Bill would omit, provides that no proceedings are to be maintainable in respect of a cause of action in tort surviving under the section against the estate of a deceased person unless either (a) proceedings against him on the cause of action were pending at the date of his death or (b) the cause of action arose not earlier than twelve months before his death and proceedings are taken not later than twelve months after his personal representative takes out representation. Under a proviso to the subsection an action may in some circumstances be brought even though the cause of action did arise earlier than twelve months before the death.

40. The subsection is inconsistent with the general principles of statutes of limitation. To illustrate the point, let it be assumed that a man has a cause of action for damages for personal injuries. The law allows him to bring the action at any time within six years after the cause of action accrues. If, however, the person against whom the cause of action lies should die within the six year period then the cause of action is liable to be barred at a time depending on the date when a grant of probate or of letters of administration is made in the estate of the person against whom the cause of action lies. The person who has suffered the injury may, without any fault on his part, be quite ignorant of the death and of the fact that a grant of probate or letters of administration has been made. The limitation period may thus be shortened by events which ought to be of no concern to him. He can, indeed, protect himself against the section by taking the otherwise idle step of issuing a writ of summons but holding it unserved. In the common case where the person responsible for the injury is indemnified by insurance, his subsequent death may be a simple windfall to his insurer. This situation ought not to continue unless there are strong reasons for its continuance.

41. The only reason which occurs to us as a justification for continuance of the provision is that the administration of the estate of the deceased wrongdoer should not be unduly delayed. This may have been a reason of considerable weight in 1841 when the comparable provisions of section 30 of the Supreme Court Act, 1841, were enacted: at that time an executor or administrator could not safely distribute the estate to his beneficiaries except under a decree in a suit in equity. Without the authority of such a decree, he took the risk of suffering judgment at law without having in his possession assets of the estate out of which he could satisfy the judgment and he might have had to satisfy the judgment out of his own property. The law was, however, changed by section 29 of the Trust Property Act of 1862, containing a provision the substance of which now appears in section 92 of the Wills, Probate and Administration Act, 1898-1965. The section

enables an executor or administrator to distribute the estate after publishing notices calling for claims against the estate and he is relieved of liability for assets distributed, as against the claim of any person of which he does not have notice at the time of distribution. This simple procedure, which is now a regular step in the administration of an estate, makes unnecessary the special limitation provisions in section 2 (3) of the Law Reform (Miscellaneous Provisions) Act, 1944. The Bill would therefore omit the subsection.

#### Section 4 (4)—Amendment of Conveyancing Act

42. Before 1920, if A, being seised of land for an estate in fee simple, granted the land to B and the heirs of his body, B became entitled to an estate in fee tail and A retained a reversion in fee simple expectant on the determination of the estate tail of B. If A's grant were to B and the heirs of his body with remainder to C and his heirs, B became entitled to the same estate tail, C became entitled to the land for an estate in fee simple in remainder after the estate tail, and A ceased to have any estate in the land. If nothing was done to bar the entail, the estate tail endured during the life of B and for so long afterwards as there were heirs of his body, that is, lawful descendants of his. If B died leaving heirs of his body, those heirs became entitled to the land on his death, and similarly the land would descend from one heir of the body to the next until there was a failure of heirs of the body of B. On such a failure the reversion or remainder, as the case might be, fell into possession.

43. Under the old law, a tenant in tail in possession might, by collusive legal proceedings known as levying a fine and suffering a recovery, assure the land to a purchaser for an estate in fee simple, so as to defeat the expectancies of those who might become heirs of the body on the death of the tenant in tail in possession and so as to bar estate in reversion or remainder on, or in defeasance of, the estate tail. See generally Sheppard's Touchstone, 8th edition (1826), p. 37; Sugden's Real Property Statutes, 3rd edition (1872), p. 193; Bythewood & Jarman's Conveyancing, 4th edition, Vol. 6 (1890), p. 521; Challis's Real Property, 3rd edition (1911), pp. 177, 314.

44. Under provisions now appearing in section 26 of the Conveyancing and Law of Property Act, 1898, a deed of conveyance acknowledged in accordance with that section has the same effect as a fine levied or a recovery suffered.

45. Although occasionally granted in New South Wales, estates tail were never common and have now ceased to be of significant utility or importance. Section 19 of the Conveyancing Act, 1919, went a long way towards abolishing estates tail and putting estates in fee simple in their place. Section 19, however, did not and does not operate in all possible cases. The following qualifications are to be observed:

- (a) The words at the end of section 19 (1), and the similar words at the end of section 19 (2) (a), "to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail", may impliedly preserve estates in reversion on an estate tail. Such an estate in reversion is not an estate "limited to take effect after the determination or in defeasance of" the estate tail: the reversion is not limited at all. The distinction between an estate in reversion and an estate in remainder is that, while the estate in remainder is limited or created by the instrument limiting the particular estate, an estate in reversion is simply that estate which remains in the grantor because his grant does not exhaust his own estate in the land. It is noteworthy that section 62 of the Victorian Act No. 2719, referred to in the marginal note to section 19, does not involve the same difficulty. That section which is in the Victorian Real Property Act 1915, is broadly similar to section 19 (1), but does not have words similar to those words quoted above from section 19 (1). The current Victorian provision is section 249 of the Property Law Act 1958. These provisions are ultimately derived from section 67 of the Victorian Transfer of Lands Statute Amendment Act of 1885 (No. 872).

- (b) Section 19 has no effect on a limitation in an instrument coming into operation before the commencement of the Conveyancing Act of an estate tail to a person not born until after the commencement of the Conveyancing Act. Section 19 (1) does not apply because the instrument comes into operation before the commencement of the Act; section 19 (2) does not apply because, at the commencement of the Act, no person is *entitled* to the estate tail. See *Mathers v. Mathers* (15th December, 1952, Roper C. J. in Eq., unreported). The same reasoning may apply to estates tail otherwise contingent on the date of the commencement of the Conveyancing Act.
- (c) Subsection (2) does not apply where the person concerned is mentally ill: subsection (2) (c).

46. The qualifications mentioned in subparagraphs (a) and (b) of paragraph 45 arise, we think, by inadvertence and there is no reason why any estates tail thus saved ought not to be converted into ordinary estates in fee simple. The exception mentioned in subparagraph (c) of paragraph 45 must have little, if any, application today. It is addressed to the case of a person who was mentally ill in 1920. On the probabilities, it is unlikely that such a person was entitled to an estate tail in 1920 and it is highly unlikely that a person so entitled is still living today. Section 19 (2) (c) is a counterpart of the old law whereby a mentally ill person could not levy a fine or suffer recovery; the provision operates, if at all, for the benefit of the heirs of the body of the mentally ill person and for the benefit of persons entitled in remainder on, or in defeasance of, the estate tail of the mentally ill person. If such a case should crop up and the children of the mentally ill person are not sufficiently provided for by any will of the mentally ill person or by their rights under his intestacy, the children have a remedy under the Testator's Family Maintenance Act. Other estates, depending as they would on the incapacity of the mentally ill person to do an act for his own benefit, do not call for the protection of the law.

47. We think that the time has come when estates tail ought to be abolished, without any exception.

48. We deal with the abolition of estates tail as a matter incidental to our review of the law relating to the limitation of actions because the present law of the limitation of actions, both here and in England, has special provisions relating to estate tail and, unless estates tail are finally abolished in New South Wales, it would be unsafe to repeal the existing statutes of limitations and replace them by an Act making no provision for estates tail. Since estates tail are practically obsolete, to include provisions concerning them in a limitation Bill would be to include what must almost certainly turn out to be dead wood.

49. We therefore recommend that the Conveyancing Act be amended by inserting after section 19 a new section 19A in the terms appearing in section 4 (4) of the Bill.

#### Section 5—Saving

50. The general savings on repeal in section 8 of the Interpretation Act apply only to the repeal of an Act, that is, a New South Wales Act. Section 5 (1) of the Bill applies these savings to the repeal of Imperial Acts.

51. Section 5 (2) of the Bill has no counterpart in the Interpretation Act of 1897, but is taken in substance from section 38 (2) (a) of the Imperial Interpretation Act, 1889. Such provisions are common in other Interpretation Acts. See *Marshall v. Smith* ((1907) 4 C.L.R. 1617, at pp. 1635, 1645). Cases in which the section would operate have been mentioned in the notes to section 4 (1) of the Bill.

## Section 6—Transition

52. These provisions have a self-evident purpose and do not call for extensive comment. Under section 6 (c), (d) of the Bill, where land is in adverse possession at the commencement of an Act founded on the Bill, the claimant will have the present twenty-year period in which to sue. Section 6 (c) speaks of "a cause of action which accrued before the commencement of this Act". The accrual rules in the Bill will govern the date of accrual (s. 11 (5)) and those rules are somewhat different from the rules as to accrual under the present law. Where, by applying the accrual rules in the Bill, or by applying the general law, it appears that a cause of action has accrued before the commencement of an Act founded on the Bill, section 6 (d) will allow an action or arbitration to be commenced within the time allowed by the present law. The closing words of paragraph (d) will prevent a clash between that paragraph and paragraphs (b) and (c) of section 6.

## Section 7—Other Limitations

53. Paragraph (a) of this section would preserve the very large number of enactments fixing periods of limitation for actions in particular classes of case. Sections 563 (1) of the Crimes Act, 1900, is an example. It provides that all actions against a person for anything done, or reasonably supposed to have been done, in pursuance of that Act are to be commenced within six months after the fact committed. We propose to deal with these enactments in a later report.

54. Section 7 (b) is taken in substance from section 32 of the Imperial Act of 1939 but its purpose is, perhaps, not immediately apparent. The idea is that, if another enactment fixes a period of limitation for some class of action, Parliament must be taken to have considered whether that limitation period should or should not apply to an action of that class brought by or against the Crown. The present statutes of limitation do not, in general, bind the Crown and it may be thought to be going against the policy expressed or implied in enactments fixing special limitation periods for actions to which the Crown is not a party, to apply the provisions of this Bill to similar actions brought by or against the Crown. Section 10 of this Bill deals with the effect of this Bill on the Crown and "Crown" is given an extensive definition by section 11 (1) of the Bill.

## Section 8—Saving of specified enactments

55. Section 8 (a) preserves the operation of section 45 of the Real Property Act, 1900–1967. Section 45 provides that "no title to land adverse to or in abrogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute." The Property Law Revision Committee has under consideration proposals concerning the acquisition of possessory titles to land under the Real Property Act. In the meantime the Bill would leave the present law unchanged. See also sections 40 and 66 of the Bill.

56. Section 8 (b) of the Bill saves the operation of section 235b of the Crown Lands Consolidation Act, 1913. The latter section provides that no title to any land of the Crown which has been set out as a road under any Act or in connection with the alienation of lands of the Crown or has been left between Crown grants for use as a road or driftway or has been dedicated under an Act for a public purpose or has been reserved in a Crown grant, shall, by reason of adverse possession, be allowed to be asserted or established as against the Crown or as against persons holding such lands in trust for any public purpose. The section has savings which are not material here. We see no reason to propose any alteration of the law in this respect.

57. Section 8 (c) of the Bill saves the operation of section 50 (2) of the Conveyancing Act, 1919. The latter section provides, amongst other things, that a conveyance of a present right of entry in any land, other than a conveyance to the person in possession, is to be void as against the person in possession or those claiming under him unless the person conveying or a person through whom he claims has been in possession of the land within twelve months from the date of the conveyance. A doubt may arise whether this provision of the Conveyancing Act can stand consistently with such provisions of the Bill as sections 28, 29 and 30. It is better to prevent such doubts by the insertion of Section 8 (c).

## Section 9—Acquiescence etc.

58. There is a similar provision in section 27 of the Imperial Real Property Limitation Act, 1833. We follow the lead of section 29 of the Imperial Act of 1939 in making the provision one of general application.

## Section 10—The Crown

59. The Imperial Common Informers Act, 1588, and the Imperial Crown Suits Act, 1769, bind the Crown by their express words. Otherwise the present general statutes of limitation do not bind the Crown. However, a nominal defendant sued under the Claims against the Government and Crown Suits Act, 1912, has the benefit of the statutes of limitation: *De Rossi v. Walker* ((1902) 2 S.R. 249). Section 10 (1) of the Bill would make the Crown generally bound by the Bill and would give the Crown the benefit of the Bill. So far as concerns the binding of the Crown, section 10 follows the applicable provisions of section 30 of the Imperial Act of 1939 and is consistent with the policy behind the Claims against the Government and Crown Suits Act, 1912. There have in the past been problems about the extent to which the Crown has the benefit of statutes of limitation: see *De Rossi v. Walker* (above). It is useful, therefore, to say expressly, as section 10 (1) of the Bill does say, that the Crown is to have the benefit of the Bill. The extensive definition of the "Crown" in section 11 (1) of the Bill should be noted.

60. Section 10 (4) of the Bill would preserve the prerogative right of the Crown to gold and silver. This follows section 30 (4) of the Imperial Act of 1939 and is, we think, in accordance with the present law. Apart from shortening the limitation period generally for an action by the Crown to recover land from sixty to thirty years, the Bill will not affect the right and title of the Crown to minerals. In particular, reserved minerals will continue to have the protection of section 235B of the Crown Lands Consolidation Act, 1913. See section 8 (b) of the Bill and paragraph 56 of these notes.

## Section 11 (1)—Interpretation of words

61. The definition of "action" is taken in substance from section 31 (1) of the Imperial Act of 1939.

62. The definition of "Crown" extends the meaning of the word so as to include, for example, the Crown in right of other Australian States and in right of the Commonwealth. It seems right that so far as other governments under the Crown have activities in New South Wales or are parties to proceedings in courts in New South Wales, those governments should be in a similar position to that of the Government of New South Wales in relation to the limitation of actions. Without some such definition as this, the presumption may be that a reference in a New South Wales Act to the Crown would mean the Crown in right of New South Wales alone: *Commonwealth v. Bogle* ((1953) 89 C.L.R. 229, at pp. 259, 260).

63. The definition of "deed" is new. An instrument registered under the Real Property Act, 1900–1967, has the effect of a deed (s. 36 (4)) and the first limb of the definition may be unnecessary. It should however, quiet doubts. As to the second limb of the definition, a debt arising under a mortgage registered in New South Wales under the Real Property Act of 1862 and having the effect of a deed under section 35 of that Act (cf. Real Property Act, 1900–1967 s. 36 (4)) has been treated as a simple contract debt in Victoria: *Payne v. The King* ((1902) A.C. 552); cf. *McClelland v. Trustees Executors & Agency Co. Ltd.* ([1936] 55 C.L.R. 483 at p. 493). To provide for the converse case, it seems reasonable to allow the limitation period of twelve years fixed by section 16 of the Bill for the instruments described in the definition.

64. The definition of "income" has been framed for the purposes of the Bill and is not based on anything in the Imperial Act of 1939. Its main use is in section 24, which puts a six-year period of limitation on an action to recover arrears of income. Capitalized arrears of interest under a mortgage are excluded from "income" as defined but are included in "principal money" as defined.

65. The definition of "judgment" is new. Without it the twelve year limitation period for an action on a judgment (section 17 of the Bill) would apply to a judgment of a New South Wales court (and perhaps to a judgment of a Commonwealth court) but not to a foreign judgment (including a judgment of a court of another State). For limitation purposes an action on a foreign judgment is an action founded on simple contract (*Dupleix v. De Roven* (1705) 2 Vern. 540; 23 E.R. 950). The limitation period for an action on a foreign judgment is now six years (Imperial Limitation Act, 1623, s. 3) and would (in the absence of the definition of "judgment") be six years under the Bill (s. 14 (1) (a)). It is better to have a uniform rule for all judgments and to avoid reliance on the fiction that a judgment debtor contracts to pay the judgment debt. This would be one consequence of the definition of "judgment".

66. The provisions of the Bill which use the word "judgment" are section 11 (1), in the definition of "income", section 26 (2) (a), as to contribution between tortfeasors, and sections 75, 76, as to joint rights and liabilities. A contrary intention would exclude the defined sense in sections 75, 76.

67. The definition of "land" is taken in substance from the definition in section 31 (1) of the Imperial Act of 1939. The Bill says expressly that "land" may be either freehold or leasehold: the definition in the Imperial Act extends both to freehold and to leasehold land, but does not expressly say so. It seems better to say so expressly and thus quiet a doubt which might otherwise arise. At the end of the definition there is a specific exclusion of easements and profits *à prendre*: these are incorporeal hereditaments and thus are excluded also in the definition in the Imperial Act but it seems useful to deal with them specifically because they are the only incorporeal hereditaments about which questions are likely to arise.

68. The definition of "landlord" facilitates the drafting of sections 33, 35 and 38.

69. "Mortgage" is not defined in the Imperial Act of 1939, but one of the main sections of that Act dealing with mortgages, section 18, speaks of a "mortgage or other charge on property". It seems useful to have the definition which appears in the Bill so as to resolve at least some of the problems which would otherwise arise on general words.

70. A possessory lien on goods is excluded because it seems better to let the rights and liabilities of the owner of the goods and the lienee respectively be dealt with by other provisions of the Bill, especially the provisions relating to the conversion or detention of goods (sections 21, 65) and to contractual debts (sections 14 (1) (a), 16, 63, 68).

71. The binding effect of a writ of execution against property is excluded because that binding effect is not a mortgage or charge in any ordinary sense (*McQuarrie v. Jaques* (1954) 92 C.L.R. 262, especially at p. 273; 27 A.L.J. 226, 306) and because the duration in force of a writ of execution is a matter of general court procedure rather than of the law of limitation of actions: *W. J. Lamb & Sons v. Rider* ([1948] 2 K.B. 331).

72. The definitions of "mortgagee" and "mortgagor" should be read with section 11 (2) (a) of the Bill, and may be compared with the corresponding definitions in section 7 (1) of the Conveyancing Act, 1919-1964. The Bill, unlike the Conveyancing Act, does not use the phrase "equity of redemption" in the definition of "mortgagor" because that phrase is inapt for some of the securities within the definition of "mortgage" in the Bill, and because the use of that phrase might restrict the meaning of "mortgage".

73. The definition of "personal representative" is taken in substance from the definitions of "administrator" and "executor" in section 5 of the Trustee Act, 1925.

74. The definition of "plaintiff" is merely intended to shorten a number of the substantive provisions of the Bill.

75. The definition of "principal money" is intended to draw a line between principal and interest (the latter being, unless capitalized under a mortgage, included in "income" as defined) and to ensure that all money secured by mortgage is either "principal money" or "income" for the purposes of the Bill.

76. The definition of "rent" is based on the definition in section 31 (1) of the Imperial Act of 1939, but specifically includes a rent payable under a lease, instead of leaving such a rent to be embraced within the archaic expression "rent service".

77. The definition of "rentcharge" is also based on the definition in section 31 (1) of the Imperial Act of 1939, but specifically excludes (as the sense of the Imperial Act excludes) a rent payable under a lease.

78. The definition of "successor" is taken in substance from section 25 (8) of the Imperial Act of 1939.

79. The definition of "trust" is based on the definition in section 5 of the Trustee Act, 1925-1965. The Imperial Act of 1939 uses a definition similar to that in the Trustee Act.

80. The reference to a trust arising only by reason of a transaction impeached and the marginal reference to *Taylor v. Davies* ([1920] A.C. 636) are made so as expressly to comprehend what might appear to many minds to be a typical constructive trust, namely, the case of a man in a fiduciary position acquiring, in breach of his duty, property in relation to which he is a fiduciary. In *Taylor v. Davies* (above) however, Viscount Cave, giving the reasons of the Privy Council, said that such a man was not a trustee within a definition similar to that in the Trustee Act and was thus not disentitled to plead a statute of limitations. He said (at p. 653), in relation to a provision like section 69 of the Trustee Act, 1925-1965—"The expressions 'trust property' and 'retained by the trustee' properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession for or on behalf of others. In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction." We think that a fiduciary who becomes a constructive trustee by taking property in breach of his duty should not be in a better position in relation to the limitation of actions than other trustees and the references inserted in the definition of "trust" will ensure that he is not.

81. In the definition of "trust" the closing words about mortgages are a modification of the words in the definition in the Trustee Act, that a "trust" does not include the duties incident to an estate conveyed by way of mortgage". The modification is made because there are many mortgages which do not take effect by way of conveyance and which comprise property which is not an "estate".

82. The definition of "trustee" is based on the definition in section 5 of the Trustee Act, 1925. Here again, the Imperial Act of 1939 defines the word, with similar effect, by reference to the Imperial Trustee Act, 1925.

#### Section 11 (2)—Meaning of references

83. Section 11 (2) (a), which defines the concept of a person claiming through another person, is taken in substance from section 31 (4) of the Imperial Act of 1939. There is a similar provision in Section 1 of the Imperial Real Property Limitation Act, 1833.

84. Section 11 (2) (b), which extends the meaning of references to a cause of action to recover land so as to embrace a right to enter into possession of land, is taken in substance from the first limb of section 31 (5) of the Imperial Act of 1939. The provision saves repetitive words in Division 3 of Part II of the Bill.

85. Section 11 (2) (c), as to a thing done to or by or suffered by an agent, saves repeated reference to agents in the substantive provisions of the Bill.

86. Section 11 (2) (d) marks an innovation of some significance. Under the statutes of limitation now in force in New South Wales and under the Imperial Act of 1939, an action for foreclosure of a mortgage of land is treated as an action to recover land. This treatment is artificial: the effect of foreclosure is to destroy an equitable estate or interest in land, rather than enable the plaintiff to recover land and this is so even though there may be a consequential order for delivery of possession. But, apart from questions of artificiality, it is a pity to require mortgagors and mortgagees to search for their rights amongst the complex provisions relating to actions for recovery of land, most of which are inapplicable to cases of foreclosure. Division 4 of Part II of the Bill has provisions dealing with foreclosure of mortgages and recovery of possession of mortgaged property. These provisions are intended to apply to the exclusion of the provisions relating to actions to recover land. It is therefore necessary to say, as section 11 (2) (d) does say, that an action to which the provisions of that Division apply is not, for the purposes of the Bill, an action to recover land.

#### Section 11 (3)—Definition of "disability"

87. This subsection may be compared with section 31 (2), (3) of the Imperial Act of 1939. The only comment which we make on the disability of infancy is to note the rule that a person ceases to be an infant on the first moment of the day before his twenty-first birthday: *Prowse v. McIntyre* ((1961) 111 C.L.R. 264). It is to be hoped that this rule will be altered by some general enactment: it does not seem right to do so merely for the purposes of this Bill.

88. In relation to persons of unsound mind, the statutes now in force use a variety of expressions such as "*non compos mentis*", "idiocy", "lunacy" and "unsoundness of mind". The Imperial Act of 1939 speaks only of persons "of unsound mind" (section 31 (2)), but there is a conclusive presumption of unsoundness of mind in the case of persons affected in specified manners by the Imperial Mental Health Act, 1959 (section 31 (3), as amended by the Mental Health Act, 1959 s. 149 (1)). In *Kirby v. Leather* ([1965] 2 Q.B. 367) the Court of Appeal in England considered the meaning of unsoundness of mind for the purposes of the Imperial Act of 1939. Lord Denning M.R. said (at p. 383)—"so here it seems to me in this statute a person is 'of unsound mind' when he is, by reason of mental illness, incapable of managing his affairs in relation to the accident as a reasonable man would do." The case was an action for damages for personal injuries suffered in a road accident. The other Lords Justices substantially agreed with Lord Denning on this point. Disability of this kind is covered by section 11 (3) (b) (i) of the Bill.

89. Another point brought out in *Kirby v. Leather* (above) was that a person may be in a state of coma or unconsciousness which in fact prevents him from attending to his affairs but which does not amount to unsoundness of mind. The wording of section 11 (3) (b) (i), "any disease or any impairment of his physical or mental condition", will, we think, be wide enough to cover such cases of coma or unconsciousness, cases which obviously ought to be cases of disability for the purposes of a statute of limitations.

90. Section 11 (3) (b) speaks of incapacity "for a period of 28 days or upwards". Under the present law here and under the Imperial Act of 1939, the only relevant disability is one which exists at the time when the cause of action accrues. If, as in *Kirby v. Leather* (above), the plaintiff becomes of unsound mind on the day when his cause of action accrues he has an extension of the limitation period; but if he becomes of unsound mind on the day after the accrual of his cause of action or at any later time there is no extension of the limitation period. This distinction is one which, we think, ought not be made. Section 52 of the Bill would give an extension of time where the plaintiff is under a disability at any time during the limitation period, whether he is under a disability when the cause of action accrues or not. But it seems right to keep this within reasonable bounds: we would not wish the Bill to produce the result that odd days of disability happening during a limitation period measured in years should be added up so as to produce an extension of the limitation period. We have therefore confined disabilities of this kind to cases where the disability endures for a period of 28 days or upwards.



91. We have already referred to section 31 (3) of the Imperial Act of 1939, whereby unsoundness of mind is presumed in cases of detention or treatment under enactments relating to unsoundness of mind. In *Franks on the Limitation of Actions* (1959), at p. 210, the author says that "this special provision is enacted to cover the case of a person who sues in respect of improper detention, for *ex-hypothesi* he has always been sane and so unable to obtain any postponement of time; while his detention may have *de facto* prevented him from commencing proceedings before the limitation period ran out." In a footnote the author refers to "the unsatisfactory case" of *Harnett v. Fisher* ([1927] A.C. 573), where the facts were similar to those put in the text and the plaintiff's case was defeated by a defence based on the statute of limitations.

92. Section 11 (3) (b) (ii) will meet the *Harnett v. Fisher* (above) kind of case and we prefer to do it in this way rather than to create conclusive presumptions in the case of persons affected in one way or another by the Mental Health Act, 1958. We have this preference because the tests justifying treatment under the Mental Health Act are not the same as the tests of unsoundness of mind which ought to govern the position for a statute of limitations.

93. Section 11 (3) (b) (iii), (iv), would make a permanent provision to do the work of such enactments as the Trustee and Wills (Emergency Provisions) Act, 1940, s. 12, and the Imperial Limitation (Enemies and War Prisoners) Act, 1945. The expression "warlike operations" is put in with the purpose of covering such operations as those of the Australian forces in Korea, Malaysia and Vietnam. The provisions would, however, apply to a war or warlike operations in which Australian forces were not engaged.

#### Section 11 (4)—Interpretation—rentcharges

94. This subsection is based in substance on section 31 (6) of the Imperial Act of 1939. A rentcharge is within the definition of "land" in section 11 (1). Under the provision in the Imperial Act of 1939 which is a counterpart to section 11 (4) (b), the date of dispossession is fixed as the date of the last receipt of rent. This does not seem to us to be right in principle: the dispossession should be on the date when the rent first becomes overdue and paragraph (b) so provides. If rent is afterwards paid, the payment will be a confirmation under section 54 of the Bill and the limitation period will begin to run afresh.

#### Section 11 (5)—Accrual of cause of action

95. This subsection is merely intended to prevent an argument that the provisions of the Bill as to the accrual of a cause of action have affect, not only for the purposes of the Bill, but also for the purposes of the general law.

#### Section 11 (6)—References to Acts

96. This subsection makes unnecessary the common words "as amended by subsequent Acts". There is a comparable provision in the Permanent Building Societies Act, 1967, s. 3 (2) (a).

### PART II—PERIODS OF LIMITATION AND RELATED MATTERS

#### DIVISION 1—Preliminary

Sections 12 and 13—Relationship of Part II to Part III; more than one bar

97. The purposes of these sections will be self-evident and they do not require further comment.

#### DIVISION 2—General

##### Section 14—General

98. The provisions of the Bill which would fix limitation periods follow a pattern which may be illustrated by reference to section 14 (1). It has been customary in the past in statutes of limitation to say that actions of specified kinds shall be brought within a specified period and not afterwards, or to say that no action of a specified kind shall be

brought after the expiration of a specified period. Although these modes of expression have the respectability of age, it is established as well as anything in the law can be established that they do not mean what they say. An action can be brought and can successfully be carried to judgment notwithstanding the apparent words of prohibition: the effect of the statutes is to give to the defendant matter which he may, but need not, plead by way of defence. To repeat the old wording in a new Bill would no doubt be a safe course but it would contribute unnecessarily to the continued obscurity of the law. The Bill therefore does not speak in terms of prohibiting the bringing of an action, but says that an action is not maintainable if brought after the expiration of the limitation period. The Imperial Maritime Conventions Act, 1911, s. 8 (cf. section 22 (2), (3), of the Bill), uses the word "maintainable" in the same way and has the ordinary effect of a statute of limitations: *The Sauria* ([1957] 1 Ll. Rep. 396, at p. 399). See also the Compensation to Relatives Act, 1897-1953, s. 6C (2), and the Law Reform (Miscellaneous Provisions) Act, 1944-1962, s. 2 (3).

99. The provisions of the Bill as to extinction of rights and title (sections 63, 64, 65) may indeed, under the present rules of pleading, make it possible to rely on a defence based on the Bill under a general denial of the right or title of the plaintiff. See *De Beauvoir v. Owen* ((1850) 5 Ex. 166, at p. 177; 155 E.R. 72). Matters of pleading, however, are matters for rules of court rather than for this Bill.

100. The expression "cause of action" is used many times in the Bill. Sometimes the cause of action is identified by reference to the kinds of facts which the plaintiff must establish, for example, section 14 (1) (a) of the Bill speaks of "a cause of action founded on contract". In other places the cause of action is identified by reference to the relief which the plaintiff is claiming, for example, section 14 (1) (d) speaks of a cause of action to recover money recoverable by virtue of an enactment. While this may not be the sense in which a pleader would use the expression, it is a convenient sense and a sense in which the expression is used in the Imperial Act of 1939.

101. There is another peculiarity about the use of the expression "cause of action" in statutes of limitation. If a man who has a cause of action to recover a debt dies and his executor takes probate of his will, the executor has a cause of action to recover the debt. Many people would regard the cause of action of the executor as a different cause of action to that of the deceased creditor: the executor would have to allege and prove the death, the will and the grant of probate. Statutes of limitation, however, proceed on the footing that, in such a case, the executor has the same cause of action as that which accrued to the deceased creditor. So also, if a man is entitled to a freehold estate in land in possession and, while a squatter is in actual possession of the land, the man entitled conveys his estate to a purchaser, the statutes of limitation go on the footing that the original owner and the purchaser have the same cause of action to recover the land. To make this conception of the one cause of action being vested from time to time in different people clear on the face of the Bill, the Bill speaks of the first accrual of the cause of action "to the plaintiff or to a person through whom he claims". The concept of one person claiming through another is dealt with in the interpretation section, section 11 (2) (a).

102. Section 14 (1) (a) is based on part of section 2 (1) (a) of the Imperial Act of 1939. The Imperial Act speaks, in section 2 (1) (a), of "actions founded on simple contract" and, in section 2 (3), of "an action founded upon a specialty". These categories are intended to include all actions founded on contract. The Bill speaks, in section 16, of a "cause of action founded on a deed" (the reasons for using "deed" instead of "specialty" are given in paragraphs 113 and 114 below in the notes on section 16 of the Bill.). In case there might be a doubt whether "cause of action founded on simple contract" and "cause of action founded on a deed" include every cause of action founded on contract, the Bill speaks, in section 14 (1) (a), of a "cause of action founded on contract . . . not being a cause of action founded on a deed" rather than of a "cause of action founded on simple contract".

103. In section 14 (1) (a), the words about quasi contract stem from section 5 (1) (a) of the Victorian Limitation of Actions Act 1958. The Victorian Act largely follows the Imperial Act of 1939 but, in the relevant passage, speaks of "actions founded on simple contract (including contract implied in law)". In Franks on the Limitation of Actions (1959), at pp. 166, 167, the author says—"although quasi-contract is today well recognized, its scope and the basis on which it rests have still to be precisely defined. For present purposes it may be accepted that in certain cases the common law implies an obligation (not a contract, for that is misleading) to pay or repay money, which is based on the broad requirements of justice. For limitation purposes actions based on quasi-contractual obligations must be treated as actions founded upon simple contract, though the relevant wording of the 1939 Act cannot be regarded as felicitous. The limitation period will therefore be six years from the accrual of the cause of action". Although "quasi contract" is an unhappy name, we think that it has a clearer meaning than "contract implied in law" and we have therefore adopted "quasi contract".

104. The six-year period of limitation for the causes of action mentioned in section 14 (1) (a) is the same as the present period of limitation under section 3 of the Imperial Limitation Act, 1623.

105. Section 14 (1) (b) is based on part of section 2 (1) (a) of the Imperial Act of 1939. The express inclusion of a cause of action for damages for breach of statutory duty follows the Victorian Act of 1958, section 5 (1) (a). While an action for damages for breach of statutory duty is an action on the case, and is a cause of action founded on tort, such actions are of comparatively recent development and are an important class of action at the present day. It therefore seems worth while to put the matter expressly. The present limitation periods for actions founded on tort are fixed by section 3 of the Imperial Limitation Act, 1623. The general period is six years, but for trespass to the person the period is four years and for slander actionable *per se* the period is two years.

106. Section 14 (1) (c) is based on section 2 (1) (b) of the Imperial Act of 1939. No doubt, at the present day, recognizances are enforced under the Fines and Forfeited Recognizances Act, 1954, and not by ordinary action. However, while the possibility of an action remains, it is necessary to have a limitation period. The present limitation period for an action of *scire facias* upon a recognizance is twenty years under section 39 of the Supreme Court Act, 1841. The Bill, like the Imperial Act of 1939, follows the recommendation of the Wright Committee in 1936 (p. 9) that the period should be reduced to six years.

107. Section 14 (1) (d) is based on section 2 (1) (d) of the Imperial Act of 1939. The present law is that an action to recover money recoverable by virtue of an enactment has a twenty-year period of limitation if it is an action of debt upon a specialty within the meaning of section 39 of the Supreme Court Act, 1841 (for this purpose, a statute is a "specialty"); if the action does not fall within section 39 of the Act of 1841, it will usually be an action founded on simple contract or quasi contract or an action on the case and have a limitation period of six years under section 3 of the Imperial Limitation Act, 1623. Nice distinctions have been drawn for the purpose of deciding whether the limitation period is twenty years or six years. The Wright Committee in 1936 (pp. 7-9) considered these distinctions and recommended that the difficulties be escaped by fixing the same period, six years, for an action for money under a statute as for an action founded on simple contract. We think that the recommendation of the Wright Committee was a wise one and the Bill adopts it. The Bill says "money" where the Imperial Act of 1939 says "a sum" because the latter expression may be misleading as suggesting a liquidated sum of money.

108. Section 14 (3) enlarges the meaning of "enactment" so as to embrace Commonwealth and foreign enactments. Without such an enlargement the word might be confined to enactments of New South Wales: Interpretation Act of 1897, s. 17; *Hall v. National & General Insurance Co. Ltd* ([1967] V.R. 355, at p. 367). An action to recover money recoverable by virtue of a Commonwealth or foreign enactment might, in the absence of section 14 (3), be regarded as an action founded on contract. An action on a domestic enactment has

been so regarded (*State of Victoria v. Hansen* [1960] V.R. 582), and there does not appear to be any reason why the position would be different in the case of a foreign enactment. If this is right, the limitation period for an action on a Commonwealth or foreign enactment would, in the absence of section 14 (3), be fixed by section 14 (1) (a). It is better, however, not to rely on the fiction that an action on an enactment is an action founded on contract, and to apply the period fixed by section 14 (1) (d) as well to Commonwealth and foreign enactments as to enactments of New South Wales. This is the purpose of section 14 (3).

#### Section 15—Account

109. Section 15 is based on section 2 (2) of the Imperial Act of 1939. The present statutory provision is in section 3 of the Imperial Limitation Act, 1623. That section puts a six-year period of limitation on "all actions of account . . . other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants". This provision applies primarily, and perhaps exclusively, to the common law action of account which has been obsolete at least since the beginning of the nineteenth century.

110. Proceedings for accounts are now taken by suit in equity and this is so whether the liability to account is a legal liability or an equitable liability. Where a suit for an account is brought on a legal liability to account a court of equity applies a six-year period of limitation: it has, however, been a matter of controversy whether the six-year period of limitation is applied in direct obedience to section 3 of the Act of 1623, or by analogy to the requirements of that section. Where the liability to account is equitable, the court applies the six-year period by analogy, for example, where the accounting party has a fiduciary duty. For discussions of the problems see Ashburner's *Principles of Equity*, 2nd Edition (1933), at pp. 504, 505; Preston and Newsom on *Limitation of Actions*, 3rd Edition (1953), at pp. 54-56.

111. The Imperial Act of 1939 provides, by section 2 (2), that "an action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action" but, by section 2 (7), that section 2 is not to apply to any claim for equitable relief except so far as any provision of the section may be applied by analogy. One view of these provisions is that section 2 (2) applies directly only to the action at law for an account, long obsolete though that action is, but that the subsection will be applied by analogy in an action for an account in equity (whether on a liability to account at law or in equity). This view is put in Preston and Newsom at pp. 54-56 and in Franks on the *Limitation of Actions* (1959) at pp. 43, 44. Another view is put in Halsbury's *Laws of England*, 3rd Edition, Volume 24 (1958), at pp. 225, 226, that, notwithstanding section 2 (7), section 2 (2) applies directly to an action in equity for an account whether the liability to account is legal or equitable. Each of these views has its difficulties. On the one hand, it would be odd if the Imperial Act of 1939 applied directly only to an action of account of a kind not brought for over a century. On the other hand, it is a bold construction of section 2 (7) which would permit section 2 (2) to apply directly to an action for an account in equity.

112. We have attempted to draw what we think is the right line in section 15 of the Bill. It will apply directly to an action, whether at law or in equity, for an account founded on a legal liability to account: it will be applicable by analogy to an action in equity for an account on an equitable liability to account. Section 23 of the Bill, the counterpart of section 2 (7) of the Imperial Act of 1939, does not apply to section 15 of the Bill.

#### Section 16—Deed

113. See the definition of deed in section 11 (1) of the Bill and the notes above (paragraph 63) on that definition. The present limitation period for an action "of covenant or debt upon any bond or other specialty" is twenty years: Supreme Court Act, 1841, s. 39. Section 2 (3) of the Imperial Act of 1939 speaks of "an action upon a specialty" and fixes a limitation period of twelve years, unless a shorter period is prescribed elsewhere in the Act. The Victorian *Limitation of Actions Act* 1958, s. 5 (3), speaks of an action "upon a bond or

other specialty". The New Zealand Limitation Act 1950, s. 4 (3), speaks of an action "upon a deed". We prefer not to use the word "specialty" because the word is archaic and is inapt where it is not intended to comprehend statutory obligations. We prefer also not to speak of an "instrument under seal" as recommended by the Wright Committee in their report in 1936 (at p. 9), because that expression might be thought to extend to an instrument intended to be no more than a simple contract but executed under the seal of one or more of the parties: see, for example, *Electricity Meter Manufacturing Co. Ltd v. Manufacturers' Products Pty Ltd* ((1930) 30 S.R. 422).

114. We think that the New Zealand Act makes the right choice in using the word "deed" and we do the same in the Bill. We take it that the policy of allowing a long limitation period for obligations of the kind now under discussion to be that contracting parties should be able, by observing appropriate formalities, so to arrange matters that they have longer than six years in which to enforce contractual rights. To say that only a deed has this consequence is to specify a clear criterion by which contracting parties can be guided. Section 14 (1) (a) should make it clear that any contractual obligation has either the six-year period of limitation in section 14 (1) (a) or the twelve-year period in section 16.

#### Section 17—Judgment

115. See the definition of "judgment" in section 11 (1) of the Bill and the notes above (paragraphs 65, 66) on that definition. The present period of limitation for an action or other proceedings to enforce a judgment is twenty years: the period is fixed by section 40 of the Imperial Real Property Limitation Act, 1833. Although section 40 of the Act of 1833 seems to speak only of judgments "charged upon or payable out of any land", the provision applies to judgments generally, whether or not charged on land. For the process by which this position was reached see Lightwood on *The Time Limit on Actions* (1909) at pp. 164, 165. The Bill follows section 2 (4) of the Imperial Act of 1939 in fixing a limitation period of twelve years.

116. The present limitation provisions here and in England concerning judgments apply, and section 17 of the Bill would apply, to an action on the judgment, but not to the processes of execution of a judgment: *W. & T. Lamb & Sons v. Rider* ([1948] 2 K.B. 331). When exercising discretions concerning the execution of a judgment after a long period, however, a court has regard to the effect which the statutes of limitation would have if an action were brought on the judgment: *Jay v. Johnstone* ([1893] 1 Q.B. 189).

117. Section 17 (2) will avoid a doubt which may otherwise arise. "Enforceable" in section 17 (1) may mean enforceable by action, or it may mean enforceable by execution. In either case, it is "enforceability" in New South Wales that is relevant. A foreign judgment registrable in New South Wales under the Administration of Justice Act, 1924–1965, s. 5, or under the Service and Execution of Process Act 1901–1963, Part IV is not enforceable under those Acts by execution until registered here. The result may be to allow a somewhat longer period of limitation period for a foreign judgment registrable as abovementioned than for a judgment of a New South Wales court. We do not think that this would be a right result and section 17 (2) will exclude it. Section 17 (2) will also avoid problems which might otherwise arise as to the date on which a judgment not registrable here becomes enforceable for the purposes of section 17 (1).

118. The problems discussed in paragraph 117 do not arise in relation to a judgment of a court of the Commonwealth, other than a court of a Territory. Section 17 (3) therefore excludes a judgment of these courts from the operation of section 17 (2).

#### Section 18—Penalty and forfeiture

119. Under the statutes now in force, where the penalty or forfeiture is for the benefit of the Crown alone, the limitation period is two years, where the penalty or forfeiture is for the benefit of the Crown or for the benefit of a common informer (other than the party grieved) suing for the same the period is one year, and where the penalty or forfeiture is given to the party grieved the period is two

years. This is the combined effect of section 5 of the Imperial Common Informers Act, 1588, and section 39 of the Supreme Court Act, 1841. Provisions for actions by informers were occasionally inserted in statutes many years ago. Such provisions are now obsolete and, indeed, the procedure has been abolished in England. However, there may be cases which, in the absence of something like section 18 of the Bill, would be without any limitation period. The safer course is to provide for some limitation period and the Bill follows section 2 (5) of the Imperial Act of 1939 in fixing the period at two years.

#### Section 19—Compensation to relatives

120. As pointed out in the notes on section 4 (3) (paragraph 34 above), the provision imposing a six-year period of limitation for these actions is taken out of the Compensation to Relatives Act and put in this Bill so as to make applicable the provisions of Part III of this Bill relating to extensions of the limitation period.

#### Section 20—Arbitral award

121. At present there is a six-year period of limitation for an action of debt on an award where the submission is not by specialty: the Supreme Court Act, 1841, s. 39. Where the submission is by deed, presumably the twenty year limitation period fixed by the same section for an action of covenant or debt on a bond or other specialty is applicable. Where a statute provided for a claim for compensation to be determined by arbitration, it was held that the Imperial Limitation Act of 1623 applied and fixed a six-year period of limitation for an action on the award: *Turner v. Midland Railway Company* ([1911] 1 K.B. 832). The Court did not give its reasons, but presumably the limitation period for an action on the case was treated as applicable. Where the award is made under an arbitration agreement, the cause of action to enforce the award arises when default is made in performance of the award, but it has been suggested that where the award is made under a statute providing for arbitration, the cause of action accrues on the date when the award is made: *Franks on the Limitation of Actions* (1959), at p. 62.

122. The Imperial Act of 1939 provides, by section 2 (1) (c), for a limitation period of six years for an action to enforce an award, where the submission is not by an instrument under seal. The remainder of the law on the subject under the Imperial Act of 1939 must be collected from section 2 (1) (d), which fixes a six-year period for an action to recover a sum recoverable by virtue of an enactment, and section 2 (3) which fixes a twelve-year period for an action on a specialty unless a shorter period is fixed by some other provision of the Act. Probably the position in England may be summed up by saying that there is a twelve-year period where the arbitration agreement is by deed and a six-year period in all other cases. The doubt on the date of accrual of a cause of action on an award under a statute remains unresolved.

123. There is room for difference of opinion on the meaning of the word "submission" in section 2 (1) (c) of the Imperial Act of 1939. The word and its context appear to be taken from the Imperial Civil Procedure Act, 1833, s. 3, the precursor of the Supreme Court Act, 1841, s. 39. At the time when those Acts of 1833 and 1841 were passed the word "submission" did not have the meaning which it is given by the definition in section 3 of the Arbitration Act, 1902, that is, "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." An agreement to refer differences to an arbitrator afterwards to be appointed was not a "submission", at least until the appointment was made; and such an agreement was not a submission in writing unless both the agreement and the appointment were in writing: *Ex parte Glaysher* ((1864) 3 H. & C. 442; 159 E.R. 603); *In re Newton & Hetherington* ((1865) 19 C.B.N.S. 342; 144 E.R. 819); *Hickey v. Queensland Sheep Investment Co. (Ltd)* (1865) 4 S.C.R. 161). The word is used in this sense in section 4 of the Arbitration Act: *In re Smith & Service and Nelson & Sons* ((1890) 25 Q.B.D. 545). In the Imperial Arbitration Act, 1950, the expression "arbitration agreement" has the meaning which "submission" has in the New South Wales Arbitration Act.

124. In this Bill, we prefer not to repeat the possibly misleading meaning of "submission" which it is given in the New South Wales Arbitration Act and we think it would be misleading to use the word "submission" without definition, as does the Imperial Act of 1939. In section 20 (4) the expression "arbitration agreement" is defined in the way in which "submission" is defined in the Arbitration Act, 1902, except that there is no mention of writing. For the purposes of a Limitation Act, it should not matter whether the arbitration agreement is in writing or not.

125. The better view is that, in an action on an award, "the action is really founded on the agreement to submit the difference of which the award is the result"; *Bremer Oeltransport G.m.b.H. v. Drewry* ([1933] 1 K.B. 753, at p. 764). It is appropriate, therefore, to speak of the "arbitration agreement" in the sense defined in section 20 (4) instead of "submission", in the old sense, which is what the Imperial Act of 1939 appears to do.

126. Section 20 attempts to resolve some of the other difficulties mentioned above. Subsection (2) fixes periods of twelve years and six years and in paragraph (a) prescribes a test which should not be difficult to apply. Subsection (3) would make the rule uniform, that the cause of action accrues when default occurs in observance of the award and not, as has been suggested in the case of an arbitration under a statute, on the date of the award.

#### Section 21—Successive wrongs to goods

127. This section is based on section 3 (1) of the Imperial Limitation Act, 1939. As compared with the provision in the Imperial Act, there is some rearrangement so as to make the section consistent in form with the other provisions of the Bill fixing limitation periods. There is nothing to the effect of section 21 in the present law.

128. Section 21 of the Bill goes beyond section 3 (1) of the Imperial Act of 1939 in that section 21 applies its special limitation period not only to an action for conversion or detinue but also to an action to recover the proceeds of sale of the goods. This change is made to cover the case where the further conversion consists in the sale of the goods and the plaintiff waives the tort and sues in quasi contract to recover the proceeds of sale: see *Suttons Motors Pty Ltd v. Campbell* ([1956] S.R. 305).

#### Section 22—Shipping

129. At present there is a six-year limitation period for an action in Admiralty for a seaman's wages, under the Imperial Administration of Justice Act, 1705. Section 22 (1) of the Bill states the substance of section 2 (6) of the Imperial Act of 1939. It differs from the provision in the Imperial Act of 1939 by saying that the provision about successive causes of action for the conversion or detention of goods (section 21 of the Bill and section 3 (1) of the Imperial Act of 1939) is not to apply to an action in Admiralty. We think that this ought to be said because the provision just mentioned is a qualification of the general rule for actions founded on tort (section 14 (1) (b) of the Bill and section 2 (1) (a) of the Imperial Act of 1939). Unless these provisions are made inapplicable to actions in Admiralty, the curious position would arise that the Bill would, in respect of an action, *in rem* in Admiralty founded on a conversion or detention, fix no limitation period if there were only a single conversion or detention but would fix a limitation period if there were successive conversions or detentions.

130. Section 22 (2)–(5) are based on the Commonwealth Navigation Act, 1912–1965, s. 396, and the definition in section 6 (1) of the Commonwealth Act. In turn, section 396 of the Commonwealth Act is based on section 8 of the Imperial Maritime Conventions Act, 1911. It is possible that actions may be brought to which neither the Imperial Act of 1911 nor the Commonwealth Act of 1912 would apply and corresponding provision should be made in this Bill. Subsections (2) and (3) embody a re-arrangement of the provisions which should bring out more clearly the intention of the corresponding provisions of the Imperial and Commonwealth Acts. See *Burns, Philp & Co. Ltd v. Nelson & Robertson Pty Ltd* ((1958) 98 C.L.R. 495).

131. Section 22 (6) excludes the provisions of Part III, relating to postponement of the bar, because of the discretionary powers under section 22 (4).

## Section 23—Equitable relief

132. This section is based on section 2 (7) of the Imperial Act of 1939, but the exclusion is extended to the provisions of section 21 relating to successive conversions or detentions of goods. Section 23 states the position reached by judicial decision on the enactments whose place is taken by the provisions mentioned in the section. We should give here a reference to the discussion in relation to section 15 of the application of the limitation period to an action in equity for an account (paragraphs 109 to 112 above).

## Section 24—Arrears of income

133. The present statutory provisions of this subject are three. Section 3 of the Imperial Limitation Act, 1623, fixes a six-year period of limitation for actions on simple contracts generally. Section 42 of the Imperial Real Property Limitation Act, 1833, fixes a six-year period of limitation for arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or any damages in respect of such arrears of rent or interest. Section 39 of the Supreme Court Act, 1841, fixes a twenty-year limitation period for an action of debt for rent upon any indenture of demise and generally for all actions of covenant or debt upon any specialty. There is an overlap between section 42 of the Act of 1833 and section 39 of the Act of 1841. To the extent of this overlap, the Act of 1841 prevails and the limitation period for an action to recover rent due under a covenant in a lease by deed is twenty years: *Barrett v Richardson* ([1930] 1 K.B. 686). The limitation period of six years under section 42 of the Act of 1833 applies to interest on a judgment debt: *Lightwood on the Time Limit on Actions* (1909), at pp. 178, 179.

134. In the Imperial Act of 1939 a six-year period for interest on a judgment is fixed by section 2 (4); a six-year period is fixed for arrears of rent by section 17 (by section 31 (1) "rent" includes a rentcharge and a rent service, and "rentcharge" means, so far as material here, any annuity or periodical sum of money charged upon or payable out of land except interest on a mortgage of land); and by section 18 (5) a six-year period is fixed (subject to exceptions) for arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land. Further, a six-year period for arrears of interest on a legacy is fixed by section 20 of the Imperial Act of 1939.

135. Section 42 of the Imperial Real Property Limitation Act, 1833, and sections 17, 18 (5) and 20 of the Imperial Act of 1939 speak of actions, not only to recover rent or interest, but also to recover damages in respect of arrears of rent or interest. These references to the recovery of damages are a puzzle.

136. Although dower has been abolished, it is worth noting that section 41 of the Imperial Real Property Limitation Act of 1833 put a six-year limitation period on an action to recover arrears of dower or to recover any damages on account of arrears of dower. This is explicable by reference to the Imperial Statute of Merton of 1235 (20 Hen. 3, c. 1), by which chapter widows deforced of their dowers, who were driven to recover them by writ of dower, were allowed to recover also as damages the value of the whole dower from the time of the death of the husband until judgment for the recovery of seisin of dower. See *Lightwood on the Time Limit on Actions* (1909), pp. 174, 175.

137. The provisions about damages in respect of arrears of rent or interest may be concerned, partly at least, with a course which was open to the distrainer in an action of replevin. Where there was a distress for rent and the distrainee brought an action of replevin and, upon giving security, recovered possession of the goods distrained, if the plaintiff-distrainee suffered a non-suit or the action otherwise went against him, the defendant-distrainer might have had a writ to enquire into the value of the goods distrained upon and was entitled to recover the value if the value were less than the arrears of rent or, if more, then so much as was equal to the arrears, with costs. This right of the distrainer-defendant was given by the Imperial Distresses and Avowries for Rents Act, 1665 (17 Cha. 2, c. 7). The right given by the Act of 1665 was characterized as a right to damages and not as a right to rent as such: see *Blackstone's Commentaries*, 15th Edition (1809), Volume 3, pp. 150-151; *Smith's Action at Law*, 11th Edition (1873), at p. 440.



138. Further remedies in damages for arrears of rent may be envisaged when one turns to the definition of "rent" in the Act of 1833: by the definition, the word extends to heriots and to services and suits for which a distress may be made.

139. Heriots and suits, in the sense in which the words are used in the Act of 1833, are unknown in New South Wales. The only "service", in the relevant sense, which occurs in New South Wales, is rent service, but distress for rent was abolished by the Landlord and Tenant Amendment (Distress Abolition) Act, 1930. It is unnecessary for the Bill to deal with claims for damages for arrears of rent.

140. Damages in respect of arrears of interest require separate consideration. The usual remedy today for the recovery of arrears of interest would be an action on the common money count for interest or an action in covenant for the interest, in either case claiming the interest as a debt. Under the old law, however, interest, even under an express promise to pay interest, was recoverable as damages: see the footnote to *Trelawney v. Thomas* ((1789) 1 Hy. Bl. 303) in the fourth edition (1827) of Henry Blackstone's reports. This old law may be the reason for the reference in section 42 of the Imperial Act of 1833 to damages in respect of arrears of interest. Our researches have led us to no other reason.

141. It is perhaps noteworthy that the main part of section 42 speaks of such damages, but the proviso, dealing with interest under a puisne mortgage or encumbrance, does not speak of damages for arrears of the latter interest. One may infer that the arrears of interest which might give rise to a liability in damages did not include interest under a mortgage or encumbrance as those words are used in the Act.

142. It may theoretically be open, even today, to recover damages in respect of arrears of interest. However this may be, we think that the words of section 24 of the Bill are wide enough to cover a claim in damages for arrears of interest as well as a claim in debt for interest. We think it unnecessary, therefore, that the Bill should deal specifically with such damages.

143. By section 24 (2) of the Bill, the limitation period fixed by section 24 (1) does not apply to an action for the recovery of interest secured by a mortgage: special provision for such interest is made in section 43 in a group of sections in Division 4 of Part II dealing with mortgages.

144. With the exception of interest secured by mortgage, section 24 is intended to apply to all money claims of a revenue character: see the definition of "income" in section 11 (1) of the Bill. Probably the most important innovation which the section would make is the reduction of the limitation period for an action to recover a dividend from twenty years to six years. The general reduction which we propose of the twenty-year limitation periods to twelve-year periods would have applied to an action to recover a dividend, but our recommendation is that the period be further reduced to six years. Our reasons are that the justifications for fixing a six-year period for the recovery of annuities, rent and interest apply as well to dividends and it is convenient that there should be the same period for all payments of a revenue character.

145. Section 24 (3) gives statutory expression to the judge-made rule that interest on principal money cannot in general be recovered after the right to recover the principal money is statute-barred. We say "in general" in the last sentence so as to leave room for the possible exception of cases "where there is an express contract to pay interest independently of principal": *Tindal, C.J., in Hollis v. Palmer* ((1836) 2 Bing. N.C. 713, at p. 717; 132 E.R. 275).

146. The cases are in conflict on the nature of such an express independent contract to pay interest. *Hollis v. Palmer* (above) was an action on a promissory note for a specified sum "with interest for the same from the day of the date of the said promissory note" (2 Bing. N.C. at p. 713), and that was not such an express contract. In *Elder v. Northcott* ([1930] 2 Ch. 422, at p. 429) Clauson, J., disowned the opinion that "the mere existence of two separate covenants, one as

to principal and one as to interest", would enable the recovery of interest after the principal was barred. *Weigall v. Gaston* ((1877) 3 V.L.R. (L.) 98) and *Re Orway Coal Co. Ltd* ([1953] V.L.R. 557) were just such cases and interest was held to be irrecoverable when principal was barred, notwithstanding that there were separate covenants for payment of principal and for payment of interest. Yet in *Cheang Thye Phin v. Lam Kin Sang* ([1929] A.C. 670, at p. 677) the Privy Council found sufficient evidence of such a contract in a ledger entry—"To loan secured by Thye Cheong, interest at 80 cts. p.m., \$50,000".

147. The distinction is unsatisfactory for two reasons. First, the authorities do not enable a line to be drawn between what is, and what is not, "an express contract to pay interest independently of principal". Second, unless there is good reason, substantive rights ought not to depend on the mere form in which an agreement is expressed: we see no reason. Section 24 (3) of the Bill therefore does not exclude an express independent contract to pay interest.

148. Section 24 (3) would not touch a case like *Parr's Banking Co. v. Yates* ([1898] 2 Q.B. 460), where a guarantee of an overdrawn bank account was enforced as to interest charged to the customer even though the guarantee was statute-barred as to principal. The Court there seems to have gone on the footing that, as between the bank and the guarantor, the money claimed did not have the character of interest. See *Elder v. Northcott* ([1930] 2 Ch. 422, at pp. 429, 430).

149. Section 24 (4) of the Bill, together with section 42 (2) (a) as to mortgage principal and section 43 (2) (a) as to mortgage interest, are intended to resolve doubts which arose under the Imperial Real Property Limitation Act, 1874, s. 8 (*Re Powers* (1885) 30 Ch. D. 291; *Re Frisby* (1889) 43 Ch. D. 106) and are still unresolved on the Imperial Act of 1939 (compare Franks on the Limitation of Actions (1959), at p. 157, and Halsbury's Laws of England, 3rd Edition, Volume 24 (1958), at p. 266). Shortly, the doubt is whether a limitation period for the recovery of the principal sum or interest applies to an action against a surety. The need is perhaps slight in section 24, but the express provision is useful in sections 42 and 43 and, if it is put in those sections, further doubts may arise if a similar provision is not put in section 24

#### Section 25—Relief against forfeiture of lease

150. Where, under a lease, the landlord has a right of re-entry or forfeiture for non-payment of rent, the landlord is, apart from statutory restrictions, entitled to bring against the tenant an action of ejectment upon the right of re-entry or forfeiture arising. Courts of equity regard these powers of the landlord as being no more than a security for the payment of the rent and will, upon the tenant paying the arrears of rent together with costs and expenses, relieve the tenant against forfeiture and restrain the landlord from proceeding with the action of ejectment. Appropriate relief is available even though judgment in ejectment has been obtained and executed. See generally *Howard v. Fanshawe* ([1895] 2 Ch. 581).

151. Although, so far as we know, the point has not been decided in a reported case, the text writers say that the tenant must, as the price of relief against forfeiture, pay all the arrears of rent, including arrears the recovery of which is barred by a statute of limitations: Lightwood on the Time Limit on Actions (1909), p. 177; Preston & Newsom on Limitation of Actions, 3rd Edition (1953), at pp. 131, 132; Franks on the Limitation of Actions (1959) at p. 147.

152. We think, for reasons which will be more fully stated in paragraphs 306 to 330 of these notes, dealing with sections 63–68 of the Bill, that the time has come when the substantive rights to rent and to other claims (whether to money or property) which may be the subject of actions to which the statutes of limitation apply ought no longer to be made to depend on the tactical situation in which the parties find themselves. We therefore think that a landlord should not, by forfeiture of a lease, be entitled to put his tenant in a position where the tenant must either abandon the lease or pay arrears of rent which are not recoverable from him by action. Section 25 is intended to prevent this result.

153. We have hitherto spoken of the relief against forfeiture which is given to a tenant under the rules of equity. The Landlord and Tenant Act, 1899–1964, enables a tenant to obtain relief against forfeiture for non-payment of rent in an action brought against him at law. By section 4 (3) and Schedule Two, the Bill would amend the Act of 1899 by inserting words which would limit the arrears of rent which a tenant must pay for relief against forfeiture to arrears not statute-barred on the date when the action for recovery of the leased property is brought. These amendments are addressed to the same object as are the provisions made by section 25.

#### Section 26—Contribution between tortfeasors

154. The material provision of section 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1946, is—“where damage is suffered by any person as the result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . .” There has been a controversy on the question whether the words “if sued” have a temporal connotation and, if the words do have a temporal connotation, what is that connotation. This controversy has been set at rest by the decision of the High Court in *Brambles Constructions Pty Ltd v. Helmers* ((1966) 114 C.L.R. 213): the words “if sued” have no temporal connotation.

155. It seems that a claim for contribution under section 5 (1) (c) of the Act of 1946 is subject to a limitation period of six years on the footing that an action to enforce such a claim is an action upon the case within the meaning of section 3 of the Imperial Limitation Act, 1623; see Stephen on Pleading, 7th Edition (1866), at p. 12; *Thomson v. Clanmorris* ([1900] 1 Ch. 718). In *Brambles' case* (above, at p. 221) Windeyer, J., said that “the statute of limitations does not begin to run in favour of a third party tortfeasor, against whom a claim for contribution is made, until after the liability of the original tortfeasor has been ascertained; for it is only then that the right to contribution arises”. That liability may be ascertained by judgment in an action against the claimant for contribution or possibly by accord with or without satisfaction or by award in an arbitration.

156. The Imperial Limitation Act, 1963, provides, by section 4, for a limitation period of two years or a claim for contribution under section 6 of the Imperial Law Reform (Married Women and Tortfeasors) Act, 1935, the source of section 5 of the New South Wales Act of 1946. The two-year period runs from the date of judgment or arbitral award establishing the liability of the claimant or, if liability is admitted by the claimant in respect of the damage, the date of the agreement fixing the amount to be paid by the claimant in discharge of his liability.

157. There are two reasons why we do not recommend the adoption, *mutatis mutandis*, in New South Wales of the provisions of section 4 of the Imperial Act of 1963. First, and to get rid of a minor point, section 4 of the Imperial Act of 1963 does not appear to fix any limitation period in what is a common case in New South Wales, that is, settlement of a claim for damages by agreement without admission of liability. It may be that the Law Reform (Miscellaneous Provisions) Act, 1946, does not enable contribution to be recovered where the claimant settles the claim against himself without admission of liability but, as the authorities now stand, we think that this would be an assumption, and an assumption which the Bill ought not to make.

158. The second reason is that under the Imperial Act of 1963 the tortfeasor liable to pay contribution is put in the unsatisfactory position that the running of the limitation period in his favour does not commence until an event, namely, judgment, arbitral award or agreement, which may not happen for an indeterminate time after the happening of the facts making him liable as a tortfeasor, and an event which is certainly outside his control and possibly outside his knowledge.

159. By section 26 (1) (b), (3), the Bill would fix an independent limitation period expiring four years after the expiration of the limitation period for the liability for which the cause of action for contribution arises. Thus, if A sues B in tort for damages, and B wishes to claim contribution from C, B will either have a defence against A's action based on expiry of the limitation period or he will have at least four years in which to decide whether to claim contribution against C. Although the position may be that the cause of action for contribution is not complete until B's liability to A is ascertained by judgment or by some other means, he may nevertheless commence his proceedings for contribution at any time after A brings his action: *Nickels v. Parks* ((1948) 49 S.R. 124).

160. We have chosen the period of four years in section 26 (1) (b) on the view that, in the overwhelming majority of cases, it ought to give the person claiming contribution ample time to make his enquiries and to commence proceedings, even if there are appeals or new trials or both in the action against him. In any event, as pointed out in paragraph 159 above, section 26 would not put on him the injustice of the limitation period running out before he is in a position to commence his proceedings for contribution. From the point of view of the person against whom the claim for contribution is made, the possible period of ten years which may run before the claim against him is statute-barred is indeed a long period, but the situation is one in which, we think, the ultimate security of such a person ought to be delayed by reason of the inherent complexities attending the liability of a tortfeasor for contribution.

#### DIVISION 3—Land

##### Section 27 (1), (3), (4)—Land—General—Recovery by the Crown and persons claiming through the Crown

161. The present limitation period for an action by the Crown or by a person claiming through the Crown is sixty years from the date on which the cause of action first accrues to the Crown: Crown Suits Act, 1769 (9 Geo. 3, c. 16; the Nullum Tempus Act). The Bill follows the Imperial Act of 1939, s. 4 (1), (3) proviso, in shortening the period to thirty years. We have given our reasons for this in paragraph 9 above.

162. It has been put to us that there is a case for a more basic change in the law of the limitation of actions to recover land from the Crown or from persons claiming through the Crown. The suggestion is outlined and discussed in paragraphs 163 to 169 below.

163. A problem which confronts those who prove or investigate possessory titles to old system land is the problem: Who is the Crown? There is no difficulty in the case of land which never has been alienated by the Crown but there is difficulty, and serious difficulty, where the documentary title to land is in a Minister of the Crown or an officer pursuant to some statute or in a statutory corporation such as the Commissioner for Railways. There are decisions of the courts saying that various Ministers, officials and corporations are, or are not, the Crown for the purposes of various statutes, but few or none of these decisions conclude the question whether the Minister, official or corporation is the Crown for the purposes of statutes of limitations.

164. Whatever may have been the circumstances in England which led to the fixing of limitation periods of sixty years in 1769 and thirty years in 1939, a new limitation Bill for New South Wales should fix limitation periods by reference to the circumstances in New South Wales in 1967. As to land which has never been alienated by the Crown, much of which is probably rarely visited by anybody whose business it is to see whether there are squatters on the land, there is a case for a limitation period longer than that running against an ordinary landowner. Where, however, land has been alienated by the Crown in fee simple it is almost invariably used for some purpose, whether the title be in a Minister or in a public corporation or official, and it is unlikely that the possession of a squatter would be undetected for a prolonged period. In the latter cases there is not, it has been put to us, the justification for a long period of limitation which there is in the case of land which has never been alienated.

165. If the ordinary twelve-year period of limitation which we proposed as between subjects applied to land which had been alienated by the Crown, the interest of the State in seeing that long possession enjoyed as of right should not be disturbed would be promoted and, so it is put, it is hard to see that the Ministers, corporations or officials having the documentary title would not have adequate time to find out that an adverse claim was being made to the land and to assert their rights as owners.

166. The great majority of cases in which such questions occur are cases concerning trifling areas of land on the boundaries of parcels. The possible need to furnish evidence, and to weigh evidence, of possession going back for sixty years is a burden both on landowners and on officers of the Registrar General.

167. The suggestion is that the long period of limitation should only apply in favour of the Crown in respect of land never alienated in fee simple by the Crown, and that in other cases, the ordinary limitation period between subjects should apply to an action by the Crown or Crown instrumentalities.

168. The suggestion does not involve any alteration to section 235B of the Crown Lands Consolidation Act, 1913: for the effect of that section see paragraph 56 of these notes. The definition of "Crown lands" in the Crown Lands Consolidation Act, s. 5 (1), may be a guide to drafting. By that subsection, "Crown lands" means "lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee-simple under the Crown Land Acts".

169. We think that the suggestion has considerable weight. However, the Bill does not give effect to it because we think that we should not recommend such a change except after ascertaining the views of those having the administration of lands within the application of the present rules concerning land of the Crown. The Bill which we now recommend will, if it becomes law, be a basis on which this important question can be considered. We have therefore decided that we should not make a recommendation on this suggestion until a later stage of our work under this reference.

#### Section 27 (2)—Land—General—Recovery by other persons

170. The present limitation period is twenty years under section 2 of the Imperial Real Property Limitation Act, 1833. The Bill follows the Imperial Act of 1939 in fixing the period at twelve years. The reasons for this course are discussed in paragraph 8 of our report.

#### Sections 28, 29, 30—Accrual—Present interests

171. The present law, which is substantially to the effect of sections 28, 29 and 30 of the Bill, is in the first, second and third limbs of section 3 of the Imperial Real Property Limitation Act, 1833. The sections may be thought to state the obvious, but it is perhaps as well to follow the lead of section 5 of the Imperial Act of 1939 and restate these matters expressly.

#### Section 31—Accrual—Future interests

172. This section reproduces the substance of the present law, which is in the fourth limb of section 3, and section 5, of the Imperial Real Property Limitation Act, 1833. Here again, the section probably does no more than state the obvious, but we think it as well to follow the lead of section 6 (1) of the Imperial Act of 1939.

#### Section 32—Forfeiture and breach of condition

173. The present law appears in the fifth limb of section 3, and section 4, of the Imperial Real Property Limitation Act, 1833. Under the fifth limb of section 3 of the Act of 1833, and under section 8 of the Imperial Act of 1939, which cover the ground of section 32 (1) of the Bill, time runs from the happening of the forfeiture or breach of condition, whether the person having the right to take advantage of the forfeiture or breach has or could have knowledge of it or not. This seems wrong. Suppose there is a lease for a term of 99 years with a covenant to do some act in the interior of the leased property

and there is the usual power of re-entry on breach but there is no power to enter and inspect. The landlord may neither know nor have the means of knowing that a breach has occurred but time will nonetheless run against him and he may have to wait until the end of the term before he can recover possession. Section 32 (1) of the Bill makes a different provision: time does not begin to run until the date on which the landlord, to continue to use the example just given, first discovers or may with reasonable diligence discover the facts. This modification would bring the law of the limitation of actions more into line with the ordinary law of landlord and tenant: before the landlord can be held to have waived a forfeiture, he must be shown to have known of the facts giving rise to the right of forfeiture at the time of the alleged act of waiver: see *Foa on Landlord and Tenant*, 8th Edition (1957), at p. 649.

#### Section 33—Rent wrongly paid

174. The present law, which is generally similar, is in section 9 of the Imperial Real Property Limitation Act, 1833. Such a provision was first made by the Act of 1833 and that Act was founded on the first report of the Real Property Commissioners made in 1829. The reasons of the Commissioners are given at pages 69 and 70 of the report as follows: "another rule is, that in the case of a lease, adverse possession so as to bar the reversioner does not commence till the expiration of the term. Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil; the person who is in receipt of them can do nothing more to establish his right, and the person to whom they are denied is virtually dispossessed. Where no rent, or only a nominal rent, is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than twenty shillings a year may for this purpose be considered nominal."

175. This is a strange provision. Time runs against the landlord and in favour of a stranger receiving the rent even though the landlord has no cause of action against the stranger. If the residue of the term exceeds the limitation period, the title of the landlord may be extinguished in favour of the stranger even though the landlord never has had a cause of action against the stranger. See section 38 (4) (c) of the Bill. No doubt, for practical purposes, this strangeness does not matter, because where there is the usual power of re-entry the landlord will at least be entitled to assert his rights by action against the tenant for recovery of the land on the basis of forfeiture or breach of condition.

176. As the comparable provision stands in the Imperial Act of 1833 and in section 9 (3) of the Imperial Act of 1939, the cause of action of the landlord accrues, for the purposes of the Act, on the date when the rent is first received by the stranger. This is wrong. Time should not begin to run until the landlord becomes entitled to recover the land from the tenant by forfeiture or breach of condition. Section 33 differs from the provisions of the Imperial Acts accordingly.

#### Section 34—Tenancies

177. The comparable provisions of the present law appear in sections 7 and 8 of the Imperial Real Property Limitation Act, 1833. The purpose of the provisions is to prevent a landlord relying on the absence of a notice to quit or other formal act determining a tenancy so as to postpone the running of time in favour of a tenant who has in fact been holding adversely to the landlord. The present comparable provision in England is section 9 of the Imperial Act of 1939.

178. Tenancies under section 127 of the Conveyancing Act, 1919, are expressly included to overcome the doubts which may otherwise arise on the question whether the tenancy arising under that section is a true tenancy at will. This provision in section 34 is based on the New Zealand Limitation Act 1950, s. 12 (1).

179. The provisions of the Imperial Acts apply only to a periodical tenancy without any lease in writing. We do not see the reason for this restriction and section 34 of the Bill omits it.

180. Under the provisions of the Imperial Acts, the cause of action against a tenant under a periodical tenancy does not accrue until the date of the last payment of rent, if that date is after the expiration of the first period of the tenancy. We think that time should not begin to run until rent becomes overdue and section 34 (2) (c) so provides. If rent is paid after the limitation period has started to run, the payment will be a confirmation under section 54 of the Bill and time will start to run afresh.

181. The "unless" words at the end of section 34 (2) provide for cases which may occasionally arise, namely, the determination of a tenancy at will during its first year, and the determination of a periodical tenancy during its first period by forfeiture or breach of condition or by exercise of an option to break the tenancy.

#### Section 35—Landlord and Tenant (Amendment) Act, 1948

182. Section 35 postpones the accrual of the cause of action in a case where proceedings to recover the land are prohibited by the Landlord and Tenant (Amendment) Act, 1948–1966. See especially section 62 (1), (3) of that Act. For the position in England under the Rent Restriction Acts, see *Moses v. Lovegrove* ([1952] 2 Q.B. 533).

#### Section 36—Equitable interests

183. The present provision is section 24 of the Imperial Real Property Limitation Act, 1833. The comparable provision in the Imperial Act of 1939 is section 7 (1). The provision in the Imperial Act of 1939 is expressed to be subject to the provisions of section 19 (1) of that Act, which deals specially with an action by a beneficiary under a trust in respect of fraud of a trustee and similar cases. The comparable provision of the Bill is section 47. The structure of section 47 makes it unnecessary to say that section 36 is to have effect subject to section 47. It does, however, seem desirable to make section 36 subject to the provisions of section 23, dealing with equitable relief generally. A clash between sections 23 and 36 is, perhaps, unlikely, but it is as well to state their relationship expressly.

#### Section 37—Settled land

184. Section 37 (1) has no counterpart in the present law in New South Wales. It is based on section 7 (4) of the Imperial Act of 1939. Section 37 is intended to preserve the cause of action to recover land of a trustee for the purpose of giving effect to such rights of the beneficiaries under the trust as are not statute-barred. At first sight, the policy of the provision is questionable because it may extend the permissible time for an action by reference to facts which are not ascertainable by the defendant. However, we do not think that this consequence is likely to be serious because, under the general law, a person who takes the legal estate as a *bona fide* purchaser for value without notice will not be affected by the claims of the beneficiary.

185. Part of the subject matter of section 36 (2) is now covered by the proviso to section 7 of the Imperial Real Property Limitation Act, 1833. Section 7 of the Act of 1833 deals with the accrual of a cause of action against a tenant at will (compare section 34 of the Bill), and the proviso says that a cestui que trust is not to be treated, for the purposes of section 7, as a tenant at will of his trustee. Section 37 (2) of the Bill is based on section 7 (5) of the Imperial Act of 1939. The purpose of the provision is to prevent a beneficiary acquiring a possessory title against his trustee and the other beneficiaries where he has been let into possession, perhaps not strictly in accordance with the terms of the settlement.

186. Apart from the case of "settled land", section 7 (5) of the Imperial Act of 1939 is confined to land held on trust for sale. The provisions of the Imperial Act of 1939 relating to "settled land" are, in general, not reproduced in the Bill because they have been framed to meet the conditions arising out of provisions of the English property legislation of 1925 which have not been adopted in New South Wales. Although the case of land held on trust for sale is a typical case where

the provisions of section 37 (2) of the Bill would be applicable, cases may also arise where the land is not held on trust for sale. For example, a beneficiary whose beneficial interest is confined to the net income of a mixed fund including land and investments in personal property may be let into possession of the land and section 37 (2) would be appropriate to such a case. We therefore have not limited section 37 (2) to land held on trust for sale.

187. Section 37 (3) has no counterpart in the present law in New South Wales: it is based on some words in section 7 (5) of the Imperial Act of 1939. In the cases mentioned in section 37 (3), the running of the limitation period has the useful effect of giving a title at law to a person or persons absolutely entitled in equity.

#### Section 38—Adverse possession

188. Section 38 has no express counterpart in the present statute law of New South Wales. Subsections (1), (3) and (4) are based on section 10 of the Imperial Act of 1939 and state the substance of the position reached by judicial decision on the Imperial Real Property Limitation Act of 1833 and similar legislation.

189. Section 38 (2) is new. It is intended, in part, to state the position reached by judicial decision on the legislation at present in force in New South Wales and, in part, to deal with a point which has been in doubt on the present legislation. See Helmore on Real Property (1961), p. 367. The doubtful point is whether consecutive periods of possession by independent squatters can be added together so as to bar a claimant who is out of possession. Section 38 (2) gives an affirmative answer.

190. We have considered, but have decided not to go beyond the Imperial Act of 1939 in attempting to resolve another problem which may arise when there is a succession of squatters. The problem is whether any interval, however short, in the adverse possession will stop time running: this problem also is discussed in Helmore at p. 367. The problem is, we think, dealt with sufficiently by section 38 (3) of the Bill, which speaks of the case where the land "ceases" to be in adverse possession. If there is a cesser of adverse possession, time stops running and it does not matter whether the interval between periods of adverse possession is long or short.

191. Much of the apparent difficulty disappears, we think, if one keeps in mind that land may be in adverse possession although there are periods when no one is in physical occupation. *Nicholas v. Andrew* ((1920) 20 S.R. 178) was such a case and further examples are given in the judgment.

192. Section 38 (5) is based on section 12 of the Imperial Real Property Limitation Act of 1833. It has no counterpart in the Imperial Act of 1939. Section 12 of the Imperial Act of 1833 ceased to have effect in England upon the conversion of undivided shares in land into interests in proceeds of sale by the Imperial Law of Property Act, 1925: *In re Landi* ([1939] Ch. 828); Preston & Newsom on the Limitation of Actions, 3rd Edition (1953), p. 328. There is a provision to the effect of section 37 (5) in the Victorian Limitation of Actions Act 1958, s. 14 (4).

#### Section 39—Formal entry and claim

193. This section gives the effect of sections 10 and 11 of the Imperial Real Property Limitation Act, 1833. It is based on section 13 of the Imperial Act of 1939. It may be sufficient simply to rely on the provision against revivor in section 5 (2) of the Bill, but it is probably safer to follow the lead of the Imperial Act of 1939 and preserve the express provisions.

### DIVISION 4—Mortgages

#### Introductory

194. The law of the limitation of actions in relation to mortgages is complex. It would take many pages to review the law fully: a short statement which does not attempt to be exhaustive will, however, display the need for simplification.



195. So far as concerns redemption of the mortgage, if the mortgage is of land the mortgagor's right of redemption is barred when the mortgagee has been in possession for twenty years: Imperial Real Property Limitation Act, 1833, s. 28, first limb. Where the security is pure personalty there is no statutory bar for an action of redemption, but the mortgagor may fail through laches or acquiescence: *Re Stucley* ([1906] 1 Ch. 67). If the security comprises both land and personalty then, apparently, a twenty-year limitation period for an action for redemption will be applied: *Charter v. Watson* ([1899] 1 Ch. 175); except perhaps where the security is mostly personalty, where redemption after the twenty-year period may be allowed as to the personalty: *Re Jauncey* ([1926] Ch. 471).

196. A mortgagee may bring a personal action against the mortgagor for the principal sum secured by a mortgage of land within twenty years next after a present right to receive the same accrues: Imperial Real Property Limitation Act, 1833, s. 40. If the security is personalty and the mortgage is by deed, the limitation period is twenty years from the time when the cause of action accrues: Supreme Court Act, 1841, s. 39. In the case of a mortgage of personalty not by deed the limitation period for an action for the principal sum is six years under the Imperial Act of 1623.

197. A personal action for the recovery of interest under a mortgage of land is barred on the expiration of a limitation period of six years after the interest becomes due: Imperial Act of 1833, s. 42. If the security is personalty and the mortgage is by deed, the limitation period for interest is twenty years under the Act of 1841, s. 39; but if the mortgage is not by deed, the period is six years under the Imperial Act of 1623.

198. A mortgagee of land may bring an action to recover possession of the land until the expiration of the twenty-year limitation period fixed by section 2 of the Imperial Act of 1833. If the security is personalty, his action to recover the security will be barred in six years under the Act of 1623.

199. A mortgagee may sue for foreclosure of the equity of redemption of a mortgage of land within twenty years of the accrual of the right to foreclose: Imperial Act of 1833, s. 2. If, however, the security is personalty, there is no statutory bar on action for foreclosure but the mortgagee may be barred by laches or acquiescence.

200. The foregoing rules are subject to modification in case, after the accrual of a cause of action, or after a right to receive the money arises, there is an acknowledgment or a payment.

201. Notwithstanding that the cause of action of a mortgagee to recover interest may be barred, he may in some circumstances obtain satisfaction of statute-barred interest. The cases are discussed in Franks on the Limitation of Actions (1959) at pp. 160-162. One instance is where the mortgagor seeks to redeem: he seeks equity and must do equity and so must pay all arrears of interest including statute-barred interest. Another instance occurs where the mortgagee sells under his power of sale and the proceeds of sale are sufficient to meet statute-barred interest: he may retain enough of the proceeds to cover the statute-barred interest before paying over the residue of the proceeds of sale. "A position of stalemate may arise as follows: if the mortgagee's action to recover arrears is barred and the proceeds of sale of the mortgaged property are in court the mortgagee will be unable to recover more than six years arrears by action, but the mortgagor will be unable to obtain payment out without paying the arrears in full": Franks at p. 161.

202. A mortgagee may exercise his power of sale, in the case of mortgaged land, at least up to the time when the right of redemption of the mortgagor becomes statute-barred and perhaps afterwards: *Re Alison* ((1879) 11 Ch. D. 284); cf. *Young v. Clarey* ([1948] Ch. 191). Where the mortgaged property is personalty, the mortgagee may exercise his power of sale at any time however remote. There will, whether the security is land or personalty, be a practical time limit on the power where the mortgaged property is in the possession of the mortgagor and the action of the mortgagee or his purchaser to recover the property is statute-barred.

203. The law thus reviewed demands clarification and we have attempted to do so in sections 41 to 45, relating to mortgages and in sections 63 to 65, relating to the extinction of rights and titles.

204. The Imperial Act of 1939 goes some distance towards simplifying the law. We, however, recommend the more far-reaching solution embodied in the sections of the Bill to which we have referred. In brief, section 41 fixes a limitation period of twelve years for an action to redeem mortgaged property, whether the property is land or personalty. The limitation period only runs while the mortgagee is in possession of the property.

205. Section 42 fixes a limitation period of twelve years for the remedies of the mortgagee for principal money by action on the personal covenant or by action for foreclosure or other relief affecting the mortgaged property. The limitation period runs from the time when the respective causes of action accrue: normally, this time will be the date on which the principal sum becomes payable.

206. Section 43 fixes a six-year limitation period for the remedies for interest of a mortgagee by action on the personal covenant or by action for relief affecting the mortgaged property. In general, the limitation period runs from the date on which the interest in question falls due for payment.

207. Section 44 deals with the adjustment of interest between mortgagor and mortgagee in cases where the limitation period for an action to recover interest does not apply. In general, the mortgagee may retain interest for six years but no more.

208. Section 45 prevents the exercise by a mortgagee of powers of sale and other powers affecting the mortgaged property after the date on which his action to recover the principal money is barred.

#### Section 40—Mortgage under the Real Property Act

209. This section states what we believe to be the accepted view of the present law as it applies to mortgages registered under the Real Property Act. See Baalman's Commentary on the Torrens System (1951), at pp. 178, 179: we prefer "barring" to "extinguishment" at the top of page 179.

#### Section 41—Redemption

210. The purpose of section 41 has been briefly described above. We add a word about the limitation period for an action for redemption of mortgaged personal property. The Wright Committee in its report in 1936 (Cmd. 5334) considered and rejected a proposal that a limitation period be fixed for an action for redemption of a mortgage of personal property. The Committee said (at pp. 15, 16 of the report)—"We do not recommend, however, that section 7 of the Real Property Limitation Act, 1874, which bars the right of the mortgagor to redeem mortgaged property after it has been in the possession of the mortgagee for twelve years, should apply in the cases of personalty. This would in our opinion give rise to serious practical difficulties, e.g., in a case where a customer of a bank charges bonds or other securities in favour of the bank as security for an advance. The bonds would be deposited with the bank and an equitable mortgage created. They would, in many cases, remain so charged for an indefinite period, to cover a more or less permanent overdraft, and unless the bank acknowledged the title of the mortgagor, the effect of section 7 of the Real Property Limitation Act, 1874, would be to extinguish the equity of redemption and give the bank an absolute title. The difference between a mortgage of land and a mortgage of personalty, so far as section 7 is concerned, is that whereas the mortgagee of land does not ordinarily take possession of the land, except by way of enforcing his security, the mortgagee of personalty may have possession of the mortgaged property from the outset, in the ordinary course of the transaction. For this reason we think that section 7 should not apply to a mortgage of personalty". Accordingly, the Imperial Act of 1939 puts no limitation period on an action to redeem a mortgage of personalty.

211. While we agree that it would be mischievous to apply to a mortgage of personalty the old rules governing the redemption of a mortgage of realty (in New South Wales, section 28 of the Imperial Real Property Limitation Act of 1833; in England section 7 of the Imperial Real Property Limitation Act, 1874), there is an innovation in section 23 (3) of the Imperial Act of 1939 which does away with the mischief. Under the latter subsection, the limitation period for an action for redemption runs afresh from the last receipt by the mortgagee of any sum in respect of the principal or interest of the mortgage debt. The old law gave this effect to an acknowledgment by the mortgagee but not to a receipt by the mortgagee of principal or interest.

212. We think that there is no reason why a mortgagor of personalty should not have his right of redemption barred when the mortgagee has been in possession of the mortgaged property for twelve years and, during that period, the mortgagor has paid nothing, either of principal or of interest. Section 41 (b) makes a similar provision in this respect to section 23 (3) of the Imperial Act of 1939 and we think it safe to make section 41 apply to any mortgage, whether of land or of personalty.

#### Section 42—Action for principal, possession or foreclosure

213. We have reviewed the present law briefly above. We have also shortly stated the effect of section 42 of the Bill. Much of the complication of the old law arises by reason of the rule that an action for foreclosure is an action for the recovery of land: it follows that basic importance has had to be given to the question whether the mortgagor or the mortgagee is in possession of the land.

214. Section 42 makes a new approach. The approach is that the main thing about a mortgage is the principal sum and the personal remedies (if any) for the recovery of the principal sum. The section follows the substance of the Imperial Act 1939 (section 18 (1)) in fixing a limitation period of twelve years for an action of the recovery of the principal sum. Then the remedies of the mortgagee affecting the property, whether by recovery of possession, foreclosure or otherwise, are taken to be merely accessory to the principal debt: compare the death duty cases on the locality of the asset represented by a mortgage. The cases are discussed in Dicey's Conflict of Laws, 7th Edition (1958) at p. 505; Lee's Stamp and Estate Duties, 3rd Edition (1966), at p. 150.

215. On this approach it is right that the accessory remedies against the property should last as long as the principal debt remains recoverable but no longer. If the limitation periods are governed, as we think they should be governed, by these principles, questions of the possession of the mortgaged property are not relevant. Section 42 of the Bill therefore provides that all the remedies of the mortgagee for the principal sum by action, whether against the person or against the mortgaged property, are to have a limitation period of twelve years running from the date of accrual of the respective causes of action.

216. We should say a word about the position of a mortgage which provides for repayment of principal by instalments over a long term and concurrent payment of interest. The limitation periods for recovery of instalments of principal or for recovery of interest by personal action will, of course, run from the date on which the instalment or interest in question falls due for payment. Section 54 (3) will prevent the limitation period for foreclosure or recovery of possession commencing to run for so long as payments of principal or of interest are continued. There will be twelve years after the last payment of principal or interest in which to recover possession or foreclose. There will thus be no danger of the remedies of the mortgagee becoming inadvertently barred during the ordinary course of a scheme for repayments over an extended period.

#### Section 43—Action for interest

217. The present law and the general purport of section 43 have been discussed above. Section 43 (1) (a) (ii) has forerunners in the proviso to section 42 of the Imperial Real Property Limitation Act, 1833, and in proviso (a) to section 18 (5) of the Imperial Act of 1939. The justification of these provisions is that the puisne mortgagee

may not have an effective remedy for interest while a prior mortgagee is in possession. The forerunners to which we have referred allow this extension of time only where the action is brought within one year after the prior mortgagee discontinues his possession. We think that this restriction is an unnecessary complication and is inconsistent with the principles which ought to govern a statute of limitations. The creditor ought to have the full period of limitation after the time when he has an effective remedy.

218. Section 43 (1) (b) states, in relation to interest under a mortgage, the rule stated in section 24 (3) of the Bill in relation to other interest. See paragraphs 145 to 148 above.

#### Section 44—Adjustment of interest

219. This section has no counterpart in the present law or in the Imperial Act of 1939. It is intended to do away with the present rules whereby a mortgagee may obtain satisfaction of statute-barred interest as the price of redemption of the mortgage, in distribution of the proceeds of sale, and in other cases. The provision is a further step in preventing the substantive rights of parties depending on the tactical situation in which they find themselves.

220. The purpose of section 44 (2) is to prevent section 44 (1) interfering with the power of the mortgagee to appropriate, in or towards satisfaction of interest, money which is in his hands while an action to recover the interest would not be statute-barred. Take, for example, the case of a mortgagee in possession. Interest falls due in 1960 and in 1963 the mortgagee receives a sum of rent from a tenant of the mortgaged property. In 1970 the mortgagor brings a suit for redemption. In settling the accounts between mortgagee and mortgagor, section 44 (1), if it stood alone, would say that the mortgagor would not be chargeable with the interest which fell due in 1960. Section 44 (2), however, would allow the mortgagee to appropriate the 1963 rent in or towards satisfaction of the 1960 interest.

#### Section 45—Power of sale, etc.

221. This provision also is new: it has no counterpart in the present law or in the Imperial Act of 1939. The present law has been shortly referred to above. It is convenient to state expressly a period of limitation for the exercise of the powers mentioned in the section and the period is fixed by reference to the limitation period for an action to recover the principal sum. Here again, the powers of the mortgagee are treated as accessory to his right to the mortgage debt.

#### Section 46—Mortgage of ship

222. This section has no counterpart in the present law. Except as modified by special legislation such as the Imperial Merchant Shipping Act, 1894, dealings with ships are governed by the ordinary law of personal property. Mortgages of ships are thus governed, in matters of limitation of actions, by the rules referred to above in paragraphs 194 to 202 of these notes, subject to the Merchant Shipping Act.

223. The main provisions of the Imperial Merchant Shipping Act, 1894, dealing with mortgages of registered ships are sections 31 to 38. These provisions are broadly comparable with the provisions for mortgages of land under the Torrens system. The mortgagee has statutory powers for the enforcement of the mortgage, rather than an assignment coupled with a proviso for redemption.

224. The Imperial Act of 1939 provides by section 18 (6) that that section, which deals with mortgages, is not to apply to a mortgage or charge on a ship. The Victorian Limitation of Actions Act 1958 has no counterpart to section 18 (6). We think it desirable to maintain uniformity with the Imperial Act of 1939 so far as concerns mortgages registered under the Merchant Shipping Act and to avoid any possible clash with the latter Act. Beyond this, however, we do not see why mortgages of ships should not be subject to the law of limitation of actions which the Bill would apply to mortgages generally. Section 46, therefore, excludes from the operation of Division 4 of Part II only mortgages registered under the Merchant Shipping Act.

## DIVISION 5—Trusts

## Introductory

225. Formerly, as a rule, an express trustee was not allowed the benefit of any statute of limitations. The law was, however, altered by section 69 of the Trustee Act, 1925–1965. By that section a trustee or a person claiming through him has the same benefit of the statutes of limitation as he would have if he were not, or did not claim through, a trustee (s. 69 (2)) and, where the action is to recover money or property and is an action to which no existing statute of limitation applies, there is a limitation period of six years (s. 69 (3)). But the section does not affect an action where the claim is founded on any fraud or fraudulent breach of trust to which the trustee is a party or privy, or is to recover trust property or the proceeds of trust property still retained by the trustee or previously received by the trustee and converted to his own use (s. 69 (1) proviso). Section 69 of the Trustee Act has other provisions which need not be noticed at present.

226. Under earlier legislation there are twenty-year limitation periods for an action to recover a legacy (Imperial Real Property Limitation Act, 1833, s. 40) and for an action to recover the personal estate or any share of the personal estate of a person dying intestate (Trust Property Act of 1862, s. 36).

227. By the Imperial Act of 1939 no period of limitation applies to an action by a beneficiary under a trust in the cases of fraud and so on mentioned in paragraph 225 above but otherwise, and if no other limitation period under the Act applies, there is a six-year limitation period for an action by a beneficiary to recover trust property or in respect of a breach of trust (s. 19 (1), (2)). Further, subject to the excepted cases of fraud and so on, there is a twelve-year period of limitation for an action in respect of a claim to the personal estate, or to any share or interest in the personal estate, of a deceased person, whether under a will or on intestacy (s. 20).

228. The provisions of this Division apply as well to trusts of land as to trusts of other property and, so far as concerns the enforcement of equitable estates and interests in land, may operate to allow a limitation period of later expiry than the period *prima facie* applicable under Division 3 of Part II of the Bill.

229. The limitation periods here and in England for the recovery of interest on legacies will be considered in paragraph 236 of these notes in relation to section 47 (2) of the Bill.

## Section 47—Fraud and conversion; trust property

230. The cases where, under the present law, there is as a rule no period of limitation, that is, the cases of fraud and so on mentioned in the proviso to section 69 (1) of the Trustee Act, are covered by section 47 (1) (a), (b), (c). The application of section 47 (1) (c) to other cases will be discussed below. We do not think that even a fraudulent trustee should be forever outside the law of the limitation of actions. Under section 47 (1), the defrauded beneficiary would have twelve years to bring his action after the time when he discovers or may with reasonable diligence discover the facts and that he has the cause of action: this seems to us to be quite long enough. If no action is brought within this period, we think it fair that the trustee should have the peace which it is the policy of a statute of limitations to give. Under the law as it stands, a beneficiary under no disability and knowing of his rights may wait, subject to questions of laches and acquiescence, for thirty or forty or more years and then call upon his trustee (or the executors of the trustee) to meet charges of fraud in relation to events of which all documentary and other evidence is likely to be lost. This is wrong and should be changed.

231. Section 47 (1) (c) applies to an action on a cause of action to recover trust property, or property into which the trust property can be traced, not only against the trustee, but also against any other person. In particular, it would apply to an action by a beneficiary to recover trust property from a person to whom it has been distributed by the trustee under a mistake. At present the limitation period for such an action would, it seems (cf. *Re Johnson* (1885) 29 Ch. D. 964 at p. 971), be twenty years if the claim were as beneficiary in the estate of a deceased person (Imperial Real Property Limitation Act, 1833, s. 40; Trust Property Act of 1862, s. 36) and six years in other cases (Trustee Act, 1925–1965, s. 69 (3)).

232. There is no need to have different periods for the cases mentioned in paragraph 231. In our view twelve years is an appropriate period for all such cases. Again, we think it right that the limitation period should not begin to run until the beneficiary discovers or may with reasonable diligence discover the facts and his rights. We think this because it is possible, even with the best of trustees, that for a long time a beneficiary will have no reason to suppose that he is a beneficiary and because the claim can only extend to property which the defendant still has in his possession but ought never to have received.

233. Section 47 (1) (d) covers claims *in personam* such as those discussed in *Ministry of Health v. Simpson* ([1951] A.C. 251). At present the limitation period would be six years under section 69 (3) of the Trustee Act. Here too, we think that a proper period is twelve years (as it now is in England under section 20 of the Imperial Act of 1939) and, because of the possibility that a beneficiary may, without fault, be ignorant of his rights for a long time, that the limitation period should not begin to run until he discovers or might discover his rights.

234. Section 47 (1) of the Bill when read with the definitions of "trust" and "trustee" in section 11 (1), will cover the cases of legacies and rights on intestacy now covered by section 40 of the Imperial Real Property Limitation Act, 1833, and section 36 of the Trust Property Act of 1863. Section 47 (1) follows the scheme of section 20 of the Imperial Act of 1939 in so far as it allows the longer period in such cases where there is fraud, retention, or conversion by the trustee.

235. In the cases of legacies and rights on intestacy the period now runs from the accrual of "a present right to receive" the property concerned. Instead of this the Bill speaks of the accrual of the cause of action, so as to maintain uniformity of expression with the other provisions of the Bill. We do not think that this change of wording will be a source of difficulty. See also section 49 of the Bill.

236. Section 47 (2) excludes from the section actions for arrears of income, except in cases of fraud and so on. Section 24 of the Bill fixes a limitation period of six years for arrears of income generally but, were it not for section 47 (2), section 24 would, in some cases at least, be overridden by sections 13 and 47 (1). Under the present law there is a six-year limitation period for the recovery of interest on a legacy both here (Imperial Real Property Limitation Act, 1833, s. 42) and in England (Imperial Act of 1939, s. 20).

#### Section 48—Breach of trust

237. Save as regards cases falling within section 47, section 48 embodies the substance of section 69 (3) of the Trustee Act, 1925–1965, and section 19 (2) of the Imperial Act of 1939. Section 48 (a) will cover cases where the trustee is liable to make good out of his own assets losses arising through breaches of trust which are not fraudulent.

#### Section 49—Accrual—Future interest

238. Provisions to a similar effect occur in the Trustee Act, 1925–1965, s. 69 (5), and in the Imperial Act of 1939, s. 19 (2), proviso. These provisions only apply to the sections in which they occur but section 49 applies for the purposes of the Division as a whole and thus applies, as the present provisions do not, to claims to legacies and rights on intestacy.

#### Section 50—Beneficiaries other than the plaintiff

239. Provisions to a similar effect occur in the Trustee Act, 1925–1965, s. 69 (b), and in the Imperial Act of 1939, s. 19 (3). Section 50 of the Bill, like section 19 (3) of the Imperial Act of 1939 applies to the Division generally, while section 69 (b) of the Trustee Act applies only to section 69. The section operates to prevent a statute-barred beneficiary getting an incidental advantage from an action by another beneficiary. Thus, if a trustee holding property on trust for A and B commits a breach of trust and A is statute-barred but B is not (because, for example, B is an infant), B can sue to have the loss occasioned by the breach of trust made good so far as concerns his own share, but the trustee will not be ordered to make good the loss *qua* A's share.

## PART III—POSTPONEMENT OF THE BAR

DIVISION 1—*General*

## Section 51—Ultimate bar

240. The only similar provision at present in force is section 17 of the Imperial Real Property Limitation Act, 1833. Under section 16 of that Act there is an extension of the limitation period for an action to recover land in cases of infancy or other disability of the plaintiff. Section 17 provides that, notwithstanding any extension for disability, an action to recover land is not to be brought after forty years from the date when the cause of action accrues. There is a similar rule in proviso (c) to section 22 (1) of the Imperial Act of 1939, but the period is thirty years instead of forty years. This ultimate bar after thirty years is a support to the security of old system titles to land: in general a vendor of old system title land must show a chain of title commencing at least thirty years before the date of the contract: Conveyancing Act, 1919–1964, s. 53 (1). It is strange, therefore, that neither the present law in New South Wales nor the Imperial Act of 1939 fixes any ultimate bar where the expiration of the limitation period is postponed by acknowledgment or part payment or on account of fraud or mistake.

241. We think, however, that, quite apart from questions of title to land, a statute of limitations ought not to allow an indefinite time for the bringing of actions even if the disabilities and other matters dealt with in Part III of the Bill do exist. These disabilities and other grounds of postponement may well be outside the knowledge of the defendant and we think it right that, after a period of thirty years has elapsed, there should be no further postponement of the statutory bar on any ground.

DIVISION 2—*Disability, confirmation, fraud and mistake*

## Section 52—Disability

242. The present provisions in force in New South Wales on the subject of disability occur in the following:

Imperial Limitation Act, 1623, s. 7.

Imperial Administration of Justice Act, 1705, s. 18.

Imperial Real Property Limitation Act, 1833, ss. 16, 40.

Supreme Court Act, 1841, s. 40.

Trust Property Act of 1862, s. 36.

The present provision in force in England is section 22 of the Imperial Act of 1939.

243. Section 11 (3) of the Bill states the cases in which, for the purposes of the Bill, a person is under a disability. We refer to the discussion of that subsection in paragraphs 87 to 93 above.

244. Section 22 of the Imperial Act of 1939 allows, in general, a period of six years to bring an action after the plaintiff has ceased to be under a disability. We think that three years is long enough, especially if the section operates, as we think it should operate, in the case of disability arising after the running of the limitation period has commenced.

245. Section 52 (2) of the Bill is no more than a safeguard. In the absence of the subsection, the view might be open that the section was spent once the plaintiff had ceased to be under his first relevant disability.

246. Section 52 (3) preserves the present position for what it is worth. The limitation period for such an action is fixed by the Imperial Common Informers Act, 1588, s. 5, and there is nothing in that Act about disabilities.

## Section 53—Notice to proceed

247. This is an innovation. There is no need for a postponement of the bar where the affairs of the person under a disability are under management pursuant to the provisions mentioned in section 53 (1), and the Master, committee or manager has had a reasonable time, which the section (read with section 52) would fix at three years, to consider whether the action should be brought or not.

## Section 54—Confirmation

248. This section deals with acknowledgments and part payments. "Confirmation" is used as a generic name to cover both acknowledgments and part payments. The present statute law in New South Wales appears in the following:

Imperial Statute of Frauds Amendment Act, 1828, s. 1.

Imperial Real Property Limitation Act, 1833, ss. 14, 28, 40.

Supreme Court Act, 1841, s. 41.

Trust Property Act of 1862, s. 36.

The present law in England appears in sections 23, 24, and 25 of the Imperial Act of 1939.

249. A large part of the law relating to acknowledgments and part payments is concerned with actions for liquidated sums for which the Imperial Limitation Act, 1623, provides a limitation period of six years. Apart from the Imperial Statute of Frauds Amendment Act, 1828, the law on this subject is judge-made. The only kind of cause of action to which the Act of 1623 applies and upon which acknowledgment or part payment has any effect is a cause of action in contract for debt or other liquidated sum. Causes of action for damages for breach of contract and causes of actions for damages for tort stand outside the rules about acknowledgment and part payment. The development of the law is considered in *Spencer v. Hemmerde* ([1922] 2 A.C. 507). The position is still the same under section 23 of the Imperial Act of 1939.

250. We think that every limitation period which the Bill would fix ought to be susceptible of enlargement by acknowledgment or part payment. Many odd contrasts can be imagined under the law as it stands. If a man steals a motor car he may be candid in making written acknowledgments of his liability to the owner without risk that the statute of limitations will stop running in his favour. There may indeed be an exception in favour of the owner if the thief sells the car, for then the owner may sue to recover the proceeds of sale in an action of assumpsit, in which a promise to pay over the proceeds of sale would be imputed to the thief and such a promise would presumably be within the rules about acknowledgment and part payment. Compare the text to the footnote (g) on page 221 of *Halsbury's Laws of England*, 3rd Edition, Volume 24 (1958), but the authorities cited do not support the text. If, however, the car is sold by the owner and the price is not paid, there is from the outset a debt within the rules about acknowledgment and part payment. If, to put a further case, a man has an insurance policy covering him against liability for personal injury to third parties and a third party is injured so as to give the insured a claim under the policy, the insurance company may admit liability both to its own insured and, as agent of the insured, to the injured third party: the admission, if in writing, will enlarge the limitation period as between the insurance company and the insured but will have no effect as against the insured in favour of the injured third party. (*The Sauria* [1957] 1 Ll. Rep. 396) unless indeed the evidence shows a contract not to plead the statute: *Lubovsky v. Snelling* ([1944] K.B. 44).

251. *Lubovsky v. Snelling* (above) is a case of some interest. There, an insurer dealing with a claim under the Imperial Fatal Accidents Acts admitted liability to the plaintiff and negotiated on the measure of damages. While the negotiations were going on the limitation period ran out and, an action being brought, the defendant, on the instructions of the insurer, pleaded the statutory bar. The Court of Appeal, incensed at the conduct of the insurer, found on slender evidence an agreement not to rely on the expiry of the limitation period and held that the defence failed. It is hard to see why the plaintiff's action was not one for the breach of a contract not to rely on the expiry of the limitation period. However that may be, the case may be regarded as a step towards the development of a common law doctrine of acknowledgment of claims to unliquidated damages analogous to the common law doctrine of acknowledgment of debts. If so, the case is an episode which supports the view that the legislature ought to make the statutory doctrine of acknowledgments apply as well to claims for unliquidated damages as to debts.

252. Instances can be multiplied, but it is enough for us to say that, in our view, considerations both of fairness and of simplicity justify extending to all the causes of action for which the Bill would fix periods of limitation the rules as to acknowledgment and part payment. As we see it, the arguments against this extension are two. First, the facts



relating to a claim for unliquidated damages, either in contract or in tort, are likely to be more complicated and less the subject of written record than are claims for debts or other liquidated sums. Second, the decision whether a writing amounts to an acknowledgment, at present difficult enough in the case of a liquidated claim, would present undue difficulties in the case of claims for unliquidated damages.

253. On the first point, while it has a foundation in ordinary experience, we think that an acknowledgment, likely as it must be to encourage the claimant to defer taking proceedings, will in general not be given carelessly and, if given carelessly, should be the occasion of loss to the person giving the acknowledgment rather than to the claimant.

254. On the second point, while it is indeed frequently a matter of difficulty to say whether, under the present law, a writing is or is not an acknowledgment, this difficulty has been significantly reduced by section 23 of the Imperial Act of 1939. In this respect the wording of section 53 of the Bill follows the substance of section 23 of the Imperial Act.

255. Another change which we recommend would tend to reduce the number of occasions on which the difficulties which we have been discussing would arise. This further change is that the Bill would allow efficacy to an acknowledgment or part payment only if it is made before the expiration of the limitation period (s. 54 (1)). When we speak of the expiration of the limitation period in this context, we mean the expiration of that period as it may be postponed by acknowledgment or part payment or by disability or by other facts having that effect under Part III of the Bill.

256. We make this recommendation, that an acknowledgment or part payment have effect only if made before the expiration of the limitation period, as part of the means of achieving the larger object to which we have already referred, namely, that when the limitation period ultimately expires, time will have really put an end to the disputes which can arise on the facts giving the cause of action. Thus, under the Bill, debts and claims to damages, titles to land and goods, claims under mortgages, and claims under estates and settlements and other trusts would all be extinguished on the expiration of the relevant limitation periods without the possibility of subsequent revival or satisfaction by accident, stratagem, or artifice. The provisions of the Bill especially directed to this end are section 25 (relief against forfeiture of lease), section 44 (adjustment of mortgage interest), section 45 (mortgagee's power of sale, etc.), section 54 (1) (confirmation) and sections 63 to 68 (extinction of right and title).

257. Under the present law difficult questions arise where two or more persons have a cause of action against two or more other persons and a confirmation (that is, an acknowledgment or part payment) is made by less than all the persons against whom the cause of action lies or is made to less than all of the persons having the cause of action. Subject to special rules for causes of action relating to property which are set out in section 54 (7) and are discussed in paragraph 267 below, the Bill would make it the rule that a confirmation would have effect only between the parties to it acting either directly or by their agents. We think that this simple rule will be no less fair than the present law or than the law under the Imperial Act of 1939. The law under the Imperial Act of 1939, though simpler than the present law is still, in our view, unduly complex.

258. To give an example of one of the complexities arising under the Imperial Act of 1939, we refer to section 25 (5), (6) of the Imperial Act. By those subsections, a confirmation of a debt made before the expiration of the limitation period binds only the maker of the confirmation if the confirmation is by way of an acknowledgment, but if the confirmation is by way of part payment, the confirmation binds all persons liable in respect of the debt. This distinction is made on a recommendation in the report of the Wright Committee in 1936 (Cmd. 5334) at p. 28. The Committee said that "the ground of the distinction is that a part payment operates for the benefit of all persons who are liable, and it would seem fair that if they take the benefit they should take it with its accompanying disadvantages". The Committee's view was that an acknowledgment without part payment, since it does not operate for the benefit of all persons liable, should not bind persons other than the maker.

259. We do not find this ground of distinction persuasive. If A and B are jointly liable for a thousand dollars and the limitation period is about to expire in favour of both of them, it is incongruous that A should be in a position, without the authority of B, and by paying one dollar or some other trifling sum, to postpone, as against B, the expiration of the limitation period until six years after the date of the payment. Such a state of the law, apart from its incongruity, appears to us to be apt to encourage underhand transactions between a creditor and one of his co-debtors.

260. Under the Bill, a confirmation might be made by an agent of a person against whom a cause of action lies and might be made to an agent of a person having the cause of action: see section 11 (2) (c) of the Bill.

261. By section 54 (2) (c) of the Bill, 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 account. By section 11 (1) of the Bill, "income" *prima facie* includes "interest on a judgment and other interest, and includes rent, annuities, and dividends, but does not include arrears of interest secured by a mortgage and lawfully treated as capital."

262. The Imperial Act of 1939 enacts that "a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due . . ." (s. 23 (4) proviso). The Imperial Act does not deal expressly with the operation of an acknowledgment of interest or rent: the operation of such an acknowledgment depends, presumably, on its own terms and, if it is in terms no more than an acknowledgment of a specific item, that will be the limit of its operation.

263. The Bill gives a greater effect than does the Imperial Act to a confirmation of income, in that the Bill would extend the limitation period, not only for the particular item confirmed, but also for subsequent items on the same account due at the time of the confirmation. We have made this provision on the view that the confirmation of one item of income is a recognition that the question of liability for that item is not closed and that, in the ordinary course of affairs, where liabilities arise in succession, the liability of earlier accrual is likely to be discharged before the liability of later accrual; so that it is a fair inference that the question of liability for a subsequent item is also not closed.

264. The same considerations do not, however, apply to items falling due before the item confirmed. Although a confirmation of one item may well be consistent only with the existence, at some time, of liability for earlier items on the same account, it does not support an inference that liability on an earlier item remains undischarged at the date of the confirmation. Indeed, in the case of confirmation by part payment, the inference is rather the other way: in the ordinary course, a payment on account of one item is not likely to be made while earlier items remain unpaid.

265. Further, where income is payable at regular intervals of less than six years, the payment on their due dates of the second and subsequent items would, if they operated as confirmations of earlier items, keep liability for the first item unbarred for as long as subsequent income fell due, and for a further six years. We do not think that this is a consequence which a Limitation Act ought to have. The Bill, therefore, does not make a confirmation of income work as a confirmation of earlier income on the same account.

266. Section 54 (6) specifies the persons bound by a confirmation. The reason for including paragraph (c) as well as paragraph (d) is that paragraph (d) may not apply to a case where an executor makes a confirmation and afterwards his probate is revoked and a grant of representation is made to another person. To say the least of it, the view is open that the new representative is not a "trustee" of the same "trust" (as those expressions are defined in section 11 (1)) as was the executor who made the confirmation.

267. Section 54 (7) of the Bill would make a confirmation of the proprietary causes of actions specified in the subsection bind persons afterwards in possession of the property concerned. The subsection has its basis in provisions in section 25 (1), (2) of the Imperial Act of 1939. One effect of the subsection is that, where there is a series of persons in possession of the property adversely to the person having the cause of action, a confirmation by an earlier member of the series will bind a later member of the series.

#### Section 55—Fraud

268. The only statutory provision in the present law is section 26 of the Imperial Real Property Limitation Act, 1833. That section postpones the expiration of the limitation period fixed by that Act for a suit in equity for the recovery of land in case of concealed fraud. There is, in addition, a considerable body of case law concerning the effect in equity of fraud and mistake. Section 26 of the Imperial Act of 1939 considerably extended these rules and made them apply to the limitation periods for actions at law as distinct from actions in equity. This extension to actions at law had previously been achieved, at least to some degree, as the result of the Imperial Judicature Acts in the 1870s. See generally Franks on the Limitation of Actions (1959) at p. 201. Sections 55 and 56 of the Bill are based on section 26 of the Imperial Act of 1939.

269. Section 26 of the Imperial Act, in dealing with fraud, speaks of an action "based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent" and of a right of action being "concealed by the fraud of any such person as aforesaid". The word "fraud" is used in one sense in the first of these passages and in another sense in the second. In the first passage, "fraud" means, at least primarily, the deceit which may be an ingredient in a common law action for damages. In the second passage, "fraud" connotes wilfulness in the concealment of the existence of a cause of action, whether the cause of action involves deceit in the common law sense or not. See Franks, at p. 202; Halsbury's Laws of England, 3rd Edition, Volume 24 (1958), at pp. 316, 317. These divergent uses of the word "fraud" may be misleading. Section 55 (1) therefore speaks, on the one hand, of a cause of action based "on fraud or deceit" and, on the other hand, of a cause of action being "fraudulently concealed". The change in wording is small, but may help to avoid confusion.

270. In section 26 of the Imperial Act of 1939, the fraudulent concealment of a cause of action does not extend to the fraudulent concealment of the identity of the defendant. Thus there is no extension of the limitation period for an action against a man who steals a motor car and conceals, however fraudulently, his identity from the owner of the car: *R.B. Policies at Lloyd's v. Butler* ([1950] 1 K.B. 76). We think that there should be an extension of time in such a case and section 55 (1) (b) so provides. The innocent purchaser is protected by section 55 (3).

#### Section 56—Mistake

271. There is nothing in the present statute law which deals with this subject. Section 56 is based on part of section 26 of the Imperial Act of 1939. See paragraph 268 above.

### DIVISION 3—Personal injury cases

#### Introductory

272. Sections 57 to 61 are based on section 1, 2, 3, 6 and 7 of the Imperial Limitation Act 1963. These provisions of the Imperial Act of 1963 were passed in consequence of the report of the Committee on Limitation of Actions in Cases of Personal Injury in 1962 (the Edmond Davies Report; Cmd. 1829). The Edmond Davies Committee was appointed early in 1961, after the trial of *Cartledge v. E. Jopling & Sons Ltd* ([1962] 1 Q.B. 189; [1963] A.C. 758). The Court of Appeal gave its decision in *Cartledge's case* before the Committee made its report and the House of Lords gave its decision in the same case after the Committee made its report.

273. The facts in *Cartledge's case* were as follows. The plaintiff, while employed as a steel dresser in the defendant's factory, contracted pneumoconiosis, a disease in which slowly accruing and progressive damage may be done to a man's lungs without his knowledge. According to the evidence, a man susceptible to pneumoconiosis who inhaled noxious dust over a period of years would have suffered substantial injury before it could be discovered by any means known to medical science. By writ issued on the 1st October, 1956, the plaintiff claimed from his employer, the defendant company, damages for negligence and, or alternatively, breaches of statutory duty causing the disease. The plaintiff could establish no breach of duty by his employer making any material contribution to the causation of the injury to his lungs after September, 1950.

274. It was held in all the courts that in such case the cause of action accrues at the date of the loss or damage when there has been a wrongdoing by the defendant from which loss or damage (not being insignificant) is suffered by the plaintiff, irrespective of his knowledge of the loss or damage and that, since the damage to the plaintiff had accrued before October, 1950, his claim was statute-barred by section 2 of the Imperial Act of 1939.

275. There is nothing in the present law in New South Wales which corresponds to these provisions. We think that the changes introduced by the provisions which we have mentioned of the Imperial Act of 1963 are beneficial in principle. The question which has troubled us is whether the changes go far enough. The Edmund Davies Committee was restricted by its terms of reference to the consideration of cases of personal injury.

276. While in personal injury cases the problem is likely to arise in an acute form and a form which must excite dissatisfaction with an evident injustice, the problem is by no means confined to cases of personal injury. Thus a man may engage a professional man, such as a solicitor or a surveyor, to give advice or to ascertain facts and the advice may be given or the facts may be reported negligently, so that damage to property or financial loss is suffered. In such a case the action for damages for negligence or breach of contract is barred at the expiration of six years from the date when the negligent advice is given or the negligent report is made, whether or not the person suffering the damage or loss knew or had the means of knowing of the damage or loss within the six-year period.

277. So, also, a director of a company liable under the Imperial Directors Liability Act, 1890, for a misrepresentation which induced a person to subscribe for shares had nothing to fear if the limitation period had expired before the facts showing the falsity of the representation came to light. The position is the same where goods are converted without the knowledge of the owner and he only discovers the conversion and the consequential loss to him, after the expiration of the limitation period. See *Howell v. Young* ((1826) 5 B. & C. 259; 108 E.R. 97); *Short v. McCarthy* ((1820) 3 B. & Ald. 626; 106 E.R. 789); *Grainger v. George* ((1826) 5 B. & C. 149; 108 E.R. 56); *Thomson v. Clanmorris* ([1900] 1 Ch. 718).

278. In *Cartledge's case* in the House of Lords, Lord Reid appears to have favoured a legislative change whereby the limitation period for a cause of action for damages would not begin to run until either the injured person had discovered the injury or it would be possible for him to discover the injury if he took such steps as were reasonable in the circumstances. The suggestion would apply as well to financial injury and injury to property as to personal injury and the absence of the relevant knowledge would have an effect analogous to that of concealed fraud or mistake. See also *Cozens v. North Devon Hospital Management Committee* ([1966] 2 Q.B. 330 at p. 347).

279. It is not easy to see why the special privilege is given only in cases of personal injury. If there is personal injury, however trivial, the way is open for an extension of the limitation period. If, however, on the negligent advice of a surveyor, a man spends his life's savings on building a house on the wrong block of land and is turned out of the house ten years afterwards, his remedy in damages against the surveyor is barred.

280. The problem is one of fixing a rule which will be a fair adjustment of the competing interests with which a statute of limitations must deal. For a statement of these interests, we cannot do better than turn to the report of the Edmund Davies Committee. At paragraph 17 of their report the Committee set out what they conceived to be the accepted function of the law of limitation of actions. In the remainder of this paragraph we paraphrase what the Committee said. In the first place, the law of limitation of actions is intended to protect defendants from being vexed by stale claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses, even if they are still available, may well not have an accurate recollection. Secondly, the law of limitation of actions is designed to encourage plaintiffs not to go to sleep on their rights but to institute proceedings as soon as it is reasonably possible for them to do so. Thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he may treat as being finally closed an incident which might have led to a claim against him. But if the law of limitation is principally designed for the benefit of defendants, it would nevertheless be a mistake to lose sight of the interests of injured persons. A plaintiff who has lost the right to claim damages before he can know of the existence of that right must inevitably feel that he has suffered an injustice.

281. This is a problem on which the principles stated above will lead different minds to different results. We have come to the conclusion, however, that ignorance of the occurrence of damage which gives a cause of action should not in general postpone the running of the limitation period. We believe that the great majority of personal injury cases where an extension of time would be available under legislation on the lines of the Imperial Act of 1963 are cases where the defendant will be indemnified by insurance. Where there is such an indemnity the burden of a claim by any single plaintiff will be widely spread over the community and the action will in fact be defended by an insurer whose business it is to defend such actions. In these special circumstances we think it right to give less weight to the function of protecting defendants from being vexed by stale claims and greater weight to the manifest injustice which an injured person would otherwise suffer. These considerations justify special treatment for cases of personal injury but do not justify a general relaxation of the law of the limitation of actions in all cases of claims for damages.

282. Sections 58, 59, and 60 of the Bill give the court a discretion to grant or withhold an extension in cases where the facts are made out. In this the Bill departs from the Imperial Act of 1963: under that Act leave must be granted once the facts are made out (s. 2 (2), (3)), but it is open to the court at the trial to make a second finding on the facts and to hold the action to be statute-barred because the facts justifying an extension are not made out: *Cozens v. North Devon Hospital Management Committee* ([1966] 2 Q.B. 330). The Imperial Act follows the recommendation of the Edmund Davies Committee in this respect. The Committee rejected a proposal that the court be given a discretion, for the reasons that a discretion would encourage hopeless applications and consequent waste of money, that the law should be certain, and that divergences of practice would arise amongst the judges (paragraph 31 of the report).

283. We see force in these reasons, but there are the other reasons which persuade us that (for New South Wales at least) it is better to give the court a discretion. As we read the Imperial Act, a plaintiff is relieved of the statutory bar however small may be the amount of damages that he is likely to recover and, at least so far as concerns the preliminary application, whether or not the tribunal of fact at the trial is likely to believe his evidence. Further, it is by no means clear that the existence of a special defence such as release or estoppel by judgment would disentitle an applicant to leave under the Act. If the damages are likely to be trivial, if evidence on an essential point is weak, or if a special defence is proved (and these are only examples) we think that a discretion to refuse leave would be useful.

284. The Edmund Davies Committee recognized the importance of safeguards to exclude actions of an unmeritorious, speculative or fraudulent character (paragraph 30 of the report), but we have serious doubts whether the Act, in denying any discretion to the court, does not leave the way open for such actions. We think, indeed, that a discretion would discourage, rather than encourage, hopeless applications, at least those instanced earlier in this paragraph and in paragraph 283.

285. On the point of certainty of the law, we recognize the merit of certainty, but do not think that uncertainty will be significantly increased when there will, in any event, be questions of reasonableness. Such questions admit of different answers by different minds. The same may be said of the point about divergences of practice amongst the judges.

286. Further, there are many precedents for discretionary powers to enlarge limitation periods and other time limits in special cases. Examples include the proviso to section 6c (2) of the Compensation to Relatives Act, 1897-1953; the proviso to section 2 (3) of the Law Reform (Miscellaneous Provisions) Act, 1944-1962; and the proviso to section 580 (6) of Local Government Act, 1919. Other examples may be found in Appendix A to this report.

287. We have, therefore, made provision in sections 58, 59, and 60 of the Bill for a discretion to grant or withhold orders under those sections.

288. Another major difference between the Imperial Act of 1963 and the Bill is that the Act of 1963 requires that, in general, an application for leave be made *ex parte*, while the Bill would leave the procedure to be fixed by rule of court. Our terms of reference do not extend to making recommendations on rules of court, but it may be useful for us to say that we think that there are substantial reasons which might lead those responsible for rules of court to make rules requiring that applications for leave under this Division be made on notice to the defendant or prospective defendant and enabling the determination of the application to be adjourned to the trial of the action.

289. It has been put to us that there may be grounds for allowing an extension of time where an injured person does not sue within six years although a reasonable man would do so, the injury being apparently small at first but later turning out to be serious. To make no provision for such a case may be said to put a penalty of large but unknown amount on a man who makes, in respect of a comparatively small apparent injury, a decision (that is, a decision not to sue) which is afterwards held not to be the decision which a reasonable man would have made.

290. The Bill does not provide for such cases. We think that to allow an extension in such cases would be to give to the person who does not sue, although a reasonable man in his position would have sued, an advantage which the law withholds, by allowing the plea of judgment recovered, from a man who, in similar circumstances and *ex hypothesi* acting reasonably, does sue for the small apparent injury. Accordingly we think that it would be wrong to alter the law of limitations of actions in this way while the plea of judgment recovered would prevent a man who had sued for the small apparent injury from afterwards suing for the more serious injury.

291. Before passing to comment on the sections in Division 3 of Part III, we note a point which we do not think can properly be dealt with in this Bill but which the Government may wish to consider in relation to court procedures in personal injury cases. Shortly, the point is whether, in a case where a plaintiff gets an extension of time under Division 3 of Part III, the trial ought not to be before a judge alone. In England actions for damages for personal injuries are normally heard by a judge alone, but in Scotland such actions are normally heard with a jury.

292. The Edmund Davies Committee, in paragraph 33b of their report, said that they were satisfied that a judge would always take into consideration the lapse of time involved when estimating the reliability or cogency (or the significance of the absence) of evidence relating to incidents in the distant past. They were conscious, too, of the fact that those who have no training in the evaluation of evidence might not be so ready to discriminate between stale and fresh recollections. The Committee expressed the opinion that in Scotland where a pursuer is seeking to take advantage of a relaxation of the ordinary period of limitation, that fact should be regarded as special cause making the case appropriate for proof before a judge as distinct from trial before a jury.

293. It may be that the Government would wish to consider these views when dealing with court procedures and we refer to them in this note for that purpose only. We make no recommendation in the matter: the question is, as we see it, one of Government policy.

#### Section 57—Interpretation

294. The definition of "personal injury" in section 57 (1) (a) is taken from section 31 (1) of the Imperial Act of 1939. Section 57 (1) (b) of the Bill specifies some matters which are amongst the material facts relating to a cause of action for the purposes of sections 58, 59, and 60. The provision is based on section 7 (3) of the Imperial Act of 1963 but there is some rearrangement and elaboration. Section 57 (1) (b) (v) is intended to embrace facts relevant to the apportionment of liability in case of contributory negligence: *see* section 10 of the Law Reform (Miscellaneous Provisions) Act, 1965.

295. Section 57 (1) (c) states the tests for determining whether material facts relating to a cause of action are of a decisive character: the paragraph is based on section 7 (4) of the Imperial Act of 1963.

296. Section 57 (1) (c) (ii) is new: it requires consideration of matters peculiar to the person whose means of knowledge is in question. Cases may arise where the prospective damages are sufficient in amount to justify bringing the action but the injured person would be obliged to pay to someone else the whole or a large part of the damages so that what would be left for the injured party would not be enough to outweigh the hazards of litigation. An example is the case where the only known heads of damage are medical expenses and loss of wages for a relatively short period. If the injured person has received workers' compensation, the bringing of an action might in substance (after allowance for solicitor and client costs) result only in a benefit to the workers' compensation insurer. The injured person may, acting reasonably in his own interests, refrain from suing in such a case but he should not, we think, be deprived on that account of the possibility of getting an extension of time in case the injuries later turn out to be much more serious.

297. Then again, there may be personal reasons for not suing when the apparent injury is small. An injured employee may, for example, reasonably take the view that an action against his employer may jeopardize the future course of his employment to an extent which outweighs the prospective damages for the injuries at first apparent. Section 57 (1) (c) (ii) would allow circumstances such as these to be taken into account.

298. Paragraphs (d) and (e) of section 57 (1) deals respectively with "appropriate advice" and the test of knowledge of a fact. These provisions are taken in substance from subsections (8) and (5) respectively of section 7 of the Imperial Act of 1963.

299. Section 57 (1) (f) should be read with section 58 (3), section 59 (4) and the words in parentheses in section 60 (1) of the Bill: the limitation period would be subject to extension even though it has expired before the commencement of an Act founded on the Bill. The effect of the Imperial Act of 1963 appears to be that the statutory bar may be lifted in any case where the action would otherwise be barred by the Imperial Act of 1939: *see* the Imperial Act of 1963, ss. 1 (1), 6. In a practical sense, the Imperial Act of 1963 is almost as completely retrospective as if the Act applied to a cause of action barred by the law in force before the Imperial Act of 1939. The Bill follows what is therefore the substance of the position under the Imperial Act of 1963 and makes this set of sections fully retrospective.

300. Section 57 (2) defines "breach of duty" so as to save repetition elsewhere in the Division. It follows the substance of some words in section 1 (2) of the Imperial Limitation Act, 1963. The inclusion of trespass to the person states the position reached in Victoria (*Kruber v. Grzesiak* [1963] V.R. 621) and in England (*Letang v. Cooper* [1965] 1 Q.B. 232).

## Section 58—Ordinary action

301. Section 1 (2) of the Imperial Act of 1963 enables the statutory bar to be lifted in a case where "the damages claimed by the plaintiff . . . consist of or include damages in respect of personal injuries to the plaintiff . . ." We would confine sections 58 and 59 to causes of action for damages for personal injury, so as not to permit the extension of the limitation period for damages on other accounts. At least in the cases of causes of action for trespass and negligence, the plaintiff has separate causes of action for damages for personal injury on the one hand and for damages for injury to his property on the other hand: *Brunsdon v. Humphrey* ([1884] 14 Q.B.D. 141). The special circumstances which alone justify the extension of the limitation period do not, in our view, justify an extension for a cause of action for damages for injury to property, whether or not there is also injury to the person.

## Section 59—Surviving action

302. In cases under section 2 of the Law Reform (Miscellaneous Provisions) Act, 1944, section 59 allows an order of extension to be made not only where the intending plaintiff has been ignorant of the material facts but also where the deceased has been ignorant of the material facts. This follows section 3 of the Imperial Act of 1963.

## Section 60—Compensation to relatives

303. There is no cause of action under the Compensation to Relatives Act if, at the date of the death of the deceased, his cause of action for damages arising out of the wrongful act is barred by a statute of limitations. Section 60 applies the principle of sections 58 and 59 to cases arising under the Compensation to Relatives Act by enabling an order to be made to the effect that the expiration as against the deceased of a limitation period will not exclude the action, where it is shown that the deceased was ignorant of the material facts.

## Section 61—Prior bar ineffective

304. This section merely states what is probably implicit in the earlier sections, but it is as well to put the point expressly.

## Section 62—Evidence

305. Unless some relaxation is made in the ordinary rules of evidence a person applying for leave under section 59 or section 60 may well find it impossible to prove what was within the means of knowledge of the deceased. This section has no counterpart in the Imperial Act of 1963, but we think that the provision may safely be included, especially in the context of the discretion to grant or withhold an order in sections 59 and 60.

## PART IV—MISCELLANEOUS

DIVISION 1—*Extinction of right and title*

## Introductory

306. This group of sections, sections 63 to 68, embody a major change in principle, although concerned with a problem which has not frequently arisen in the reported cases. It is a change to which we have referred before and the proposal is that it be made a general rule that, on the expiration of the limitation period for a cause of action, the personal right to debt, damages or other money, or the right of property, which the cause of action would enforce is to be extinguished.

307. The only provision in the present law to this effect is section 34 of the Imperial Real Property Limitation Act, 1833, which provides amongst other things that at the determination of the period limited by the Act to any person for bringing an action or suit the right and title of that person to the land for the recovery whereof the action or suit might have been brought is to be extinguished. A further step was taken by the Imperial Act of 1939, which provides for the extinction of title to a chattel where the limitation period for an action in respect of the conversion or wrongful detention of the chattel has expired without the owner recovering possession of it (s. 3 (2)).



308. The Wright Committee considered the matter in its report made in 1936 and, while seeing some merit in the proposal for the extinction of title to goods where an action for conversion or detinue is barred, made no recommendation on the matter. The Wright Committee considered nine cases where the continued existence of the right after the remedy was barred had some significance.

309. The first case was where a debtor pays money on account of debts, some of which are statute-barred and some not, and the money is not appropriated to any particular debt. In such a case the creditor may appropriate the money to a statute-barred debt. This would no longer be good law if the right to the debt were extinguished. This is a case in which we think that the right of the creditor ought to be extinguished. The shadowy continuance of the right without remedy is an unnecessary complication of the law and may conceivably lead, on the one hand, to manoeuvres of the creditor with a view to obtaining payment without action and, on the other hand, to the debtor abstaining from further business transactions with the creditor and to that extent restricting his freedom of action. The continued existence of the right after the law has taken away the remedy is a situation which, we think, a modern system of law should avoid.

310. The second case considered by the Wright Committee was the case of a specific or residuary legatee under a will who owes a statute-barred debt to the estate of the deceased: in such a case the executor may deduct from the legacy the amount of the debt. Apparently the executor can only deduct the debt where the debt, if paid, would swell the fund out of which the legacy is payable: the legatee is treated as having already received a part of his legacy, namely, the amount of the debt. The Wright Committee commented that the extinction of the right to the debt would have a doubtful effect in this case inasmuch as it would still be arguable that the legatee ought to be treated as having already received a part of his legacy. The law was considered by Byrne J. in *Dingle v. Coppen* ([1899] 1 Ch. 726). No doubt there are many sets of circumstances in which the rule might be applied, but in the common case where the debt was owing to the testator and was statute-barred at the time of his death, the argument that the rule would apply notwithstanding extinguishment of the right has eluded us. In such a case, the testator has the remedy in his own hands: he can say in his will that the legacy is to be reduced by the amount of the debt. The rule in question has no practical utility here and we think that its abolition would do no harm.

311. The third case considered by the Wright Committee concerns the payment by an executor of a statute-barred debt. He may do so, even a statute-barred debt owing by the estate to himself. But he cannot do so if a court has declared in an administration suit that the debt is statute-barred and any beneficiary or any other creditor of the estate may require the statute of limitations to be set up, except against the creditor at whose suit the administration order was obtained. The Committee observed that this case was not of great importance in practice and that the power of the executor to pay a statute-barred debt could nearly always be defeated by an application to the court. If the right to the debt, as well as the remedy to recover it by action, were extinguished, the executor would no longer have this power. Here again, we think that it would be a useful simplification of the law if the right to the debt were extinguished. Indeed, to do so would be to preserve the substance of the present law but at less expense to the persons concerned: if, as the Wright Committee point out, the right of the executor to pay a statute-barred debt can nearly always be defeated by an application to the court, it is better to extinguish the debt and save the possible expense of an application to the court. The point that the case is not of great importance in practice is, to us, a circumstance in favour of extinguishing the right and thus simplifying the law.

312. The fourth case considered by the Wright Committee concerns the rule that a trustee may pay statute-barred costs. The Committee observed that this presumably covered the payment of any statute-barred debt. The extinction of the right would do away with the rule. Again, the case was not of great importance in practice. In this case, too, for substantially the reasons we have given in relation to the third case, we think that it would be useful if the right to, as well as the remedy for, statute-barred costs were extinguished.

313. The fifth case considered by the Wright Committee concerns liens and charges. A solicitor's lien may be enforced after his costs are statute-barred, so may a wharfinger's lien and it may be that any kind of lien can be enforced after the claim which the lien secures is statute-barred. An equitable charge on shares can be enforced, by action for foreclosure or sale, though the debt for which it is security is statute-barred.

314. The Wright Committee considered that far the most important matters were dealt with in this fifth case and that here again it seemed very doubtful what effect, if any, the extinguishment of the debt would have on collateral rights against property. The Committee referred to its earlier recommendations that limitation periods be fixed for the recovery of money charged on personal property (twelve years, *see* now Imperial Act of 1939, s. 18 (1)); for the recovery of arrears of interest on money charged on personal property (six years, *see* now Imperial Act of 1939, s. 18 (5)); and for foreclosure in respect of mortgaged personalty (twelve years, *see* now Imperial Act of 1939, s. 18 (2)). Actions to enforce liens and charges (including foreclosure actions) would be governed by those provisions. But those provisions would not affect the case where a creditor has in his possession a security which he could enforce without bringing an action, nor did the Wright Committee think that the right to enforce such a security in such circumstances ought to be limited. A creditor naturally refrained from bringing an action so long as he held an ample collateral security, and it would be inconvenient to both parties if he were compelled to enforce the security or lose his right altogether. The Committee did not desire to bring this about.

315. We think that the case of a possessory lien on goods requires special treatment. We would save a debt secured by possessory lien on goods from extinction for as long as the owner of the goods has a cause of action for the conversion or detention of the goods or to recover the proceeds of sale of the goods, but only so far as is necessary to support and give effect to the lien. Section 68 of the Bill so provides. A possessory lien is not within the definition of "mortgage" in section 11 (1) of the Bill.

316. We have already, in the discussion in these notes (paragraphs 202, 221) on mortgages given our reasons for thinking that there should be a limitation period for the exercise by a mortgagee of personalty of powers of sale and other remedies without action. The limitation period would be twelve years and would not begin to run until the last payment of principal or interest. It may be conceded, as the Wright Committee said, that a creditor naturally refrains from bringing an action so long as he holds an ample collateral security, and that it would be inconvenient to both parties if he were compelled to enforce the security or lose his right altogether. But we think that the creditor has sufficient freedom of action if he has twelve years in which to exercise his powers after the last payment of principal or interest and the debtor can always relieve the creditor of any compulsion which he might otherwise feel: the debtor may give an acknowledgment. Except for the case of possessory liens, therefore, we do not think that it is necessary to save a debt from extinction so as to enable a person having a security on property to exercise his powers against the property.

317. The sixth case which the Wright Committee considered concerns the conversion of goods. Under the law of England in 1936, the cause of action against the person who converted goods was barred after six years, but the right in the property still subsisted; so that if a fresh conversion took place by a different person, the statute began to run afresh. The Wright Committee found that there was something to be said for the extinction of title to goods where an action for their conversion or detention was statute-barred but they made no affirmative recommendation. The Imperial Act of 1939, by section 3 (2), now extinguishes title in such a case and section 65 of the Bill would do likewise.

318. The seventh case considered by the Wright Committee concerned the position of a statute-barred debt in bankruptcy. It appears that a statute-barred creditor may present a bankruptcy petition, and although the debtor may plead the statute, no other creditor can object, if the debtor does not do so. As against any creditor (other than the creditor who presented the petition) the trustee in bankruptcy is bound

to plead the statute. The Wright Committee observed that this case, if it was good law, was of very slight importance. We agreed and, so far as bankruptcy questions are open to control by the law of New South Wales, we see no harm in the extinction of the right to a statute-barred debt.

319. The eighth case considered by the Wright Committee was the case of a debt incurred as the result of a tort, so that the debt can be claimed as part of the damages flowing from the tort (for example, hospital expenses in an action for damages for personal injuries). Such a debt can be so claimed notwithstanding that the debt is statute-barred. Such a case would be very unlikely to occur and we do not find in the possibility of such a case occurring a reason for saving statute-barred debts from extinction.

320. The ninth and last case which the Wright Committee considered concerned the rules of private international law. Where a claim is made in the English courts, being a claim to which foreign law applies, the English statutes of limitation are applied, because they are considered to be part of the procedural law, on the ground that they bar the remedy and do not extinguish the right. The applicability of a foreign statute of limitation is decided by the same test. If it bars the remedy only, it is procedural and is not applied in the English courts; if it extinguishes the right, it is considered part of the substantive law and is considered to be operative. The present law is the same in New South Wales. The Wright Committee said that the distinction was of great importance in the field of private international law but thought that the problem should be considered separately, as it was a problem of considerable difficulty.

321. As we see it, if a statute of New South Wales extinguished the right and also barred the remedy by action, that extinction would be given effect by foreign courts applying the common law rules of private international law in cases where, by reason of matters of domicile, locality of property, or of the proper law of a contract, the rights of the parties were governed by the law of New South Wales. This is a consequence which appears to us to be natural and proper and we do not find anything in it which goes against our proposal that rights and titles should in general be extinguished when the causes of action for their enforcement are statute-barred. The change which we propose would not affect the other provisions of the Bill which fix limitation periods for the bringing of actions: these would continue to apply to actions brought in New South Wales for the enforcement of rights arising under the laws of other countries. The common law rules of private international law on this subject are severely criticized in Cheshire's *Private International Law*, 7th Edition (1965), at pp. 585-588.

322. A further case has arisen in Tasmania. In *In re Howlett* ([1964] Tas. S.R. 63), Neasey J. held that the rule of equity, that if a debtor to a testator becomes his executor he is deemed to have paid the debt to the estate, applies to a debt statute-barred at the testator's death. We think that this consequence of taking probate of a will is likely to be outside the contemplation both of the testator and of the executor and, in the rare case in which the rule would be known to be applicable, would tend to restrict the testator in his choice of an executor and to discourage the executor from taking probate, all for the sake of enlarging the estate by the amount of a debt which the testator has seen fit not to enforce in his lifetime. We think, therefore, that in such a case the continued existence of the debt has more mischief than utility.

323. No other case occurs to us where the continuance of a right or title notwithstanding that the cause of action for its enforcement is statute-barred is likely to be of substantial importance. In Franks on the *Limitation of Actions* (1959), at p. 30, after saying that, in general, the Imperial Act of 1939 merely withdraws the remedy by way of legal proceedings on the expiry of the limitation period and leaves the legal right untouched, the author says that "this state of affairs is very well settled by authority but is, it is suggested, unsatisfactory since it fails to eliminate uncertainty (the prime benefit of the Statute) . . ." We think it a useful reform to extinguish the right when the cause of action for its enforcement is barred and thus abolish a number of complicated rules of law which have little practical importance but stand merely as an occasional embarrassment to the student, the lawyer and the citizen.

## Section 63—Debt, damages, etc.

324. Section 63 of the Bill applies the principle of extinguishment which we recommend to debts, damages, and other money recoverable by actions for which limitation periods are fixed by the Act. Section 63 (2) preserves the right for the purposes of an action brought before the expiration of the limitation period.

## Section 64—Account

325. The peculiarities of the remedy by way of an action for an account call, as a matter of drafting, for separate treatment, but otherwise section 64 is merely complementary to section 63.

## Section 65—Property

326. This section would extinguish titles to property on the expiration of the limitation period fixed by the Act for an action to recover the property. So far as concerns land, it takes the place of section 34 of the Imperial Real Property Limitation Act, 1833. So far as concerns goods the subject of a cause of action for conversion or detention, section 65 adopts the substance of section 3 (2) of the Imperial Act of 1939.

327. Section 65 (2), like sections 63 (2) and 64 (2), preserves the title for the purposes of an action brought before the expiration of the limitation period.

## Section 66—Instrument under Real Property Act

328. Section 36 (4) of the Real Property Act, 1900–1967, provides that an instrument registered under the Act shall take effect as a deed. Where there is a cause of action founded on an unregistered instrument but the instrument is afterwards registered, there would be a possibility of rights and titles being extinguished before the time when they would be extinguished if the instrument had been promptly registered. Section 66 is intended to prevent this.

## Section 67—Future interest in land

329. There is a comparable provision in section 20 of the Imperial Real Property Limitation Act, 1833, which must be read with section 34 of the Act of 1833. Compare, also, section 6 (5) of the Imperial Act of 1939. These provisions of the Imperial Acts speak in terms of barring the remedies by action for the recovery of the land by virtue of the future estate or interest. It seems to us better, however, to speak in terms of extinction of the title because, whenever the case arises to which the provisions would apply, the cause of action must necessarily be statute-barred before the estate or interest falls into possession.

## Section 68—Possessory Lien

330. We have discussed the purpose of this section in paragraphs 314 and 315 above.

## DIVISION 2—Arbitration

## Introductory

331. There is nothing in the present law of the limitation of actions in New South Wales which applies expressly to proceedings in an arbitration. An arbitrator acting under an ordinary submission to arbitration, however, is bound to give effect to all legal defences, including a defence under any statute of limitation: *Board of Trade v. Cayzer, Irvine & Co. Ltd.*, ([1927] A.C. 610). In England express provision was first made in the Arbitration Act, 1934, but the relevant law now appears in section 27 of the Imperial Limitation Act, 1939. We think it desirable to adopt the substance of the present English law.

## Section 69—Interpretation

332. Paragraph (a) of section 69 (1) of the Bill follows the definition of "submission" in the Arbitration Act, 1902, s. 3, except that there is no requirement that the agreement be in writing. It is conceivable, though unlikely, that an arbitration agreement may not be in writing and it is therefore undesirable to confine the definition to an agreement in writing. The word "submission" is not used because of the difficulties with that word discussed in paragraphs 123 and 124 above.

### Section 70—Application of the Bill to arbitrations

333. Section 70 (1) is based on section 27 (1) of the Imperial Act of 1939, but the Imperial Act makes not only that Act but also any other enactment relating to the limitation of actions apply to arbitrations. We do not at present recommend taking this further step: we think it would be dangerous to do so without prior consideration of as many as can be found of other particular enactments relating to limitation of actions and consultation of the persons affected. We propose to consider these particular enactments in a later report.

334. Section 70 (2) of the Bill has no counterpart in the Imperial Act of 1939, but it seems useful to state expressly what is no doubt implicit in section 70 (1).

### Section 71—Accrual

335. This section corresponds to section 27 (2) of the Imperial Act of 1939. The purpose of the section is to apply the limitation rules to an arbitration under a *Scott v. Avery* ((1856) 5 H.L.C. 811; 10 E.R. 1121) clause. The Imperial provision speaks of "any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement". We do not think that this is an apt description of the effect of a *Scott v. Avery* clause: such a clause is more accurately described as one which prevents the accrual of a cause of action which, in the absence of the *Scott v. Avery* clause, would accrue and puts in the place of that cause of action a distinct cause of action on the award of the arbitrator. Section 71 therefore extends to the case where a cause of action with respect to a difference or matter referable to arbitration does not accrue at all.

336. Further, the Imperial provision operates only where the effect of the arbitration agreement is to defer the accrual of the cause of action until an award is made: it would not apply where the accrual was deferred until the happening of some other event. Section 71 extends to the latter case.

337. Section 27 (2) of the Imperial Act of 1939 provides that, notwithstanding any term to the effect mentioned in paragraph 335 above, the cause of action is to be deemed to have accrued at the time when it would have accrued but for the term in the agreement, and this is to be so for the application of the Act not only to proceedings under the arbitration but also to an action. We see a danger in this that a *Scott v. Avery* clause may prevent the bringing of an action until after the expiration of the limitation period and, on a possible construction of section 27 (2), that an action on the award must be brought before the expiration of the limitation period, an event which may happen before the arbitrator makes his award. We confine section 71, therefore, to fixing the date of the accrual of the cause of action for the purposes only of the proceedings in the arbitration, and not for the purposes of an action on the award or for any other purpose.

### Section 72—Commencement

338. This section deals with the subject-matter dealt with by section 27 (3), (4) of the Imperial Act of 1939. There are differences in detail which a comparison of the provisions will disclose but it does not seem necessary to point them out expressly in this note.

### Section 73—Extension of limitation period

339. The corresponding English provision is section 27 (5) of the Imperial Act of 1939. The purpose of the section is to prevent the time spent in arbitration proceedings leading to a party being deprived of his remedies by the expiration of a limitation period.

## DIVISION 3—General

### Section 74—Set-off, etc.

340. For the present law of the limitation of actions in relation to set-off and counterclaim, see *McDonell & East Ltd v. McGregor* (1936) 56 C.L.R. 50. The only comparable provision in the present law is section 4 of the Imperial Statute of Frauds Amendment Act, 1828, which provides that the Imperial Limitation Act, 1623, and the Act of 1828 shall be applied to the case of any debt on simple contract alleged by way of set-off. The comparable present English provision is section 28 of the Imperial Act of 1939.

341. Section 28 of the Imperial Act of 1939 provides amongst other things that a claim by way of set-off or counterclaim is to be deemed to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded. In some cases a defendant may counterclaim against a person who is not a party to the original action: in such a case it is not right that the running of the limitation period should be stopped by the commencement of proceedings to which he is not a party. Section 74 provides that, in that case, the action against the new party is not to be taken to have been brought until he is made a party to the claim.

#### Section 75—Joint right

342. There may be procedural difficulties where the remedy of one of a number of joint creditors is statute-barred. Whether procedural difficulties do exist will depend on the statutes and rules of court regulating the procedure of the court in which the action is brought. It seems desirable to have a general provision in this Bill to meet a situation which the Bill would be likely to produce, for example, where an acknowledgment is made to one only of a number of joint creditors.

343. Where the persons having the joint right are trustees or partners the working out of their rights amongst themselves where one is statute-barred is not likely to be troublesome. Other cases are unlikely to be frequent. In any case, it would be going beyond the proper field of a limitation Bill to attempt to foresee, and to provide for, the cases where questions will arise between persons having joint rights.

#### Section 76—Joint liability

344. This section is complementary to section 75. Part of section 1 of the Imperial Statute of Frauds Amendment Act, 1828, is directed to the same problem. Compare, also, section 39 of the Common Law Procedure Act, 1899. Again, it seems useful to have a general provision to meet a situation which would be likely to arise under the Bill.

345. Here again one might apprehend difficult problems arising between persons having a joint liability where one has the benefit of a statutory bar and the other or others do not. However, the provision in the Imperial Act of 1828 does not appear to have caused trouble.

#### Section 77—Rules of Court

346. This section would enable procedures to be established for applications to the Court under the Bill. Subsections (2), (3), (4) are taken in substance from the Law Reform (Miscellaneous Provisions) Act, 1946, s. 4 (2), (3).

#### PROVISIONS OF THE IMPERIAL ACT OF 1939 WITH NO COUNTERPART IN THE BILL

347. The purpose of paragraphs 348 to 364 below is to specify the more important provisions of the Imperial Limitation Act, 1939, which have no counterpart in the Bill which we recommend. The headings below refer to the section, subsection, etc., of the Imperial Act of 1939 which is to be discussed and give a brief description of the subject-matter.

#### Section 2 (1) proviso—damages for personal injuries

348. This proviso was inserted by the Imperial Law Reform (Limitation of Actions etc.) Act, 1954, s. 2 (1). The effect of the proviso is to reduce from six years to three years the limitation period for an action for damages for negligence, nuisance, or breach of duty (statutory, contractual, or otherwise) where the damages claimed consist of or include damages for personal injuries. The proviso is based on a recommendation in the report of the Committee on the Limitation of Actions made in 1949 (the Tucker Committee; Cmd. 7740). The Imperial Act of 1954 also repealed the Imperial Public Authorities Protection Act, 1893, and other enactments fixing special periods of limitation.

349. We are not aware of any reasons for the reduction of the present period of six years to three years in New South Wales, except the obvious reason that it would be convenient to those who are likely to be defendants, or likely to be called upon to indemnify defendants, in such actions. The question must remain open for reconsideration when, as we propose to do, we consider the very large number of enactments fixing special periods of limitation for actions against public authorities and other persons. At present we do not recommend that the limitation period of six years for actions for damages for personal injuries be reduced.

#### Section 4 (1) proviso—Crown claim to foreshore

350. By this proviso an action by the Crown to recover foreshore may be brought at any time before the expiration of sixty years from the date of accrual of the right of action; and where a right of action to recover land, which has ceased to be foreshore but remains in the ownership of the Crown, accrued when the land was foreshore, the action may be brought at any time before the expiration of sixty years from the date of the accrual of the right of action, or thirty years from the date when the land ceased to be foreshore, whichever period first expires. This proviso has no counterpart in the present law of New South Wales and had none in England. It is not based on any recommendation of the Law Revision Committee in its Fifth Interim Report made in 1936 (the Wright Committee; Cmd. 5334). We are not aware of anything in the circumstances of New South Wales which justifies this change. We have therefore not put any corresponding provision in the Bill.

#### Section 6 (2)—Future estates and interests in land

351. This subsection has its origin in the second limb of section 2 of the Imperial Real Property Limitation Act, 1874. It has no counterpart in the present law of New South Wales. The effect of it is that where a person is entitled to a future estate or interest in land and the person entitled to the preceding estate or interest is not in possession on the date of its determination, the limitation period for the recovery of the land by virtue of the future estate is twelve years from the date of accrual of the right of action to recover the land by virtue of the preceding estate or interest or six years from the date of accrual of the right of action to recover the land by virtue of the future estate or interest, whichever period last expires. Cases to which the subsection would apply would be rare in New South Wales. Since the only effect of the subsection is to shorten the limitation period by a maximum of six years, we think that the provision is an unnecessary complication and we have therefore not put such a provision in the Bill.

#### Section 6 (3)—Reversion or remainder on estate tail

352. This subsection enacts that subsections (1) and (2) of section 6 shall not apply to an estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest. Section 4 (4) of the Bill would, we think, finally abolish estates tail: *see* paragraphs 42 to 49 above.

#### Section 6 (4)—Recovery of land by person taking under an assurance

353. This subsection provides that no person shall bring an action to recover an estate or interest in land under an assurance taking effect after the right of action to recover the land has accrued to the person by whom the assurance is made or by some person through whom he claims or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance is made could have brought such an action. The words about a person entitled to a preceding estate or interest have reference to section 6 (2) which, for the reasons given above, we do not reproduce. The remainder of section 6 (4) says again what has been said already in section 4 (3), that the time for bringing an action to recover land runs from the date on which the right of action accrues to the plaintiff, or, if it first accrues to some person through whom he claims, to that person. For these reasons we think it unnecessary to put in the Bill any counterpart of section 6 (4).

Section 7 (2)—Preservation of the title of a tenant for life or statutory owner of settled land

354. This subsection has no counterpart in the present law of New South Wales and had none in England. It deals with cases which may arise under provisions of the Imperial property legislation of 1925 which have not been adopted in New South Wales. We do not think that there is any need for a provision such as section 7 (2) in New South Wales.

Section 9 (4)—Tenancy provisions not to apply to the Crown

355. This subsection says that subsections (1) and (3) of section 9 are not to apply to a tenancy at will or lease granted by the Crown. Section 9 (1) has provisions relating to tenancies at will generally corresponding to those of section 34 of the Bill. Section 9 (3) deals with the case of rent paid by a tenant to the wrong person and generally corresponds to section 33 of the Bill. Section 9 (4) thus gives privileges to the Crown but, strangely as it seems to us, does not give a similar privilege in the case of a periodical tenancy granted by the Crown. No doubt circumstances in England required the allowance of these privileges, but we are unaware of any circumstances in New South Wales which so require. We therefore have not reproduced section 9 (4).

Section 11—Cure of defective disentailing assurance

356. This section has a counterpart in section 23 of the Imperial Real Property Limitation Act, 1833, which was superseded in England by section 6 of the Imperial Real Property Limitation Act, 1874. Having regard to the proposed final abolition of estates tail by section 4 (4) of the Bill (*see* paragraphs 42 to 49 above) there is no need to have a provision along these lines in the Bill.

Section 15—Administration to date back to death

357. This section enacts that for the purposes of the provisions of the Act relating to actions for the recovery of land and advowsons, 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 the letters of administration. There is a similar provision in section 6 of the Imperial Real Property Limitation Act, 1833, but this is limited to "chattels" of the deceased. Presumably section 6 of the Act of 1833 is concerned with leasehold land, which can be spoken of as a chattel interest. We think that section 44 of the Wills, Probate and Administration Act, 1898, covers the ground and there is no need for such a provision in the Bill.

Section 21—Limitation of actions against public authorities

358. This section fixed a special limitation period of one year for actions in respect of acts done under statute or any public duty or authority. It was repealed by the Law Reform (Limitation of Actions etc.) Act, 1954. We propose to deal with the question of special periods of limitation for actions against public authorities or other persons in a later report and we therefore make no provision for such matters in the Bill, except the saving in section 7 (a).

Section 22 (2)—Disability in personal injury cases

359. This subsection provides by paragraph (b) that in the personal injury cases for which the three-year limitation period applies (*see* paragraph 348 above), section 22, which deals with disabilities, is not to apply 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. This provision is obviously inappropriate in the case of an adult under mental illness: *see Kirby v. Leather* ([1965] 2 Q.B. 367, at pp. 383, 385, 386). But we think it inappropriate, also, in the case of disability by mere infancy. The law puts no duty on a parent to prosecute claims of this kind on behalf of his child and the child would have no redress if the parent allowed the claim to become statute-barred by failure to prosecute it. One can see that in the ordinary course of events a parent probably would prosecute such a claim but it is easy to imagine the case, which would not be uncommon, where the child not only has the misfortunes of being the child of an irresponsible parent and of suffering personal injuries, but also would have the added misfortune of his claim to redress becoming statute-barred as a consequence of the irresponsibility of his parent. For these reasons we have not included in the Bill anything corresponding to section 22 (2) (b) of the Imperial Act of 1939.



Section 23 (2)—Acknowledgment of reversion or remainder on estate tail

360. This subsection is ancillary to section 11 (*see* paragraph 356 above) and, for similar reasons, we make no corresponding provision in the Bill.

Section 25 (5) proviso, (6) proviso—Acknowledgment and payment on account of statute-barred debt

361. These provisos specify the persons to be bound by an acknowledgment or payment on account of a debt after the limitation period for an action for its recovery has expired. Under section 54 (1) of the Bill an acknowledgment or payment after the expiration of the limitation period would be of no effect. There is therefore no place in the Bill for provisions corresponding to these provisos.

Section 31 (5)—Reference to a right of action to recover land

362. By this subsection (amongst other things) references in the Act to a right of action to recover land include, in the case of rent charges, a right to distrain for arrears of rent, and references to the bringing of such an action include references to the making of such a distress. There is no need to say anything in the Bill about distress for rent because that form of distress was abolished by the Landlord and Tenant Amendment (Distress Abolition) Act, 1930.

Section 31 (7)—Meaning of expressions for the purposes of Part II

363. These are interpretative provisions which are not necessary in a Bill drawn on the scheme on which the Bill which we recommend is drawn.

General

364. The Imperial Act of 1939 contains provisions relating to spiritual and eleemosynary corporations sole (section 4 (2)), advowsons (section 14), the Duchy of Lancaster and the Duke of Cornwall (section 30) and tithes (section 31 (5)). There is no place for such provisions in the law of New South Wales.

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*APPENDIX D*

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## APPENDIX D

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