THE LEGAL EFFECTS OF THE PASSING OF TIME

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PART II**

The first part of this article considered the relevance to the limitation process of the distinctions between prescription and limitation, substance and procedure, right and remedy and the role played in the process by possession. There follows, in this part, a discussion of the legal bases of the limitation rules and the need for a general statute of limitations.

A STATUTE OF LIMITATIONS

What is a Limitation Provision?

The importance of the question goes to the consequences of the application of 'limitation' enactments. In particular the Limitation of Actions Act provides that it does not apply where any other limitation period is made applicable by another statute.[1]

Whether a 'time limit' is or is not a 'limitation' provision does not necessarily depend on whether it affects the remedy or the right, for both types of provisions are included within the Limitation of Actions Act. The question whether a provision limiting the time within which an action must be brought prescribes 'a period of limitation' would seem to depend on the purpose of that provision. In *Airey v. Airey*[2] the Court of Appeal held that a provision that a cause of action in tort must have arisen 'not earlier than six months before' a death did not prescribe a period of limitation. '[I]t imposes as a condition precedent to the maintainability of an action . . . that the tort should have been committed' within six months of the death.[3] It was not a period within which action must be taken. But, the Court held, a second requirement that the action was not maintainable unless proceedings were started not later than six months after the representation was taken out 'clearly imposes a period of limitation'.[4]

Such a distinction seems perfectly valid. The purpose of limitation rules is to give legal sanction to a factual situation by terminating an existing right and creating a new one. The requirement that a cause of action must *arise* within a certain period of time has nothing to do with the principles on which the fate of existing causes of action are decided.

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** Part I appears p. 407 *supra*.

1 Limitation of Actions Act 1958, s. 33.

2 [1958] 2 Q.B. 300.

3 *Ibid.* 310.

4 *Ibid.*

A somewhat different distinction having the flavour of the right/remedy dichotomy has been drawn by some members of the High Court. In *The Crown v. McNeil*[5] the Court was asked to construe a requirement of the Crown Suits Act 1898 of Western Australia that no claim under a specified part of the statute could be enforced unless a petition was filed within twelve months after the claim arose. It was held that the requirement (in the words of Isaacs J.) 'differs fundamentally from our ordinary Statute of Limitations'. It laid down a condition for the enforcement of a claim under the statute whereas the limitation statute took from a person 'something he already has independently of that statute'.[6] In *Australian Iron and Steel Ltd. v. Hoogland*[7] Windeyer J. summed up the distinction:[8]

> It may be that there is a distinction between Statutes of Limitation, properly so called, which operate to prevent the enforcement of rights of action independently existing, and limitation provisions annexed by a statute to a right newly created by it. In the latter case the limitation does not bar an existing cause of action. It imposes a condition which is of the essence of a new right.

The distinction drawn is on its face dependent on whether the 'time limit' is created with the right, but the relevance of this factor to limitation principles is difficult to appreciate. As Windeyer J. says, limitation provisions affect existing causes of action. But this surely means *actually existing rights*. The fact that the provisions enabling such rights to exist and applying time limits thereto are enacted at the same time is neither here nor there.

Whatever its merits, a distinction can no doubt be drawn on the basis that some limitation provisions affect the right and some the remedy. Such a contrast appears in the Limitation of Actions Act itself between the provisions referring to interests in land and chattels and the provisions referring to other specific causes of action.[9] But it is difficult to appreciate how the distinction is drawn in substance between a limitation provision 'properly so called' and one such as appeared in the Western Australian Crown Suits Act requiring that a petition must be filed within a specified period of time.

Any distinction there may be must depend on the wording of the particular provision and its purpose to be gathered from its context. A provision such as that considered in *The Crown v. McNeil*[10] would not

[5] (1922) 31 C.L.R. 76.
[6] *Ibid.* 100. The same distinction was drawn by Knox C.J. and Starke J. *ibid.* 96.
[7] (1962) 108 C.L.R. 471.
[8] *Ibid.* 488. *Cf. Maxwell v. Murphy* (1957) 96 C.L.R. 261. The distinction was recognised by the Scottish Court of Session in *M'Elroy v. M'Allister* [1949] S.C. 110. *Cf. Davis v. Mills* (1904) 194 U.S. 451.
[9] Contrast Limitation of Actions Act 1958, ss 6(2), 18, 'title . . . shall be extinguished' with s. 5 '[t]he following actions shall not be brought. . . .'
[10] (1922) 31 C.L.R. 76.

seem to be distinct in concept from the provision labelled in the judgment as one of limitation.

It has been contended that the distinction between an essential condition of a right and a provision affecting its enforcement (or the distinction between right and remedy) is unsound. But if we are to have it, let it be based on understandable principles.

The Category Framework

> Statutory provisions imposing time limits on actions take various forms and have different purposes. Some are for preventing stale claims, some for establishing possessory titles, some for the protection of public authorities, some in aid of executors and administrators.

So Windeyer J. has described the limitation process.[11]

A major defect in our limitation process is just this variety of statutory provisions involving the grouping of various causes of action according to quite differing criteria. It adds up to a series of individual rules in an area which could, it is suggested, be arranged in a pattern. The words of Windeyer J. should not be accepted as an introductory general review but as showing the need for a detailed examination of the categories adopted and their operative criteria.

The Real Property Limitation Act 1833 (Eng.)[12] provided for postponement of the accrual of actions within that enactment 'in every case of a concealed fraud'.[13] The English Limitation Act of 1939 was enacted following the recommendations of the Wright Committee which reported in 1936.[14] One of those recommendations, duly enacted, was that the equitable rules applicable to fraud and mistake should apply to all actions within the Act.[15] It has been said that a wide interpretation of the provisions relating to mistake would deny the general principle (of the common law) that ignorance of the existence of a cause of action does not prevent time from running.[16]

The possibility that a fundamental principle of the limitation process may or may not operate illustrates the defective state of the rules concerning limitation. The English statute of 1939 modernized and co-ordinated rules some of which were statutory and some of which were based wholly on judicial decision. But neither the Act nor the report which led to it brought to the area an examination of the nature of the process.

[11] *Australian Iron and Steel Ltd. v. Hoogland* (1962) 108 C.L.R. 471, 488.
[12] 3 & 4 Will 4 c. 27.
[13] S. 26.
[14] *Fifth Interim Report (Statutes of Limitation) of the Law Revision Committee* (1936) Cmd 5334.
[15] *Ibid.* paras 22, 23. Limitation Act 1939 s. 26. S. 24 of the Victorian Limitation Act 1958 is identical with s. 26 of the English Act.
[16] Franks, *Limitation of Actions* (1959) 206-7. As to the general principle *cf. infra* n. 91.

The Victorian Limitation of Actions Act 1958,[17] at present in operation, is based on the framework of the English enactment of 1939. Persistence in basing the rules on legal categories necessitates a piecemeal approach which has been accentuated by the entire exclusion of a number of equitable actions from the scope of the Act.

In 1967 the Law Reform Commission of New South Wales recommended a comprehensive Bill updating and consolidating the limitation rules of that State.[18] In 1969 the Bill was enacted as recommended.[19] Again, the framework of the English Act of 1939 has been adopted.[20] Although the Commission in a full report recommended far reaching changes in particular areas, it retained the category approach. Although the statute, following the Commission's recommendations, provides that in all cases the expiry of the limitation period affects both rights and remedies,[21] no attempt is made to examine the relationship between prescription, adverse possession and extinguishment of rights.[22] Some actions for equitable relief are excluded[23] and provision is made for the extension of the limitation period in certain cases where there is fraud or mistake.[24]

There seems no reason why the limitation process should not be based on one or two general rules applicable to all causes of action with exceptions where a particular type of action calls for a particular rule. If the basic principle were acquisitive and all rules related to rights, the remaining general issue would be simply the length of the applicable period. Other factors may be relevant to particular categories, for example the requirement of adverse possession for the loss of an interest in a physical thing or the fact that the action is against an executor. But such additional or exceptional rules could be justified in principle because of criteria which distinguish them from the general pattern.

The present process is made up of rules of prescription, acquisition of similar rights and extinguishment of remedies. Except within the area of prescription there is no general application of a limitation period but rather rules applying particular periods to particular categories of causes of action. In some instances the categories are based on the legal basis of the cause of action. So there are listed actions founded on contract and

[17] No. 6295. It incorporates the three-year period applicable to certain actions for damages for personal injury introduced by the English Limitation Act 1954.

[18] *Report of the Law Reform Commission on the Limitation of Actions* (L.R.C. 3) (1967). *Cf. Report on Limitation of Actions of Ontario Law Reform Commission* (1969).

[19] Limitation Act 1969. The Act will come into force on 1 January 1971.

[20] *Report* (L.R.C. 3) para. 10.

[21] Limitation Act 1969 ss 63-8; *Report* (L.R.C. 3) notes paras 306-23.

[22] The Commission's terms of reference were 'to review the law relating to the limitation of actions, notice of action and incidental matters'. It recommended the exclusion from the Act of easements and profits and most incorporeal hereditaments without giving reasons (see s. 11(1)—definition of 'land').

[23] Limitation Act 1969 s. 23; *Report* (L.R.C. 3) notes para. 132.

[24] Ss 55, 56; *Report* (L.R.C. 3) notes paras 268-70.

tort[25] and actions relating to trust property.[26] In other cases the categories are based on the degree of formality attached to a particular obligation (for example, actions upon a specialty).[27] In others still, the subject matter of the action allied with its purpose is the criterion, (for example, actions to recover land,[28] or actions to recover damages for personal injuries).[29]

The New South Wales Law Reform Commission did not discuss the value or desirability of the retention of this approach or the principles on which it depends. The acceptance by the Commission in large measure of the English framework effectively removed from its consideration fundamental questions relevant to the limitation process. The result is that while the Limitation Act 1969 (N.S.W.) contains many changes from the Victorian and English provisions, they all remain within a similar framework. That framework has hardly been examined.

There are four main aspects of the present piecemeal approach:

(i) the appearance of some general limitation provisions in statutes other than the general statute and the exclusion from the process of some equitable actions entirely;

(ii) the distinction drawn between prescription and limitation of actions;

(iii) the role of equity in the limitation process;

(iv) the categories to which the limitation periods are attached.

(i) NEED FOR A GENERAL STATUTE

The English and Victorian statutory scheme limiting the ability to bring proceedings bears a heavy historical imprint. The Victorian provisions contained in the Limitation of Actions Act 1958 and enacted in substance in 1955[30] show very little departure from the English Limitation Act enacted in 1939[31] as amended by the Law Reform (Limitation of Actions) Act 1954. As has been said, the English Act incorporated many of the recommendations of the Wright Committee, and brought together rules found in various statutes of varying antiquity.[32] But rules limiting the

[25] Limitation of Actions Act 1958, s. 5(1)(a); Limitation Act 1969 (N.S.W.), s. 14(1)(a)(b).

[26] Limitation of Actions Act 1958, s. 21; Limitation Act 1969 (N.S.W.), ss 47, 48.

[27] Limitation of Actions Act 1958, s. 5(3). The Limitation Act 1969 (N.S.W.) retains the category in principle but defines it as 'by deed' (see ss 14(1)(a), 16). The Wright Committee recommended 'instrument under seal'.

[28] Limitation of Actions Act 1958, ss 7-18; Limitation Act 1969 (N.S.W.), ss 27-39.

[29] Limitation of Actions Act 1958, s. 5(6); Limitation Act 1969 (N.S.W.), s 57-62.

[30] Limitation of Actions Act 1955.

[31] Limitation Act 1939.

[32] *E.g.* Limitation of Actions Act 1623 (21 Jac. 1 c. 16); Crown Suits Acts 1769 (9 Geo. 3 c. 16); Statute of Frauds (Amendment) Act 1828 (9 Geo. 4 c. 14) s. 1; Civil Procedure Act 1833 (3 & 4 Will. 4 c. 42) ss 3-7; Real Property Limitation Acts 1833 (3 & 4 Will. 4 c. 27) and 1874 (37 and 38 Vict. c. 57); Mercantile Law Amendment) Act 1856 (19 and 20 Vict. c. 97) ss 9-14; Public Authorities Protection Act 1893; Trustee Act 1888 (51 and 52 Vict. c. 59) ss 1, 8; Arbitration Act 1934.

bringing of tortious actions against a deceased's estate and wrongful death actions were left in their respective statutory niches.[33] Similarly, the rules applicable to actions for wrongful death and actions against an executor or administrator are not found in Victoria in the Limitation of Actions Act 1958. The limitation period relevant to wrongful death actions is specified in the Wrongs Act 1958.[34] The limitation period relevant to actions against executors and administrators is set out in the Administration and Probate Act 1958.[35]

The substantive effect of this separation of limitation rules is (without specific contrary provision) that the provisions of the Limitation of Actions Act relating to extension of the limitation period have no application.[36] There seems no reason why all the general limitation rules could not be gathered together in one code. Although the relevant provision of the Administration and Probate Act 1958 has been recently amended,[37] there was no attempt to bring it within the Limitation of Actions Act. The New South Wales statute, on the other hand, while abolishing a special limitation period relating to actions against executors and administrators, includes provisions relating to wrongful death.[38]

(ii) PRESCRIPTION AND LIMITATION OF ACTIONS

The rules of prescription are directed at the acquisition of an interest. The rules of limitation of action are directed at the extinguishment of a right or remedy.

(a) Prescription

Prescription is essentially a simple doctrine. It is a means of acquiring a right by long user. Prescription was recognized as a means of acquisition of a right in the middle ages by the common law.[39] Unlike limitation of actions however, apart possibly from an Act of 1540, it was not the subject of statutory provision until 1832, when the Prescription Act intended to simplify a situation complicated for historical reasons, merely caused further complications.[40]

[33] Law Reform (Miscellaneous Provisions) Act 1934 (Eng.), s. 1(3) as amended by s. 4 of the 1954 Act; Fatal Accidents Act 1846, s. 3 as amended by s. 3 of the 1954 Act. The Limitation Act 1963 (Eng.), s. 3 enables the court to extend the period in certain cases of ignorance of material facts.

[34] S. 20.

[35] S. 29(3) as amended by No. 7296 of 1965.

[36] See N.S.W., *Report of the Law Reform Commission on the Limitation of Actions* (L.R.C. 3) (1967) para. 34. The introduction in England by s. 4 of the Limitation Act 1963 of a special limitation period for actions for contribution between tortfeasors is subject to the provisions for extension of the period on the grounds of disability, fraud and mistake contained in the 1939 Act (see 1963 Act s. 4(3)).

[37] *Supra* n. 39.

[38] S. 19, *Report* (L.R.C. 3) notes paras 34, 35, 39, 41. The statute includes a special period for action for contribution between tortfeasors (see s. 26; *Report* (L.R.C. 3) notes paras 154-60).

[39] Pollock and Maitland, *History of English Law* (1923) ii. 141 *et seq.* *Cf* generally Salmond, *Essays in Jurisprudence and Legal History* 'Essay II—The History of Prescription'.

[40] Holdsworth, *History of English Law* vii. 350-1.

Originally, prescription could be of either a right concerned solely with persons or a right attached to seisin of land. The basis of the claim to the former was use by the claimant and his ancestors; to the latter (which was called 'in the que estate') use by the claimant and his predecessors in title to the land.[41]

Although in early law prescription may have applied more widely,[42] it has for long been confined to 'incorporeal hereditaments'. The type of prescription now relevant (that formerly attached to seisin) is not, despite its simple core, a principle of acquisition dependent only on user for a period of time.[43] For example, it presupposes a grant. It is therefore only a secondary means of acquisition in the sense that one of the characteristics of the right acquired must be that it is capable of being the subject of a grant at common law. Further, the user must be without permission, openly and without force. The basis of the doctrine, because of these requirements, is much closer to acquiescence than to a simple legal recognition of a factual situation which has continued for some time. It emphasizes rather the holder's sleeping on his rights than difficulty of proof or passage of time. At one time it required 'immemorial user'. This was fixed in the thirteenth century as user from 1189.

The consequences of this in England were twofold. On the one hand, if the requirement was taken literally, the burden of proof on a claimant was impossible to discharge, and on the other hand it was only against the holder in fee simple that the principle could operate. The former defect was to some extent dealt with by statute and the judicial invention of the fiction of the lost modern grant. The courts would, if there had been user for twenty years (and provided that the alleged right was capable of existing as the interest alleged, for example as an easement or profit), presume the grant had been made and lost. It has been argued that the year of 1189 was fixed as that from which user must be proved by analogy with a requirement imposed by the Statute of Westminster in 1275 that a writ of right would lie only in respect of an entry made after 1189. If, it is then said, the courts had continued to apply analogies with succeeding statutes of limitation, the requirement of twenty year user would have been reached by that course.[44]

The literal requirement of immemorial user could have prevented the admission of prescription as a means of acquisition of right in Australia except by statute.[45] But in 1904 the High Court, taking a substantive

[41] Salmond, *op. cit.*
[42] Pollock and Maitland, *op. cit.*
[43] For the requirements generally, see *Gale on Easements* (13th ed. 1959) ch. IV.
[44] Holdsworth, *op. cit.* iii. 166, vii. 343-4.
[45] As has been done by following the English Prescription Act in Tasmania (Prescription Act 1934) and adopting it in Western Australia (see Act 6 Will. IV. No. 4). The English Act appears to extend to South Australia (see *White v. McLean* (1890) 24 S.A.L.R. 97).

rather than technical view, held that the English common law in 1828 was that enjoyment for twenty years was a ground of prescriptive title. In *Delohery v. Permanent Trustee Co. of New South Wales*[46] the Court held that an easement of light could be acquired in this way in New South Wales. The English common law rule was not merely a 'law of local policy' and therefore applied.[47]

(b) Limitation of Actions

In contrast to the history of prescription, the principles of limitation of actions are statutory in origin. Today the general provisions in each state are in the main gathered together,[48] with specific provisions applicable in particular situations appearing in statutes dealing with those situations. As has been said, the Limitation Act 1969 (N.S.W.) is more comprehensive than statutes of other states.

The earliest limitation statutes in England, The Statutes of Merton (1237)[49] and Westminster (1275)[50] imposed limits on the bringing of real actions.[51] No other relevant statute was enacted until 1540[52] when a statute again fixed periods within which the real actions could be brought. In 1623[53] the period of limitation was set at twenty years for the action of ejectment[54] and periods were specified for the first time in relation to personal actions.[55]

Until the Real Property Limitation Act 1833 (Eng.)[56] the rules extinguished remedies only. The consequence was that if the holder of the right managed to persuade the person under the obligation to comply with it his title was secure; or, if a person dispossessed obtained possession peaceably after the limitation period had expired, he regained his former right. With the exception of actions relating to the recovery of land and to the conversion or detention of goods this pattern is maintained today. So, a statute-barred debt may be set off against a general legacy and has been held to attract probate duty as 'property', a mortgagor might be made to pay statute-barred interest in order to redeem, and money paid in relation to an enforceable debt may be applied by a creditor to a statute-barred debt.[57]

The English Act of 1833 provided for the extinguishment of title to land on the expiry of the limitation period.[58] The Limitation Act 1939 (Eng.)

[46] (1904) 1 C.L.R. 283.
[47] *Ibid.* 310-1.
[48] *Cf.* Jackson, *Principles of Property Law* (1967) 267-8.
[49] 20 Hen. III c. 8.
[50] 3 Edw. I c. 39.
[51] *Cf.* Pollock and Maitland, *op. cit.* ii. 51, 81.
[52] Act of Limitation (32 Hen. VIII c. 2).
[53] Limitation of Actions Act (21 Jac. 1 c. 16).
[54] *Ibid.* s. 1. *Cf.* Bl. Comm. iii. 306-7.
[55] *Ibid.* s. 3.
[56] 3 & 4 Will. 4 c. 27.
[57] See *supra.*
[58] S. 34.

provided likewise in relation to chattels on the expiry of the limitation period for the bringing of actions for conversion or detention.[59]

There are no provisions specifically relating to acquisition of title. But an interest in land cannot be lost unless a party has been in 'adverse possession' for the required period of time.[60] In this respect therefore, the loss of an interest depends on a specified connection of another person with the land. As 'possession' is a root of title, the holder of the interest cannot lose it unless another person has an interest in it. The loss of the holder's interest simply gives greater force to the possessor's interest. The requirement does not apply to chattels. The Victorian legislation is based on identical principles.[61]

Salmond maintained that the distinction between prescription and extinction of rights has nothing to do historically with the distinction between corporeal and incorporeal things.[62] The root of the distinction he says, lies in the difference between rights which were of the common law and those which were thought of as *contrary* to it. So the basis of a claim to an estate in fee simple recognized by the common law was simply seisin. But the basis of a right contrary to it (an encumbrance, presumably, in modern terminology) was immemorial seisin.

But today prescription is tied to the classification of 'incorporeal hereditaments' as a category of rights.[63] Whatever its historical basis as an independent principle, the present justification for its continuance as such must be found in some element relevant to the modern limitation process.

(c) Why the Distinction?

It is difficult to distinguish analytically today between 'incorporeal' and 'corporeal' legal 'things'. An easement is an incorporeal hereditament but a lease is an interest in corporeal land. Yet both indicate rights over land and limited interests can be held in both. The incorporeality indicates only the somewhat uncertain distinction between the holding and use of a corporeal 'thing' and the holding of an interest in that 'thing'.

The distinction between easements and profits and rights over land which require possession has been defended on logical and practical grounds. Blackstone argues that as regards the latter 'more certain evidence may be had', but the right to enjoy the former can be established on nothing else but immemorial usage'.[64] But this relates only to the grounds of establishing the right and not to the nature of the right itself. Somewhat more recently it has been emphasized that easements and

[59] S. 3(2).
[60] *Ibid.* s. 10(1).
[61] Limitation of Actions Act 1958, ss 6(2), 14, 18.
[62] *Supra* n. 43.
[63] *Cf. supra.*
[64] Bl. Comm. ii. 264.

profits are *'in iure aliena'*, in contrast to the exercise of rights over land in one's own possession.[65] But with respect, even if the phrases used are considered as general definitions this is no distinction at all. The distinction depends on the premise that (colloquially) the land 'belongs' to someone and that his right is more powerful in some way than any right which others have in relation to 'his' land. Both the holder of the interest in a lease and the holder of an interest in an easement exercise a right in relation to the land. The only distinction is that the former is more general in content than the latter. But this is no basis for the application of different principles especially as regards acquisition by usage. For whether the interest be that of a fee simple or an easement the claim is the same *viz* that by continual user a title has been lost and gained.[66]

(iii) THE ROLE OF EQUITY IN THE LIMITATION PROCESS

Our present statute attempts to deal generally with common law actions, but with only some of the actions having their root in equity. However, the equitable rule that in certain cases the presence of fraud or mistake would extend the period applies to all actions within the statute.

(a) Equitable Causes of Action

Before the 1939 enactment the only English limitation statutes which by their provisions applied to equitable actions were the Real Property Limitation Acts of 1833 and 1874. Yet courts of equity applied the principles of the statute of 1623 and the Civil Procedure Act 1833 (Eng.), sometimes 'in obedience' to the statutes and at other times acting 'by analogy' with them.[67]

There is some dispute as to where the line between acts of obedience and analogy was or should be drawn. One theory would make it depend on whether the matter fell within the sole jurisdiction of equity. If it did the statute would be applied only by analogy. If it was within the jurisdiction equity exercised as auxiliary to or concurrently with the common law courts, the courts of equity were obliged to follow the statutes. An alternative view was that the courts of equity would 'obey' the statutes wherever they would follow common law, whether or not the matter was solely within the equitable jurisdiction.[68] According to this view, therefore, the statutes had a wider area of operation but their actual application was subject to refusal to apply the rules in a particular case on the ground that it would be inequitable to do so.

[65] Goodman, 'Adverse Possession or Prescription—Problems of Conflict' (1968) 32 *Conveyancer and Property Lawyer (New Series)* 270.

[66] The English Law Reform Committee in its *Fourteenth Report* (1966) Cmnd 3100 unanimously recommended the abolition of prescription as means of acquisition of profits and by a small majority its abolition with respect to easements. Those recommending the retention of prescription as regards easements would simplify the requirements but retain the acquisitive effect. For the arguments see particularly paras 30-8.

[67] See generally Brunyate, *Limitation of Actions in Equity* (1932) ch. 1.

[68] *Ibid.*

The English enactment of 1939[69] and the Victorian Act of 1958[70] make no attempt to fuse the common law and equitable jurisdictions. Actions for equitable relief are excluded from the ambit of the provision specifying limitation periods for contractual, tortious and other specified 'personal' actions. These periods apply, therefore, only as corresponding prior enactments would have been applied—'by analogy'.[71] Actions against fraudulent trustees or against a trustee in respect of property or proceeds converted to his use are not barred at any time.[72] Restrictive covenants are apparently not within the statute.[73] But the Acts apply (following the provisions of the Real Property Limitation Act 1833 (Eng.)) to any 'equitable estate or interest' in land as they would to a legal estate in land.[74] Apart from the trust actions specified as excluded, a six year period is applied to actions by a beneficiary to recover trust property or in respect of breach of trust where no other period is applicable.[75] In addition, the equitable view of the effect of fraud and mistake was adopted.[76]

The rules are all the direct result of historical development. Each exemption and inclusion can be traced to the views taken by the courts of equity towards the limitation statutes of the seventeenth and nineteenth centuries. But the question is whether the earlier approach should continue to govern. The New South Wales Law Reform Commission recommended that limitation periods should apply to all trust actions, and that a period of twelve years should apply to those actions outside the scope of the Victorian statute.[77] Otherwise the role of equity ought to remain as it is in Victoria.[78]

It should be stressed that the statutes specifically provide that the limitation provisions do not affect 'any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise'.[79] Construing the provision as referring to equitable bars based on lapse of time, it continues the equitable discretion to bar a plaintiff either because of delay or conduct giving the impression that the right will no longer be enforced. However, where equitable relief is requested to enforce a legal right, delay in bringing proceedings will not of itself bar the remedy. The court will act by analogy with the limitation period which would apply to

[69] Limitation Act 1939 (Eng.), s. 2(7).
[70] Limitation of Actions Act 1958, s. 5(8).
[71] *Ibid.*
[72] Limitation of Actions Act 1958, s. 21(1). As to other actions concerning trust property see *ibid.* s. 21(2). The provisions are identical with s. 19 of the English Act of 1939.
[73] *Cf.* Franks, *op. cit.* 247. But it is difficult to see why they are not within the provision relating to 'interests in land'.
[74] Limitation of Actions Act 1958, s. 3(1) (definition of land), s. 11(1). *Cf.* Limitation Act 1939 (Eng.), ss 7(1), 31(1).
[75] *Supra* n. 77.
[76] Limitation of Actions Act 1958, s. 27; Limitation Act 1939 (Eng.), s. 26.
[77] See *Report* (L.R.C. 3) paras 230-7; Limitation Act 1969, ss 47-8.
[78] *Ibid.* s. 23.
[79] Limitation of Actions Act 1958, s. 31; Limitation Act 1939 (Eng.), s. 31.

the legal remedy. The court will also act 'by analogy' where the equitable remedy is thought to correspond with the legal.[80]

It has been said that the historical controversy over the equitable application of limitation principles 'is now only an academic one'. In every case where the court formerly acted 'in obedience' to the statute it now acts in *express* obedience. The field in which the court acts 'by analogy' with the statute has also been narrowed by the inclusion in the Act of cases 'proper to be the subject of a statutory limitation but formerly not within any Limitation Act'.[81]

It is difficult to appreciate how the enactment of the modern Limitation statutes has rid the law entirely of the importance of equity's earlier approach. Actions for equitable relief which are based on contract, tort or other specified grounds are excluded from the statutes' operation. It is clear that the controversy affects actions within that area (for example, an action for equitable damages). The question remains relevant therefore whether equity would necessarily apply or not apply the limitation rule according to the nature of its jurisdiction over the issue, or whether it would act according to its principle of following the common law. Whether the question *should* now be relevant is a different matter.

Apart from the inclusion of mortgages of personal property within the provisions relating to recovery of money secured by a charge, the field of 'analogy' would not seem to have been narrowed to any great extent by the 1939 enactment. The older statutes, however, did widen the area covered by that provision to include some matters originally outside.

The inclusion of equitable interests in land, while meaning that any action to recover an interest in land is within the Act, simply applies the provisions of the 1833 Act. If anything it narrows the type of case to which the Act will apply. The earlier statute provided that any claim to any interest in land in equity had to be made within the statutory period applicable to legal interests.[82] By referring specifically to 'equitable interests' the present legislation would effectively seem to exclude cases such as *Inwards v. Baker*[83] and *Errington v. Errington and Woods*.[84] In those cases the claim was to possession of land. It was an equitable claim to a proprietary interest in land but not a claim to an equitable interest. It can, however, be argued that the cases are outside both enactments being equitable claims concerning land but not (technically) to an 'interest in land'. If this be so, no limitation provision applies.

It has also been said that 'there still does remain the large field in which a rigid statutory period of limitation is inappropriate'.[85] But this is surely

[80] Franks, *op. cit.* 244-6.
[81] *Preston and Newsom on Limitation of Actions* (3rd ed. 1953) 257.
[82] See s. 24.
[83] [1965] 2 Q.B. 29.
[84] [1952] 1 K.B. 290.
[85] Preston and Newsom, *op. cit.* 257.

questionable. The acceptance of the principles of laches and acquiescence does not necessarily mean that a statutory period of limitation should not also be applicable. Both laches and acquiescence require more than the simple passage of time to be established. Acquiescence requires conduct which amounts to consent to the removal of a right from its holder. Laches 'ordinarily' requires at least knowledge by the holder of the existence of the facts which are the source of the right.[86]

If the principle of the barring of right by the mere passing of time is accepted, it is difficult to appreciate why some actions for equitable relief are excluded. It may well be that in certain circumstances an action may be barred or a right extinguished at a point earlier than the statutory time limit because of the conduct of the person entitled to it. But what reason is there for not applying the general time limit to equitable actions?

There seems no reason why the ability to obtain specific performance or an injunction should not be as limited by the passing of time as the ability to obtain damages, nor why limitation provisions should apply in some cases to these modes of relief and not in others. There is no relevant fundamental distinction between either the remedies or the types of action calling for such a differentiation. Simply because the earlier statutes of limitation were confined to common law is no reason why some types of relief should now be excluded. Such exclusion should require strong justification. Yet there seems none except historical development.

(b) Fraud and Mistake

In 1939 the Wright Committee recommended the extension of the equitable rule that fraud or mistake could postpone the start of the period until the claimant had a reasonable chance of discovering the cause of action.[87] This is now the English and Victorian rule[88] and is enacted by the Limitation Act 1969 (N.S.W.).[89]

The Wright Committee gave only one substantive reason for this particular recommendation apart from that of reduction of complication. Discussing both actions based on fraud and actions concealed by fraud it said 'it is obviously unjust that a defendant should be permitted to rely upon lapse of time created by his own misconduct'.[90] This argument was simply applied without discussion to actions for relief from the consequences of mistake. Making the scope of their recommendation plain

[86] *E.g. Lindsay Petroleum Co. v. Hurd* (1874) 5 P.C. 221, 241. And it is hardly conceivable that equity would apply the doctrine in any case of faultless ignorance.
[87] *Fifth Interim Report (Statutes of Limitation) of the Law Revision Committee* (1936) Cmd 5334 paras 22, 23.
[88] *Supra* n. 81.
[89] Ss 55, 56. *Cf. Report* (L.R.C. 3) paras 268-73. S. 55 provides for the extension of the period where a person fraudulently conceals his identity. The English provision has been held not to cover this, *R.B. Policies at Lloyds v. Butler* [1950] 1 K.B. 76.
[90] (1936) Cmd 5334 para. 22.

the Committee emphasized that 'the mere fact that a plaintiff is ignorant of his rights is not to be a ground for the extension of time'.[91]

The English and Victorian provisions follow these recommendations. Where the action is based upon, or the right of action is concealed by the fraud of the defendant or his agent, or the action is for relief from the consequences of a mistake, the limitation period starts only when the plaintiff could 'with reasonable diligence' have discovered the fraud or mistake. The extension of the period where fraud conceals the accrual of the cause of action is an understandable limitation on the principle that rights are lost simply by the passing of time. But extensions because actions are based on fraud or mistake are more difficult to justify. Apart from necessary consequential problems of interpretation,[92] 'fraud' is defensible on the ground that the defendant's conduct causes the situation to be set apart from the general run. But it is arguable that 'fraud' is no more reprehensible than (for example) a deliberate act causing injury. In cases of mistake there is not even this possible justification. The Wright Committee's only reason for extension of the period on the grounds of fraud and mistake is relevant strictly only to situations where a cause of action is concealed by the defendant's acts.

It is hardly consistent with the basic limitation principle to justify these extensions on the basis that it may be more likely that the plaintiff would not know of the cause of action. Yet this seems to be the only reason for the provisions. If the principle of the plaintiff's knowledge or chance of knowledge should be adopted then it should be adopted generally. There is nothing in actions based on fraud or mistake to distinguish them *as such* from other causes of action for limitation purposes. Just as the equitable doctrines of fraud and mistake were generally adopted, so the principle of laches and acquiescence could, in effect, form our limitation rules. But there is simply no reason today to apply different statutory rules to different remedies on the basis of the legal/equitable distinction.

(iv) CATEGORIES GOVERNING THE LIMITATION PERIOD

The Present Pattern

The Victorian legislation follows the English in form and content. The basic framework, as has been said, is that of the English Limitation Act of 1939 enacted following the report of the Wright Committee.[93] In its

[91] *Ibid.* para. 23. The N.S.W. Commission offer no reasons for the adoption of these provisions.

[92] As to the meaning of 'fraud' within the section see *Beaman v. A.R.T.S., Ltd.* [1949] 1 K.B. 550. To bring an action within the provision fraud must be an essential ingredient *(ibid.). Cf. R.B. Policies at Lloyds v. Butler* [1950] 1 K.B. 76. Pearson J. has held that a similar restriction applies to the 'mistake' provision. See *Phillips-Higgins v. Harper* [1954] 1 Q.B. 411. It is arguable that this is too restrictive, see Franks, *op. cit.* 206-7.

[93] (1936) Cmd 5334.

deliberations, the Committee subdivided the subject matter of the various statutes which were before it. The Committee considered common law actions, actions for the recovery of land, actions against public authorities, actions to recover money charged on land, judgments and legacies, actions concerning trustees and equitable remedies. Some equitable actions were excluded from the statute, and the limitation rules applicable to actions for wrongful death and actions against a deceased's estate were not included in the general statute. The equitable rules extending the limitation period in certain cases of fraud and mistake were generally adopted. The limitation periods specified in the Act were attached to particular categories of causes of action. The categories were defined by differing criteria.

In discussing common law actions the Committee considered whether a more flexible system of limitation rules should be introduced. It was thought that two possible methods were either to confer on a court a general jurisdiction to extend a period or to provide that the period should start only on the discovery of a cause of action. The Committee concluded that any advantages of these proposals were outweighed by the certainty which the more rigid system supplied.[94]

The English statutory limitation provisions were substantially amended in 1954[95] following (after some little time) the report of the Tucker Committee.[96] Special periods of limitation applicable to public authorities were abolished and the limitation periods applicable to wrongful death actions and actions against a deceased's estate extended. A new category of certain causes of action for damages for personal injury was introduced and the limitation period formerly applicable to these as common law actions reduced from six to three years.

The limitation period applicable to this last category was made more flexible by the Limitation Act 1963 following the report of the Edmund Davies Committee.[97] Under that statute an action may be brought outside the limitation period by leave of a court where the plaintiff satisfies the court that his ignorance of a material fact prevented him bringing the action within the period.

The Limitation Act 1969 (N.S.W.) does for that State what the Limitation Act 1939 did for England. It gathers together varied limitation rules and, in addition, includes those rules referred to above which still escape the general rubric in Victoria and England. It also deals with the matters covered by the English Limitation Act 1963.[98]

[94] *Ibid.* para. 7.
[95] By Law Reform (Limitation of Actions) Act 1954.
[96] *Report of the Committee on the Limitation of Actions* (1949) Cmd 7740. See also the *Report of the Monkton Committee on Alternative Remedies* (1946) Cmd 6860 para. 107.
[97] *Report of the Committee on Limitation of Actions in Cases of Personal Injury* (1962) Cmnd 1829.
[98] Ss 57-62. *Cf.* N.S.W., *Report* (L.R.C. 3) para. 13.

The Law Reform Commission, the deliberations of which led to the statute, differed from the Victorian approach in a number of fundamental general matters.[99] The Commission's recommendations and the resulting statutory provisions also contain a number of specific changes from the rules at present operating in Victoria. First, on the expiry of the limitation period, the right and not merely the remedy is extinguished.[1] Second, an ultimate bar of thirty years from the accrual of the cause of action is proposed, so that even where the curtain is not rung down because of the presence of some particular factor the right will nevertheless in time be extinguished.[2] Third, a period of limitation is proposed for actions against trustees whether or not the trustee has been fraudulent.[3] Fourth, in a rational approach to limitation of actions based on a mortgage, the rules are proposed on the basis that a mortgage is principally a loan of money.[4] Finally, the statute applies more widely the principle that the limitation period should not start until the person entitled to the cause of action has had a reasonable chance to discover its existence.[5]

Despite these considerable changes in view the Bill continues to tread the historical path along which the Victorian and English legislatures have ambled. It is understandable that the early English statutes were drafted in procedural terms, and, perhaps that the Courts of Chancery should hesitate before applying to equitable claims rules specifically referring to forms of actions at common law. But the continuation of the approach is open to question.

The procedural emphasis has had two results.[6] It has assisted the development of the theory that the expiry of the limitation period removed only the remedy and not the right, and it has meant that the general approach to limitation questions has been through the various categories of action. The introduction of the principle of extinguishment of right in regard to actions for the recovery of land by the Real Property Limitation Act 1833 (Eng.) imported a flavour of the real and personal distinction into the limitation process. This was affected but not obliterated by the extension of the principle to chattels in 1939.

The Limitation Act 1969 (N.S.W.) abolishes the remains of the distinction between right and remedy by extinguishing the right in all cases. But the statute retains the procedural flavour. While forms of action are no longer specified, particular legal categories remain the grounds for

[99] See generally *ibid.* paras 13-8.

[1] See Part I of this article.

[2] S. 51; *Report* (L.R.C. 3) notes paras 240-1. As the Commission points out there is an ultimate bar in the English (and Victorian) statutes on actions to recover land or money charged on land (see Limitation of Actions Act 1958, s. 23(1)(c))

[3] S. 47; *Report* (L.R.C. 3) notes para. 230.

[4] See *Report* (L.R.C. 3) notes paras 214, 215.

[5] As in the widening of the provision concerning fraud and in personal injury cases.

[6] *Cf.* Jenks, 'A Blind Spot in English Law' (1933) 49 *Law Quarterly Review* 215.

the application of particular limitation periods. There is no change in this respect from the present English and Victorian provisions. Further, the classification, as in England and Victoria, is based on a number of diverse grounds. Apart from the proposals concerning mortgages the Commission's report contains no discussion of the desirability of this approach.

The limitation scheme, insofar as there is one in the Victorian and English statutes, provides for three principal limitation periods. In Victoria these are three, six and fifteen years. Broadly speaking the longest of these periods applies to actions to recover land and certain other specific actions—actions on specialties or judgments and an action in respect of a claim to the personal estate of a deceased person.[7] The period of six years applies to actions founded on simple contract or tort, some actions to enforce an award, actions to recover any sum recoverable by virtue of an enactment, actions to recover arrears of interest, actions for accounts, actions to enforce recognizances and those actions with respect to trust property to which any limitation period is applied.[8] The period of three years, although it applies only to limited types of actions, applies to so many situations that it must be regarded as a principal period. It applies to actions

> for damages for negligence nuisance or breach of duty . . . where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person.[9]

Where a death is relevant to an action for damages the period of limitation in some cases is measured from the death. So in Victoria a 'wrongful death' action by relatives of the deceased must be commenced within three years of the death.[10] An action in tort against a deceased's estate if not pending at the death may be brought either within the period which would have been applicable had the deceased been living or, if not barred at his death, within six months of the personal representative taking out representation.[11]

Extension of the Period

The periods specified in the Limitation of Actions Act 1958 may be extended in certain cases of fraud and mistake. Other grounds of extension are, in some cases, acknowledgment of the obligation and disability of the plaintiff.[12] In addition, the English courts have power under the 1963 enactment to extend the period of three years where the claim is for damages for personal injury in cases of the plaintiff's ignorance of a material fact.

[7] Limitation of Actions Act 1958, ss 5(3), 5(4), 8, 15, 22.
[8] *Ibid.* ss 5(1), 5(2), 5(7), 21(2).
[9] *Ibid.* s. 5(6).
[10] Wrongs Act 1958.
[11] Administration and Probate Act 1958, s. 29(3) (as amended by No. 7296 of 1965).
[12] Limitation of Actions Act 1958, ss 23-6.

The Limitation Principles

Any classification of causes of action for limitation purposes must be with the three basic limitation principles in mind.[13] First, it is clear from the present rules that the essential element of the present process is the removal of a right by the passage of time. It is simply a legal recognition of a factual situation. With some exceptions, the principle that the holder has slept on his rights is not adopted as fundamental. Any difference in the length of the periods must depend on the differing value placed by the legal system on the rights to which the periods apply. If it is accepted that the prerequisite of knowledge of a right must give way to the legal recognition of a factual situation it is difficult to extend the period in any particular case *only* because in that case the right is more likely not to be known. But it is not difficult to admit the principle of a reasonable chance of knowledge as a *general* prerequisite for the loss of rights or as a ground for discretionary extension of the period.

The other principal element to be considered is the evidence on which a decision of the dispute will depend. So in 1949 the Tucker Committee recommended a shortening of the limitation period applicable to actions for personal injuries. It was desirable, said the Committee, that such actions be brought to trial quickly 'whilst the evidence is fresh in the minds of the parties and witnesses'.[14] But it could be argued that such actions may now have to be brought before the damage can accurately be assessed, or indeed, even appreciated. And it has been found necessary in England to provide for an extension of the period where a claimant does not know of material facts.[15] It could be said also that the Committee's reason for its recommendation applies to any case where the evidence is other than written.

The type of evidence available is, in part, the reason for the distinction drawn between actions founded on simple contract and actions upon specialties. The Wright Committee recommended that the distinction be between instruments under seal and simple contracts. In its view, firstly, a person should be able to protect a right from limitation and secondly, there were cases in which the right was not known. The Committee thought it would be inconvenient if, for example, loans granted on bonds had to be called in within six years where the interest is waived.[16] The Limitation Act 1969 (N.S.W.) draws a similar distinction.[17]

It is not easy to appreciate why a person should be able to protect a right from limitation unless the right is one which because of its nature

[13] See Part I of this article p. 409 *supra*.

[14] (1949) Cmd 7740 paras 22, 23. The Committee did recommend a period of two years with a discretion in the court to increase it to six.

[15] The Limitation Act 1969 (N.S.W.) does not provide for a three-year period in these cases. The Commission saw no reason for it. See *Report* (L.R.C. 3) notes paras 348, 349.

[16] (1936) Cmd 5334 para. 5.

[17] In terms of Contract/deed. See ss 14(1)(a), 16; *Report* (L.R.C. 3) notes paras 113, 114.

should not be limited. Nor is the possibility of non-discovery any more relevant to this particular cause of action than any other. The Commission and the Wright Committee clearly took the view that formality enables a longer period to be set. But the distinction would seem more sensible in limitation terms if it were based on the difference between written and oral transactions. Although the Commission placed weight on the 'formality' aspect of a deed, the importance for limitation purposes would seem to lie less in the degree of formality adopted than in the evidence made available. It is however more than possible that oral evidence would be relevant even where the action is based on a deed and the presence of writing cannot of itself be taken as necessarily overcoming the objection of difficulty of proof.

The three principles all play a part, therefore, in the present limitation process. While the basic principle is a 'certain end to litigation', not sleeping on rights and difficulty of proof are matters which are relevant in assessing when that end should be imposed. The length of a particular period should be based on the conscious decision that one or the other principle is called for in the particular context.

The main distinguishing criteria adopted by our present rules are the legal nature of the action and the purpose of the action (in the sense of the relief sought). So, for example, actions of contract and tort (nature) are limited by the six-year period, and actions for the recovery of land (purpose) by the fifteen-year period. Sometimes the two types of interest overlap, for example, claims in respect of personal injuries based on 'negligence nuisance or breach of duty' and actions to recover money secured by a mortgage or charge.

Prima facie the limitation period would seem to depend on the value of the interest affected. In addition to the nature and purpose of the cause of action, the particular remedy sought, the object in which the interest exists or the formality of the transaction which is the root of the right affected are other possible grounds of distinction. But as with the application of the three basic principles, the particular distinctions adopted should be justified on grounds relevant to the process.

The inevitable danger of listing particular causes of action is that some will be omitted or that the list will become outdated. Quasi contract is omitted from the Victorian legislation, although the statute includes within contract 'contract implied by law'. The English courts have construed quasi contractual claims as falling within 'contract' on the basis that they have a common basis in actions on the case.[18] The New South Wales statute repairs the omission. It perhaps is time for the Victorian statute to recognize the cause of action which Lord Wright in 1942 called a third class of obligation apart from contract or tort.[19] A large

[18] *In re Diplock* [1948] Ch. 465, 514.
[19] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 62.

category which is ignored is that of estoppel rights. We have already referred to the question whether such rights in relation to land could be classified as actions to recover land. They may in some cases be caught by the provisions excluding actions for equitable relief, but the nature and purpose of the cause of action are ignored.[20]

The possible omission of some causes of action or the necessity to apply outdated concepts provides substantial grounds for questioning the category approach. The differing criteria adopted lend further support.

Criteria of the Categories

Some categories specify their criteria by their definition, for example, claims in respect of personal injuries. In others they are necessarily implied by the selection of a particular element as relevant to the application of a specific rule. Where a death is relevant to an action, that death has in some cases been specified as relevant to the limitation process. In both types of cases the issue is the same, *viz* whether the criterion selected is relevant to the process, and, if relevant, justifiable as part of the pattern of the process.

We have already commented on the variety of categories and the differing nature of principles on which the categories are based. There is nothing inherently wrong with such a system. But it raises the questions not only of the need for the category approach but of whether any of the varying types of criteria should be selected as that on which to build the limitation process. We have suggested a general limitation statute based on acquisition of rights specifying a limitation period applicable to all causes of action unless otherwise stated. The present categories refer *(inter alia)* to the subject matter with which the action is concerned, the relief claimed, the legal basis of the action and specific factual elements connected with the action. Also relevant may be the identity and nature of the parties. Any or all of these criteria may be retained but only, it is suggested, for the reason that an action so defined is distinct in some way relevant to the limitation process. There must be some element in the factors relevant to the cause of action which makes it desirable that the period is longer or shorter than the general period. The justification for some of the present categories is doubtful.

(a) WHERE A DEATH IS RELEVANT TO THE PROCEEDINGS

The date of death is adopted as the starting point of the limitation period for wrongful death actions by Victoria, England and New South Wales. In this case, the action does not exist until the death. The only

[20] An action would be within the exclusion provision only if it falls within certain categories (in Victoria specified in Limitation of Actions Act s. 5, as to which *cf. supra* nn. 14-6). As to the general difficulties of classifying for limitation purposes *cf. Hall v. National and General Insurance Co. Ltd.* [1967] V.R. 355, 367; *Chesworth v. Farrar* [1966] 2 All E.R. 107.

point of policy is whether the nature of the action justifies a longer period of limitation (as it starts not from the date of injury but date of death) than similar types of action where the plaintiff lives. Actions arising out of the same set of facts distinguished only by the identity of the plaintiff will be subject to a limitation period starting at the date of injury. An action may be brought for and against a deceased's estate and, apart from tort, the usual limitation rules apply. In these cases the death is not taken to be a relevant factor. Does the nature of the relative's action take the case out of the general rule?

A special rule applies to actions in tort which survive *against* the estate of a deceased person. Until 1965 in Victoria it was required that either (i) proceedings were pending at date of death or (ii) proceedings were brought within six months of the taking out of representation.[21] The rule has been amended by adding the general limitation period as a third alternative.[22] The New South Wales Commission recommended that no special rule apply to these cases.[23] It is, however, arguable that the failure to take out representation may cause the action to become statute-barred. Is not the retention of this alternative therefore justifiable?[24] If it is justifiable it is difficult to appreciate why the provision is limited to tortious actions. If the fact of death and its consequences on legal proceedings is relevant to tort it is hard to see why it is not relevant to other causes of action. The ability to sue the deceased's estate was originally framed in procedural terms and geared to actions in trespass or trespass on the case 'for any wrong committed . . . in respect of' the plaintiff's property real or personal.[25] The generalization of the ability to sue has not been accompanied by a generalization of the limitation provision.

(b) CLAIMS IN RESPECT OF PERSONAL INJURIES

In introducing a limitation period of three years the 1954 enactment specified particular causes of action, *viz* negligence, nuisance, or breach of duty, although 'breach of duty' is a catch-all phrase. It added the criterion of the purpose of the action, 'damage for personal injury'. The 1963 enactment allows this shorter period to be extended by the court on the basis rejected by the Wright Committee, namely ignorance of the facts which would establish a cause of action. The wording of the 1954 enactment (faithfully repeated in both the 1963 Act and the Victorian statutes of 1955 and 1958) caused two particular problems. One was raised by the setting out of particular causes of action. The other was the

[21] Administration and Probate Act 1958, s. 29(3).
[22] Administration and Probate (Surviving Actions) Act 1965, s. 2.
[23] Report (L.R.C. 3) notes paras 39-41.
[24] The Commission addressed all its arguments to the requirement of the N.S.W. legislation that the action must be brought within 12 months of representation being taken out, (see *ibid.* paras 39-41).
[25] Civil Procedure Act 1833 (3 & 4 Will. 4 c. 42). s. 2.

scope of the provision which was specified as claims 'including' a claim for damages for personal injury.

The Law Reform Commission of New South Wales refused to follow the English and Victorian statutes insofar as they provide for a three-year period but adopted with some modification the principle of extension of period as embodied in the 1963 Act.[26] Following the Commission's views the Limitation Act 1969 (N.S.W.) provides for the ability to extend the period where an action is founded on 'negligence nuisance or breach of duty for damages for personal injury'.[27]

The Commission considered the two particular problems caused by the wording of the English and Victorian enactments. The possible exclusion of a cause of action by the listing of others was the issue in the Victorian case of *Kruber v. Grzesiak*[28] and the English case of *Letang v. Cooper*.[29] In both it was held that trespass to the person was included within breach of duty, and that 'negligence' included actions of trespass in which negligence was an essential ingredient. The New South Wales statute spells out that breach of duty includes trespass to the person.[30]

Insofar as the extension of the period applies to personal injury actions,[31] it was not enough for the Commission that the claim 'includes' damages for personal injury. It must be a cause of action for damages for personal injury. The Commission thought there were no grounds for the reduction of the limitation period from six years in cases where claims 'included' damages in respect of personal injuries except 'the obvious reason that it would be convenient to those who are likely to be defendants'.[32] But it did accept that there were grounds for the extension of the six-year period in personal injury actions.

The Commission therefore rejected the Tucker Committee's view that this type of action was distinguished from others because of the desirability of rapid trial. But it accepted the Edmund Davies Committee's recommendations and added a ground of its own as a justification for providing for discretionary enlargement of the six-year period. In its view, in the great majority of personal injury cases within the provision, the defendant will be indemnified by insurance, and the burden of a claim will therefore 'be widely spread over the community'.

It may be arguable that the number of persons sharing the burden is a relevant element to consider when assessing the balance between plaintiff and defendant. It does not, however, answer the problem of difficulty

[26] *Report* (L.R.C. 3) notes paras 272-93, 348-9.
[27] S. 58(1).
[28] [1963] V.R. 621.
[29] [1965] 1 Q.B. 232. *Cf. Long v. Hepworth* [1968] 1 W.L.R. 1299.
[30] S. 57(2).
[31] It applies also to 'wrongful death' actions (see s. 60).
[32] *Report* (L.R.C. 3) notes para. 349.

of evidence, and it may be thought that it is in just these cases that this difficulty is particularly marked.

However, the principal argument against the Commission's reason for singling out these actions is that the criterion involved is not adopted as the basis for the extension. If 'insurance' is the ground then surely insurance should be the criterion. The New South Wales proposals may well penalize the non-insured, and there is certainly no examination of whether this is a defensible legal policy.

The Commission, in effect, allows a longer limitation period in particular cases of personal injury actions than in others of the same class. Again, the only justification appears to lie in some characteristics of these actions relevant to limitation distinguishing them from the others. One is left to wonder what it is.

The general questions raised by the formation of this category remain. The Tucker Committee based its recommendation for the shortening of the period on the need to bring the action to trial quickly. We have already suggested that this is not particularly convincing as a basis for the selecting of this particular group of actions as against others. The Commission's comment that in its view the only reason for shortening the period was convenience for defendants does not seem very wide of the mark.

In 1962 the Edmund Davies Committee, in recommending a discretionary enlarging of the three-year period in particular cases, gave no reason why this should apply only to cases of personal injury or why they should form an exception. After reviewing the type of circumstances which cause a plaintiff to lose a right of action before he knew he had one, the Committee set out the three major limitation principles and stated that it was 'convinced that some amendment to the law is called for'.[33] The Committee interpreted its terms of reference to include cases of imperceptible injury and 'concealed causation' (that is, where a person knew of the injury but not its cause). But it thought that cases where the plaintiff's ignorance was due to an external fact (such as the identity of the person causing the damage) were excluded from its consideration. The Committee's view was that the last type of case called for no special treatment in the personal injury area, and thought that there was a practical distinction between that type and those which it was considering. In the cases where ignorance was due to lack of knowledge of the injury or cause of injury the injustice caused by the rigid period would be inevitable.[34]

The inevitability argument hardly stands in the light of the Committee's recommendations that one prerequisite for the enlarging of the period is that the plaintiff 'could not reasonably have been expected to

[33] (1962) Cmnd 1829 paras 17, 18.
[34] *Ibid.* para. 18.

discover' the injury or its cause.[35] It may be said that the three-year period itself justifies the discretionary ability to extend. But apart from that,[36] the only possible justifications it would seem are the nature of the cause of action, the type of remedy or the purpose of the action. Of these, only the purpose of the action has any relevance as a distinction for limitation purposes. But whether there is a sufficient distinction between that group of actions and others is doubtful.

(c) ACTIONS FOR THE RECOVERY OF LAND

The actions within this category are claims to obtain an interest in land by virtue of a judgment of the court.[37] We have already referred to the distinctions between such actions and actions brought in respect of chattels so far as the requirements of adverse possession are concerned. There is no corresponding category as regards chattels or intangible objects, and in this respect the rules are faithful to the old distinction between real and personal property. The provisions relating to extinguishment of title to chattels are phrased in the procedural terms of the ability to bring an action in respect of the conversion or wrongful detention of a chattel, and there are no specific references to actions brought in respect of intangible objects.

A claim to obtain an interest in land could be founded on contract and conceivably on tort, and therefore attract two different limitation periods. It seems as though the distinguishing feature of the category of recovery of land is its historical source of ejectment. It may be that there is a 'limitation' distinction to be drawn between the loss and acquisition of 'title' or a primary relationship and the loss or acquisition of a particular right or cause of action whatever the nature of the thing in which the interest is held. But the influence of historical development is such that the rules remain governed by the old distinctions between the forms of action. Instead of distinctions based on the value of the interest, the rules still depend on the land/chattels distinction. Interests in other objects are simply ignored as such and are treated still as particular rights. It can also be argued that within the 'title' area an interest in land is more valuable than an interest in other objects. But let the distinctions be based on modern rather than feudal criteria.

(d) ACTIONS TO RECOVER MONEY SECURED BY A MORTGAGE OR CHARGE

This category raises the questions (a) whether actions to recover money secured by a mortgage are, because of the security, distinguished from other types of debt; and (b) whether the action to recover the money is,

[35] *Ibid.* para. 44(c)(i).

[36] It will be recalled that the Limitation Act of 1969 (N.S.W.) provides for a discretionary extension of a six-year period (see *supra*).

[37] *Williams v. Thomas* [1909] 1 Ch. 713, 730 *per* Buckley L.J.

for limitation purposes, distinct from other actions relevant to the mortgage.

The present rules have their origin in the Real Property Limitation Act 1874 (Eng.). In that statute[38] and in the Victorian statutes prior to that of 1955,[39] the provision was confined to mortgages of land or rent. The Wright Committee recommended that the rules be extended to mortgages of personal property.[40] Other mortgage actions where the security is land are classified as actions to recover land or treated as such. A foreclosure action is stated to be such an action.[41] Redemption actions are specifically dealt with within the category.[42] An action by the mortgagee for possession would fall within the general definition.

The Limitation Act 1969 (N.S.W.) treats mortgages as a separate category with its focal point on the recovery of the principal and interest.[43] On this basis all other remedies are ancillary, and the limitation periods are fixed accordingly. The latter approach is based on an analysis of the mortgage as a legal relationship. Unlike the Victorian legislation, it prescribes the limitation rules according to the analysis.

The New South Wales approach seems more relevant to limitation issues. The starting point in a limitation scheme should surely be the relationship or interest which is the basis of the claim. Concentration on a particular form of relief claimed rather than the relationship to which it is relevant is likely, as the New South Wales view shows, to mean that the major aim of the relationship is ignored.

Conclusion

It is difficult to see the relevance to the limitation process of distinctions based *only* on the legal basis of a right, the purpose of a cause of action, or the type of 'thing' to which the right relates. It is questionable whether substantive distinctions relevant to limitation issues can be drawn between the various types of relief. It is hard to appreciate why a longer period, for example, should apply to an action for recovery of an interest than to an action for damages or to an action to recover money rather than for an injunction. It makes little sense to draw such distinctions without referring to the particular legal relationship at issue.

The question then remains of the value of that relationship so far as the limitation process is concerned. On this approach the limitation scheme could, after adopting a general rule, make exceptions in relation to particular types of legal relationship. For example, is a 'mortgage' a relationship which calls for special rules or would rules relating to

[38] S. 8.
[39] Property Law Act 1928, s. 304.
[40] (1936) Cmnd 5334 para. 10.
[41] Limitation of Actions Act 1958, s. 20(4)(a).
[42] *Ibid.* s. 15.
[43] See Limitation Act 1969, Division 4; *Report* (L.R.C. 3) paras 214, 215.

relationships created by deed suffice as an exception? Do 'trusts' form a category which calls for special rules?

The Victorian limitation scheme shows little evidence of being the result of a rational rather than an historical and largely unoriginal approach. The scheme should, it is suggested, focus on legal relationships and take note of the difference between the relationship on which rights are based and those particular rights. Not only would this put the limitation process on an organised footing but rid us of such distinctions as are based only on outdated procedure.

SUMMARY

It is suggested that the rules relating to extinguishment and acquisition of interests should be re-examined, and that there is little reason for the three major distinctions in approach.

To adopt the prescriptive approach would simply be to acknowledge that a right can be transferred in this area as in others without the holder's consent. It would avoid the complications which follow from the preoccupation with adverse possession. To recommend the prescriptive approach is necessarily to support the suggestion that the process should be geared to rights and not remedies, but that suggestion is also made independently of the primary submission. Even if neither of these views were to be supported it has been argued that the effect of the limitation process, whether it refers to remedy or right, is substantive. But it has also been suggested that the labels of substance and procedure are unhelpful.

Within the process, the role of possession has been questioned, and a general statute of limitations urged. This statute should include equitable as well as legal causes of action, and should not be based on the 'category' approach. The present grouping of actions should be jettisoned, the scheme focussed on legal relationships, and any departure from the general rule justified by criteria relevant to the limitation process.

There can and should be a *limitation process;* at present there are a large number of *rules* distinct largely because of historical development. It is respectfully suggested that the area is ripe for reform.