THE LEGAL EFFECTS OF THE PASSING OF TIME

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ABANDONMENT, ACQUIESCENCE AND PASSING OF TIME

Our legal system accepts the proposition that rights can be transferred without the holder's consent. He may find that they have been transferred because, for example, they are defeasible by definition as are equitable interests. Or the rights may be vested in another because of his conduct.

Rights may also be extinguished by the simple passing of time. But in this instance the legal system concentrates mainly on the termination rather than the transfer of the rights.

The failure to enforce a right over a period of time may be (a) a conscious positive abandonment of the right, (b) a negative acquiescence in its non-enforcement, (c) the creation of a situation in which because of his conduct the holder should not be allowed to enforce his rights and (d) inaction from which no consent to loss of the right should be implied.

The recognition of the passing of time as the basis for loss of rights implies necessarily that conscious action is not required. But this does not mean that the principles relevant to one are, or should be, entirely independent of the other. In both cases the holder's rights are defeated without his consent and in both cases the essential question is what happens to those rights.

(i) *Abandonment and Acquiescence*

A holder consciously surrendering his rights may act deliberately to abandon his rights or simply acquiesce in their destruction.

Acquiescence is a well established principle of acquisition of rights in equity and therefore relates to 'transfer'.[1] Abandonment in this context is, therefore, another label for acquiescence.[2] The basis of loss and acquisition is the holder's conduct.

But abandonment can refer to unilateral action by the holder and, as such, it raises the problem of the consequences of that action. What happens to the right?

Where the right is in an incorporeal 'thing' such as a copyright, the essential question relates to the ability to abandon rather than the consequences of abandonment. The existence of the 'thing' depends on the

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[1] *E.g. Willmott v. Barber* (1880) 15 Ch. D. 96.

[2] *Ibid.* 105-6. The principle seems nothing more than an extension of estoppel. See *Hopgood v. Brown* [1955] 1 W.L.R. 213; *Ramsden v. Dyson* (1866) L.R. 1 H.C. 129.

existence of a right which in turn depends on the existence of a holder. But where the 'thing' in which the right exists is corporeal, the legal system, based as it essentially is on physical consequences, must take legal cognisance of the physical entity. There is therefore, in this instance, the possibility of a 'thing' in which no person has any rights existing within the legal system. Perhaps understandably, our legal system is not over enthusiastic about such 'things' and apparently admits their existence only in the case of animals.[3] Animals might never be subject to any rights, or may become so subject and later revert to their former state. But in almost all other respects a physical thing is never a *res nullius*.[4]

But this does not mean that a person cannot unilaterally abandon rights—only that a thing cannot become one in which no interest at all is held. There are, therefore, provisions for the vesting of interests where no holder exists according to all other rules.[5]

Further, the objection to total abandonment does not apply to the abandonment of limited interests such as an easement or a bailment.[6] Such interests are akin to, and in some ways can be analysed as, incorporeal things. Their existence depends on the existence of a holder. Take him away and, without express provision by the legal system, there is nothing left. If, as is the rule, abandonment of a limited interest has the effect of enlarging the greater interest hitherto encumbered, abandonment takes on the appearance of transfer.

The ability to abandon an interest may be qualified where responsibilities or liabilities are imposed on the holder as characteristic of the interest. This, presumably, is relevant to the rule that there can be no abandonment of *all* the interest in a thing, and also operates to prevent unilateral abandonment of, for example, a lease.[7] Where the interest is purely a privilege (say, an easement), the rules equate abandonment with acquiescence by the holder of the interest. Unless the interest depends on actual usage, mere non user is not sufficient. There must be acts from which the court either can construe 'consent', or can find the conduct is such that the holder should not be allowed to deny that he has 'acquiesced' in the surrender or abandonment.

[3] *Reeve v. Wardle* [1960] Qd. R. 143.

[4] Jackson, *Principles of Property Law* (1967) 126-7. A lien may be 'abandoned' (*Vaines on Personal Property* (4th ed. 1967) 137-8), but the term is used there in the sense of surrendering one interest through acquisition of another. As to abandonment in insurance law, *cf.* Goff and Jones, *The Law of Restitution* (1966) 388-9.

[5] *E.g.* Administration and Probate Act 1958, s. 55.

[6] Although an easement is called an 'incorporeal' thing, a bailment (or leasehold) is not usually viewed in this light. Yet both are interests in a physical thing. Differences may arise in the possible divisibility of interests within the easement, bailment or leasehold but they do not affect the essential similarity. If there is a distinction it goes to content of the right; bailments and leaseholds are rights of general user easements rights of particular user.

[7] *Cf.* Megarry and Wade, *Law of Real Property* (3rd ed. 1966) 674.

[8] *I.e.* where the root of the interest is possession or user.

(ii) *Passing of Time*

Three principles have been advanced as the basis of the limitation process

(i) that holders of rights should not sleep on their rights,[9]

(ii) that the longer the period of time after a dispute arises the more difficult the questions of proof,[10]

(iii) that at some stage the factual *status quo* should be recognized—the limitation enactments are 'statutes of repose'.[11]

Unless the first principle is adopted as fundamental, the principles of abandonment and acquiescence do not form necessary prerequisites for extinguishment. But there remains the problem of what happens to the right.

Our limitation process is made up of three distinct areas. Firstly, the 'open ended' area where a right is lost or fundamentally changed; secondly, an area where a right similar to that lost is acquired by a person acting inconsistently with the right; thirdly, where the person acting inconsistently acquires a positive right. Looked at from the acquiring person's standpoint he acquires, in the first case, a right *correlative* to that lost (for example, a debt), in the second, a right *similar* to that lost (for example, the possession of land), and in the third, part of the holder's interest (for example, an easement).[12]

CORRELATIVE AND SIMILAR RIGHTS COMPARED

The correlative right is acquired as an automatic consequence of a loss; or the acquisition is simply the removal of an obligation. In this instance the loss and acquisition are complementary parts of a unitary process. But the acquisition of a similar right requires a 'transfer'. In this instance therefore the acquisition does not necessarily follow from the loss. They are two distinct steps and there may be loss without acquisition.

[9] *E.g. Board of Trade v. Cayzer Irvine and Co.* [1927] A.C. 610, 628. Lord Atkinson there expressed the view that the 'whole purpose' of the limitation enactment of 1623 was to deprive persons who have good causes of action 'of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them'. In *R. B. Policies at Lloyds v. Butler* [1950] 1 K.B. 76, 81, Streatfield J. thought that this was but one policy of the statutes, the other being that there shall be an end of litigation and that protection shall be afforded against stale demands'. *Cf. Cholmondeley v. Clinton* (1820) 2 Jac. & W.1, 140, *per* Plumer M.R.

[10] *E.g. Jones v. Bellgrove Properties Ltd.* [1949] 2 K.B. 700, 704, *per* Lord Goddard C.J. In *White v. Parnther* (1829) 1 Kn. 179, Lord Wynford, delivering the advice of the Privy Council, gave this as one of the principles of the statutes of limitation; but also called them 'laws of peace and justice', referring to the 'cruelty' of taking away property from a person who had for long held it.

[11] *Doe & Durore v. Jones* (1791) 4 T.R. 301, 308, *per* Lord Kenyon C.J. See also *Court v. Cross* (1825) 3 Bing. 329, 332 *per* Best C.J.; *White v. Parnther* (*supra*); *R. B. Policies v. Butler* (*supra*), *cf. Cholmondeley v. Clinton* (1820) 2 Jac. & W.1, 140.

[12] A right acquired may be both similar and correlative as where a landlord's rights are extinguished in favour of a tenant.

Abandonment of a right is permitted only where the necessary conse quence is acquisition. But extinguishment is permitted even though th consequence is a 'right free' thing that is, where the loss does not resul in the enlargement of a superior interest or the acquisition of a corre lative.[13]

The distinction between the acquisition of correlative and similar right is, it is suggested, fundamental in any analysis of our limitation process The tendency is, by concentrating on the right lost, to equate situation which differ essentially as to the right acquired.

A limitation process must take account of the consequences of ex tinguishment. However, present rules do this, if at all only as a subsidiar question. The starting point of a cohesive limitation process must b the analysis of its effect in the light of its purposes, and this can be don only by reviewing the entire process of extinguishment and acquisition.

THE LIMITATION PROCESS AS THE BASIS OF TRANSFER

Where a correlative or a similar right to that lost is acquired, the pro cess emphasizes extinguishment. It is a fundamental principle that tha which is lost is *not* that which is acquired.[14] The transaction is a takeove rather than a transfer.

But in one area usage for a period of time creates a right just as if th right had been transferred. The area is limited to incorporeal heredita ments (mainly easements and profits) and the principle involved is 'pre scription'.[15] The rules in this area have gone to the opposite extreme t those in the areas of correlative and similar rights. Whereas in the latte areas the continual emphasis is on the non-identification of the acquire with the defeated right, in the prescriptive area the requirements for 'trans fer' include capacity of the holder to transfer as though the usage was i fact a transfer. As it is deemed to be a transfer, ancillary rules a imported.

Whether the differing types of approach should be retained is open t question. The different points of emphasis are, perhaps, a result of unde playing the multiple character of the limitation process and the isolatio

[13] An interest in land may not be lost unless a person is in 'adverse possession' the land. (See Limitation of Actions Act 1958, s. 14(1), (2)), and therefore there c be no 'right free' land, but the loss of an interest in chattels occurs on the expi of the limitation period 'in respect of the conversion or wrongful detention' of t chattel. (See Limitation of Actions Act 1958, s. 6.) There is no requirement of a person having an interest in the chattel.

[14] This *is* a necessary consequence where a correlative right is acquired. As to t acquisition of a 'similar' right *cf. St. Marylebone Property Co. Ltd. v. Fairweath* [1963] A.C. 510.

[15] As to other incorporeal hereditaments *cf.* Megarry and Wade, *op. cit.* 786 'Rent charges' are the only interest of this category within the Limitation Act (s. (1) 'land') and it seems unclear whether prescription can also apply to them.

of 'prescription' as a principle of acquisition of rights.[16] The refusal to view the process as a whole as a mode of transfer unduly complicates a perfectly simple and clear method of acquisition of rights; and we shall see how the courts have created further difficulties by qualifying the nature of the extinguishment.

It would seem that there is little reason why the prescriptive principle could not be extended to include at least the acquisition of all positive rights. It is arguable that an 'acquisitive' approach helps less in the case of acquisition of correlative rights. But even in this area, the question of the enforceability of that which is gained is relevant, as an essential question for the beneficiary is against whom he can resist a claim.

THE LIMITATION PROCESS — ACQUISITIVE OR EXTINCTIVE?

'Non-Exercise of Rights' as a Uniform Principle

While the extinguishment of a right necessarily involves questions of acquisition, concentration on extinguishment may be adequate where acquisition is restricted to a negative correlative. But once it is conceded that some kind of positive right is acquired it becomes totally inadequate to ignore the nature of the right acquired. According to our limitation process extinguishment occurs in interests in land and interests in chattels. But only as regards some interests in land (incorporeal hereditaments) is an acquisitive principle wholly adopted.

Where a right similar in nature to that lost may be acquired, the question arises of the connection between the non-exercise of claim rights and the loss of the interest to which those rights relate. Should the interest in fee simple be defeated through failure to exercise the right to take proceedings in respect of any interference with that interest? One adverse act may raise only the question of the extinguishment of the right of enforcement relevant to that specific act. But continuous adverse acts may defeat the interest as a whole. The limitation rules must therefore provide not only for the denial of each claim right but the conditions for the denial of the whole interest.

If non-exercise of enforcement rights is retained as the governing principle even where on expiry of the limitation period the interest which is the basis of those rights is lost, the consequences of the extinguishment are left in the air. In particular the danger of a *res nullius* arises. If the principle of non-exercise is rejected there seems little reason why the limitation process should not be recognized generally as acquisitive. The expiry of the limitation period should have the effect of a transfer.

[16] As to the distinct historical development of prescription and limitation of actions see *infra*.

'Acquisition' as a Uniform Principle

As we have said it is essential to decide what is to be acquired. Wher all that is acquired is a negative correlative the 'acquisitive' approac serves only to emphasize this result. But where a positive right of a simila nature to that lost is acquired, it is only by emphasizing the acquisitiv part of the process that limitation rules can be made to fit into the leg system as a whole. It is necessary to decide therefore, the nature of th right which is acquired, any formalities necessary for its acquisition an the relationships which can be acquired.[17]

NATURE OF RIGHT ACQUIRED

We have already suggested that the prescriptive principle should b generally applied. The necessary consequence is that the holder's intere or part of it is transferred to the beneficiary of the passing of time. Th would mean no change of present approach in the areas of incorpore hereditaments and in those cases where a negative correlative is acquire But it would alter the approach to interests in land other than incorpore hereditaments and, it would seem, interests in chattels.

In the areas of land and chattels the limitation process has moved aw from the rule that the correlative right only is acquired. But it continu to concentrate on extinguishment, and provides only that on the expiry the limitation period, title is extinguished.[18] In the result there is the poss bility of a chattel which is a *res nullius,* and complications already r ferred to resulting from the lack of contact between the extinguishment one right and the acquisition of another arise.

In order to prevent the possibility of *res nullius* where a right may l lost without it being acquired by another, it must be possible to create a interest simply by actions relevant to the 'thing'. The legal system has be prepared to defend possession of physical things as against those with r claim, and it is perhaps not surprising that acts of possession took on a ro in the limitation process.

Possession forms the basis of protection against third parties indepen ently of the process.[19] Within the process, taking possession is the type 'inconsistent act' which eventually results in extinguishing the holde rights.

[17] The suggestion of a uniform acquisitive principle does not mean either that acts necessary to create it should be of the same nature in each case or that limitation periods should be of the same length. Within a registration scheme would form the basis for a claim to registration.

[18] Limitation of Actions Act 1958, ss 6(2), 18.

[19] *E.g. Wilson v. Lombank* [1963] 1 W.L.R. 1294; *Allen v. Roughley* (1955) C.L.R. 98, 107-11 *per* Dixon C.J.

A *res nullius* cannot arise by the operation of the limitation process as egards land, for a holder's interest cannot be lost unless there is a person vho holds a possessory interest.[20] But the same provision does not apply o chattels.[21] The interest in chattels may be lost on the expiry of a limitaion period for the bringing of actions in conversion or for detention of oods. A *res nullius* may, therefore, be created by the operation of the mitation process.

The process as regards land seems to emphasize the acquisitive element ı all respects except the logical conclusion of the acquisition by the ıewcomer' of the right lost. It would have been possible to provide for ıe inability of a holder to exercise his right to recover land after a period f non-exercise. To prevent a *res nullius,* it could then have been provided ıat the right was not lost unless and until another person went into ɔssession. The question of the nature of the acquired right would remain, ut the principle of extinguishment through non-exercise would have been ɔplied consistently. Under the existing system, however, the holder's right lost only after a period of time during which another has been in ɔssession. In other words, the essential element is the taking of possession ıther than the non-exercise of the right. Immediately a positive course of ɔtion by a person other than a holder is made a prerequisite for the loss the holder's right, the process takes on a prescriptive flavour. But the rocess is still commonly viewed in this respect as one of extinguishment;

> the operation of the Statutes of Limitation is merely negative. It destroys the leaseholder's title to the land but does not vest it in the squatter. The squatter is not liable on the repairing covenants . . . Nor, when the leasehold is a tenancy from year to year, does he step into the shoes of the tenant so as to be himself entitled to six months' notice to quit . . .[22]

The right gained by the expiry of the limitation period is based essenally on possession and not on the expiry of the limitation period. Its ıaracter remains as it was prior to the expiry of the period although its nforceability increases. 'And when the superior claim . . . ceases to available the rights founded on possession will be indistinguishable from e rights of ownership'[23] or, more specifically perhaps, the effect of the ocess is to destroy an interest to which the adverse possessor's interest ıs subject. And that is all.

Difficulties of Independence of Interest Acquired

It is difficult to appreciate the reasons for insistence on the independence the interest acquired from that lost. The adverse possessor's interest is a al interest. Its necessary limits stem not from the enforceability of the

[20] *Supra* n. 13.
[21] *Ibid.*
[22] *St. Marylebone Property Co. Ltd. v. Fairweather* [1963] A.C. 510, 544 *per* rd Denning, 535 *per* Lord Radcliffe. *Cf. Tickner v. Buzzacott* [1965] 1 Ch. 426.
[23] Pollock, *A First Book of Jurisprudence* (1929) 185.

interest but from the lack of *conscious* transfer. But if the interest acquire is limited by law to that of the former holder there seems little reason i policy why the possessor should not be thought of as acquiring the actua interest of the holder. The expiry of the limitation period on this basi simply forms one of the methods by which rights may be transferre without the consent of the holder.

The courts have driven the rules into quite unnecessary tangles by th insistence on independent title. The House of Lords in *Fairweather v. S Marylebone Property Co. Ltd.*[24] decided that a tenant whose title had bee 'extinguished' by virtue of the limitation process nevertheless could sur render his interest to his landlord. The landlord was therefore able t evict the squatter without waiting till the end of the term. The theory o which the decision was based was that the principle of limitation is relativ and that title was extinguished only against the adverse possessor directl affected. But, so far as it relates to the adverse possession,[25] how a tenar whose title is extinguished has anything to transfer is, to say the leas puzzling.[26]

The essential element of the *Fairweather* case was that the landlord claim to enter depended on an act of the tenant. Had the landlord acte under a forfeiture clause the squatter would have had no defence. Th right of re-entry is a proprietary interest to which the lessee's interest subject and does not depend on the transfer of any interest from lesse to lessor.[27]

The decision probably again illustrates the view that title gained b limitation should be confined as narrowly as possible.[28] But it also equat the extinguishment of title to loss of remedy as distinct from loss of righ for the principle of relativity of title means only that while the rig cannot be enforced, it can be dealt with. '[W]hen a squatter dispossess a lessee for the statutory period it is the lessee's right and title as against t squatter that is finally destroyed but not his right or title as again persons who are not or do not take through the adverse possessor.'[29] Th

[24] [1963] A.C. 510.
[25] *Ibid.* 538, 545.
[26] It is even more difficult to accept the thesis where, as in the *Fairweather* ca the title to the land is registered. If the register is amended or rectified making t squatter the registered proprietor any ability to defeat his title means necessarily exception to indefeasibility.
[27] In the *Fairweather* case Lord Denning expressed the view that a squatter cou not pay the rent without the authority of the leaseholder nor could he apply relief against forfeiture. In *Tickner v. Buzzacott* [1965] 1 Ch. 426 Plowman applied the *dictum* in holding that a squatter had no right to ask for relief fr forfeiture. If however, a squatter succeeded to the term he would have the necessa basis for applying for relief. The transfer should be treated as an assignment of lease without obtaining the lessor's consent, which could therefore still lead forfeiture if there was a forfeiture clause in the lease.
[28] *Cf.* Lord Radcliffe's thought of injustice to the lessor *infra.*
[29] *St. Marylebone Property Co. Ltd. v. Fairweather* [1963] A.C. 510, 538 Lord Radcliffe (setting out the alternative which he later approved).

s but one step away from the strict theory of loss of enforceability only— · theory thought to be abolished in cases concerned with the recovery of nterests in land and chattels.[30]

The limitations on the interest acquired and the reasoning of the *Fair-eather* case apply, presumably, to the extinguishment of title to chattels s well as to land. Although the likelihood of a similar situation to *Fair-eather* arising in regard to chattels is not great, a bailee could presumably rminate the relationship by agreement with the bailor regardless of hether or not his title had been 'extinguished'.

Whatever the basis of the possessor's title, it is suggested that it is diffi-ult to justify the *Fairweather* decision on the present statutory provisions nd that, if it is to be supported, amendment is desirable, if only for the ake of clarity. It must then be clearly set down exactly to what extent a tle is not extinguished by the limitation process. Is it to be confined to rrender of a limited interest to the holder of a superior interest, or is it) include transfer of the interest to third parties?

In fact the retention of a power (however wide) to deal with the interest rges a connection between the title lost and the title gained. The prin-ple of the independence of the possessor's title denies that connection, lmitting only that the title gained is limited by those interests limiting the le lost. It is easier to accept the *Fairweather* approach (that it is not the hole' title which is gained by possession) if the basis of acquisition is ansfer, as there is then simply a retention of part of the title.

One of the grounds relied on by Lord Radcliffe illustrates the difficulties extinguishment without acquisition. His Lordship thought that if the ssee's title was totally extinguished on the expiry of the limitation period, e lessor's right of action must accrue at the time of the extinguishment. he squatter has not got the lessee's term or estate and there is nothing tween the fee simple owner and the man in possession'.[31] His Lordship ought that because of this a lessor may be deprived of his title when he ad neither means of knowing nor reason to know that dispossession of rt of the premises had taken place',[32] and this would be quite wrong. ie thought of injustice to the lessor may be understandable. However, it difficult to use any such injustice as a reason in the context of a limita-n process which does not generally require means of knowledge as a erequisite for the commencement of a limitation period.[33] But even apart

[30] *Cf.* n. 18 *supra.* In *Re Howlett* [1964] Tas. S.R. 63, it was held that a statute-rred debt was 'property' and therefore dutiable under the Deceased Persons' Estates ties Act 1931 (Tas.). In the *Fairweather* case the tenant retained something of ue; a 'right' capable of surrender.

[31] [1963] A.C. 510, 538. The landlord's interest is an interest in reversion and, as h, his right of action to recover possession would not accrue until it became an erest in possession (Limitation of Actions Act 1958, s. 10) or, if he was entitled recover possession because of the tenant's breach of condition or act which could d to forfeiture, when he acted to do so. (*Ibid.* s. 12).

[32] [1963] A.C. 510, 538.

[33] See *Howell v. Young* (1826) 5 B. & C. 259; *Cartledge v. Jopling* [1963] A.C. 758 *infra.*

from this, if the squatter did succeed to the lessee's interest (as Lor Radcliffe implied), or part of it, the lessor's right would not then accru until either the term expired or was terminated by the lessor. The mer fact of succession would not be enough to grant the squatter all the right of the lessee. Although the effect of the limitation process would be trans fer this does not mean that the transfer, so far as the lessor is concerned was 'made' with his consent. The effect would simply be that of assignmen without consent.

At present an interest in land or chattels gained through limitation i based essentially on adverse acts rather than on the *effect* of those acts o the holder's interest. If the prescriptive principle were applied, as it i suggested it should be, the acts would be treated as the means by whic the title was acquired rather than as merely defining the nature of th interest itself.

CONDITIONS NECESSARY FOR ACQUISITION

Ability to Grant

As we have said, the acquisition of an interest by prescription requir the ability of the former holder to grant it. It is deemed to be a transfe The importation of rules of capacity because the acquisition has the effe of a transfer represents the opposite extremity to the rule that the acquire interest is not the same as the defeated interest. Yet, although the resu of the prescriptive process is that part of the holder's interest is transferr to the beneficiary, it does not follow that questions of capacity are relevar It is suggested that the process be regarded as what it is—an acquisition an interest on the basis of acts inconsistent with the exercise by the hold of either that interest or an interest which cannot stand with that acquire of any rights. A grant of an interest should not be *deemed* to occur, but should be provided that it *does* occur. No question of capacity to gra could arise. The principle would be simple and direct.

Under the present system, a person, to obtain an interest by prescri tion, must act openly, without force, and without permission of the hold Only the last requirement is contained in the rules relating to extinguis ment of rights. However, it is suggested that the other two requireme should be applied either generally, or not at all. Their application m depend on the principles upon which the limitation process is based, a the purposes of that process. If the purpose is to give legal recogniti to a factual state, there is no call for the application of the two requi ments. If the principle that a holder must not sleep on his rights is fun mental then the requirement of open conduct becomes relevant. If force to be a disqualifying element (which is now only the case in prescripti then it should be adopted generally.

Role of 'Possession'

(a) CRITERION FOR LOSS

The limitation process deprives a person of an interest in land only if it is a *present* interest. A holder of an interest in reversion or remainder cannot be deprived of that interest. The relevant limitation period does not start to run until the interest becomes one in possession.[34] It will be recalled that a further prerequisite for the loss of an interest is adverse possession by another. As regards land, therefore, the process operates only where a person is, by being in possession, acting inconsistently with the rights of the holder of an interest in possession.

Possession is not made directly the focal point in that part of the limitation process applicable to interests in chattels. The relevant limitation period is expressed not, as with land, in terms of the right of recovery but in terms of the action available to a holder of an interest when he has lost it. So the title to chattels is extinguished when the right to bring an action for conversion or detinue has been destroyed by the limitation process provided the holder has not recovered possession since the right accrued.[35] In effect, this means that title can only be extinguished where the person deprived has had a right to possession and has not been in possession during the limitation period as the causes of action of conversion and detinue require such a right.[36] But there is no requirement of 'adverse possession'.[37]

It is a matter of policy whether a proprietary interest in a thing capable of possession which does not entitle its holder to take possession should be capable of defeasance and acquisition by another through the limitation process. Insofar as the process applies to particular causes of action the criterion for extinguishment is inaction, or failure to prosecute the action.

Where the relevant question is one of 'title' it seems at least arguable that the cause of extinguishment of title (or acquisition as it is now suggested) should be inaction in the face of acts inconsistent with the title. Where the holder of an interest is entitled to possession, possession by another is clearly inconsistent with the former's interest. But this does not mean that where a holder is not entitled to possession there cannot be acts just as inconsistent with his interest (such as a dealing with the interest).

[34] Limitation of Actions Act 1958, s. 10(1). But the holder of a future interest who also holds an interest in possession in the same land may lose his future interest at the time he loses his interest in possession (*ibid.* s. 10(4)). In some circumstances the limitation period starts from the accrual of the right to the predecessor in title (*ibid.* s. 10(2), (3)).

[35] Limitation of Actions Act 1958, s. 6(2). See, for a contention that the extinguishment of title depends on two acts of conversion, Higgins, in Starke (ed.), *The Australian Year Book of International Law 1965* (1966).

[36] *E.g. Bute (Marquess) v. Barclays Bank Ltd.* [1955] 1 Q.B. 202, 211; *Jarvis v. Williams* [1955] 1 W.L.R. 71. As to the connection between a right to possession and a recognized 'interest' see *infra* n. 55.

[37] In *Douglas Valley Finance Co. Ltd. v. S. Hughes (Hirers) Ltd.* [1967] 2 W.L.R. 503 it was held that adverse possession was not even a requirement of the tort of conversion.

The insistence on the dependence of title on adverse possession does not necessarily mean that only interests in possession can be defeated. A person in possession may act inconsistently not only with the rights of the holder of the interest in possession but also with the rights of holders of future interests. But it does restrict the number and type of situations in which an interest not in possession can be defeated. It can be defeated only if a person other than the holder is in possession or (more strictly) if the person in possession has acted inconsistently with the interest.

It is at least questionable whether 'possession' should form the basis of the extinguishment and acquisition of proprietary interests in physical things. If it were to be agreed that future interests could be acquired or lost through the limitation process, it would still be possible to retain the requirements of adverse possession. But it would be more in keeping with the legal system to concentrate on the interests which are its focal points. In concentrating on possession it emphasizes on the one hand a consequence of an interest and on the other a particular interest.[38] The question should relate to the primary relationship rather than one aspect of that relationship, and a right that does not entitle a person to possession should perhaps be as capable of acquisition through the limitation process as one that does.

The removal of 'possession' as the necessary criterion for loss of title would change the nature of the preliminary inquiry into the connection of the holder with the thing in question. At present a court must ask whether a holder has, as regards land, an interest in possession or, as regards chattels, a right to possession. In both cases the relevant right to possession would seem to depend on a proprietary interest as distinct from a personal interest enforceable only against the grantor of the interest.[39] Without the need for possession the inquiry would relate simply to the existence or otherwise of the interest, and this would be decided by the concept or the relationship which forms the basis of particular rights. The relevant question would be how the relationship (as distinct from any particular right founded on the relationship) is affected by inconsistent acts.

(b) CRITERION FOR ACQUISITION

The courts must, at present, also inquire whether the connection with the land of the person who will benefit from the limitation process amounts to 'adverse possession'. Prior to the Real Property Limitation Act 1833 (Eng.),[40] 'adverse possession' was a technical common law doctrine accepted by equity at the beginning of the nineteenth century.[41] Certain relation

[38] As to the need for an 'interest' as a basis for the right to possession see *infra* n. 55.

[39] The ability to bring an action in conversion or detinue or to recover an interest in land would seem to require this type of interest. See (land) *Cowell v. Rosehill Racecourse Co. Ltd.* (1937) 56 C.L.R. 605, (chattels) *City Motors (1933) Pty. Ltd. v. Southern Aerial Super Service Pty. Ltd.* (1961) 106 C.L.R. 477. *Cf.* n. 51 *infra*.

[40] 3 & 4 Will c. 27 (1833).

[41] *Cholmondeley v. Clinton* (1820) 2 Jac. & W.1.

ships with the holder of the interest would exclude the possibility of the possession ever being 'adverse', and the holder could terminate the adverse nature of possession by formal acts without recovery of possession. The Act of 1833 although retaining the phrase 'adverse possession', abolished the exceptions to the general rule so that 'the question is whether twenty years have elapsed since the right accrued'.[42]

The present rule, as specified in the Victorian and English Acts, requires 'adverse possession' for the accrual of the right of action to recover the interest so possessed. The abolition of the old doctrine of adverse possession cannot mean however, that the possession need no longer be inconsistent with the holder's interest. In *Paradise Beach and Transportation Co. Ltd. v. Price-Robinson,*[43] the Privy Council emphasized that the nature of the possession was irrelevant. In that case the possession of itself was not wrongful but the manner of its exercise was inconsistent with the rights of others also entitled to possession, being for the use and benefit only of those actually in possession.[44] It formed the basis of title. The inconsistency stemmed, therefore, from acts which amounted to asserting exclusive possession as against others entitled.

The recognition that the possession must be at least inconsistent with the holder's interest maintains the focal point of the limitation process. It is suggested that, in fact, it is the inconsistency and not the possession which should be emphasized. If possession were to be treated only as a species of inconsistent acts the issue before a court would simply be whether the acts were of such a degree that they were inconsistent not only with a particular right but with the relationship on which that right depended. Concentration on 'possession' has imported the legal difficulties of that concept, so that user or occupation may not amount to 'possession'. Yet both or either may be wholly inconsistent with the holder's interest. In *Hughes v. Griffin*[45] it was held that the occupation must be 'adverse' if it was to form a good root of title. A licensee, it was said, could not succeed in establishing the necessary 'adversity' because he occupied by permission of the licensor. Had the original relationship been a tenancy, it would have been determined for limitation purposes by statutory provision at the end of either one year or the particular period for which it had been granted.[46] No such provision existed in relation to licences and therefore there was no specific termination of the original permission. But could a licensee ever satisfy the onus of proving that he no longer occupied by virtue of that permission?

[42] *Nepean v. Doe d. Knight* (1837) 2 M. & W. 894, 911. *Cf. Paradise Beach and Transportation Co. Ltd. v. Price-Robinson* [1968] A.C. 1072, 1082-3.
[43] [1968] A.C. 1072.
[44] The claim was by tenants in common against other tenants in common who had been in possession from 1913 for their own use and benefit.
[45] [1969] 1 W.L.R. 23.
[46] Limitation of Actions Act 1958, s. 13.

It has been strongly argued that the principle that a licensee cannot acquire title by adverse possession is contrary to the principle that 'possession' may alter from derivative to adverse; and it has been suggested that as regards licensees this takes place when the licensor can take proceedings to evict the licensee.[47] If the reasoning in *Hughes v. Griffin*[48] is the basis of the doctrine that a licensee cannot acquire a title by adverse possession this argument appears unanswerable. The exercise of rights over land inconsistently with the holder's interest when the holder can take action but does nothing, creates a classic 'limitation' situation.[49]

The objection to the ability of a licensee to acquire an interest through limitation may be connected more with the requirement of possession than that of adversity. A licence is traditionally viewed only as a contract and the licensee's rights are purely contractual.[50] The primary relationship created is therefore contractual as distinct from proprietary.

It was the lack of a proprietary interest which led the High Court in *Cowell v. Rosehill Racecourse Co. Ltd.*[51] to hold that a licensee had no right to possession. Yet, as Evatt J. pointed out in his dissenting judgment, such a right could stem from a contract which could be specifically enforced or in regard to which an injunction would issue.[52] The House of Lords took a like view in *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.*[53]

In a departure from the traditional view, it has been held that in some circumstances a contractual licensee has a proprietary interest in the sense that he can enforce it against a successor in title to the licensor.[54] The licensee is able to assert a right to possession against both the grantor and his successor in title.

A 'proprietary' relationship, it would seem, has become linked with the right of possession even though it is not the sole available source of such a right. Apart from actual possession, that source must be an abstrac

[47] Goodman, 'Licences and Limitation' (1966) 30 *Conveyancer and Property Lawyer (New Series)* 106.

[48] [1969] 1 W.L.R. 23.

[49] In *Cobb v. Lane* [1952] 1 All E.R. 1189 the issue was whether the defendant had been a tenant at will. If he had been, he had acquired, by the statutory provision terminating the relationship a 'limitation' title. It was held that he was licensee and that he could not 'pray in aid the provisions of the Limitation Act 1939'. Goodman, *op. cit.* reads this as referring only to whether the licensee's possession was adverse, but it could equally well refer to the question of whether the licensee was in possession. This is emphasized by a preceding statement that the licensee 'had only a personal privilege with no interest in land'.

[50] *E.g. Wood v. Leadbitter* (1845) 13 M. & W. 838; *Thomas v. Sorrell* (1673) Vaughan 351.

[51] (1937) 56 C.L.R. 605.

[52] *Ibid.* 651-2.

[53] [1948] A.C. 173.

[54] *E.g. Errington v. Errington and Woods* [1952] 1 K.B. 290. *Cf.* cases where estoppel provides the basis for the relationship such as *Inwards v. Baker* [1965] Q.B. 29.

relationship recognized by the legal system (such as a contract or a lease).[55]

At one time in England[56] and still in Australia[57] the grant of 'exclusive possession' meant that the relationship could not be a licence. The distinctive feature of possession should be differentiated from the distinction drawn between contract and property. A person could have 'exclusive possession' against the grantor of the right in a contractual sense and yet have no proprietary interest in the sense of enforceability of his interest against another person. On the traditional view of a licence (that it is a contract which if broken leads only to damages), the two distinctions are equated. Once that view is rejected so must be the inability of the licensee ever to be in 'possession'.

But, more fundamentally, it is suggested that the confining of 'possession' to property relationships ignores the ability of a party to a contract to enforce that contract.[58] If this view were accepted a person could be in 'possession' whether his interest is contractual or proprietary in an enforceability sense. Where he is in 'possession' the limitation issue is simply the inconsistency of the possession with the rights of the holder of the superior interest.

The main contention is, however, that the criterion of a limitation interest should be inconsistency with the holder's interest rather than 'possession'. If this were accepted the question for the court would be, as we have said, whether the acts of a licensee are so inconsistent with the interest of the holder (as distinct from any particular right to protect the interest) that, after the relevant period, the interest is transferred.[59]

The abolition of 'possession' as a sole criterion of acquisition of interest would rid the system of an artificial concept which is in reality all part of the general question which is at the heart of the limitation process, *viz*

[55] The right to possession cannot be a source itself even though some of Evershed M.R.'s remarks in *Jarvis v. Williams* [1955] 1 W.L.R. 71 might be construed as inferring that it is.

[56] *Lynes v. Snaith* [1899] 1 Q.B. 486, 488. For the present view see *Cobb v. Lane* [1952] 1 All E.R. 1189, applied by the Privy Council in *Isaac v. Hotel de Paris* [1960] 1 W.L.R. 239. According to this view the nature of the relationship depends on the intention of the parties.

[57] *Radaich v. Smith* (1959) 101 C.L.R. 209.

[58] While the distinction between a right to damages for breach and a request for performance is appreciated, if that request would be or had been granted the *right* to performance is established. In the context of the tort of inducement to breach of contract Lord Denning based his reasoning on the 'right' of a party to performance. See *Torquay Hotel Ltd. v. Cousins* [1969] 2 Ch. 106.

[59] The question will always arise whether the acts establish occupation of the whole of a piece of land or merely user of part of it. At present the principles applied will differ. It is difficult to appreciate why. The English Law Reform Committee has recommended that many of the principles of the acquisition of easements and profits be equated with the principles of adverse possession (See *Fourteenth Report* (1966) Cmnd 3100). Whether the acts relate to user or occupation will of course remain relevant whether or not the recommendation is enacted. Where acts are equivocal the actor's intention may be relevant in deciding whether they relate to user or occupation. But see Goodman, 'Adverse Possession or Prescription—Problems of Conflict' (1968) 32 *Conveyancer and Property Lawyer* (*New Series*) 270.

have there been acts inconsistent with the holder's interest, and if so, are they of sufficient degree to 'transfer' the interest? Even if the ability to acquire an interest is still to depend on a physical connection with the land it is questionable whether 'possession' should be used to describe that connection. It is a concept employed in widely different contexts for different purposes. It is used as a basis of the ability of a person to protect his connection with land, the acquisition of a title through the limitation process and to start the limitation period running. It is doubtful whether the issues raised are identical.

(c) RELATIONSHIPS WHICH CAN BE ACQUIRED

The concept of limitation does not necessarily require, as does prescription in its present application, positive action on the part of the person acquiring the interest. Its essential element is action inconsistent with a right held by another. Such action may be either active or passive.[60]

This in turn means that a right acquired must be capable of creation by inaction. Where a given right depends, for example, on the fault of another party, it is difficult to see how mere inaction by that other party could create it. A right to sue in negligence could not, therefore, be acquired through mere passing of time. But a right which could be created by agreement or representation, could, on this reasoning, be acquired. A failure to deny that such agreement or representation had occurred in the face of facts showing that it had, would create a right.

The principle of acquisition of rights is not, therefore, confined *by nature* to interests in physical things. At present, however, acquisition and even extinguishment of rights are *legally* confined to such interests. In all other areas only the remedy is barred. There is no possible reason why extinguishment of 'title' (as distinct from remedy) ought to be so restricted once it is admitted that the concept logically applies outside the physical sphere. Equally, if it were to be accepted that acquisition should be the governing principle it would apply no matter whether the object in which the interest exists is corporeal or incorporeal.

The essential question again goes to what is acquired—a correlative right, or part of the holder's interest? If it were possible, for example, to acquire through the limitation process an interest in confidential information (as distinct from the ability to resist a suit by the interest's former holder), there is no reason why it should be treated any differently from an interest in land or chattels.

[60] The nature of the inconsistency will depend on the nature of the right. Passive failure to repay a debt may be all that is required to acquire the 'right' not to pay it; but active occupation of land may be required as the basis of acquisition of an interest in it. Where the right acquired is a right in relation to some object some connection between person and object would seem necessary.

RIGHTS AND REMEDIES

The suggestion already made that the limitation process should be thought of as acquisitive has been based on the supposition that it will lead to an acquisition of rights. At present however much of our limitation process is directed solely at the remedy.[61] So, for example, the ability to enforce a debt may be terminated after six years, but if the money owing under it is paid, it is paid in furtherance of an existing obligation.

Apart from the question of a uniform acquisitive principle, it is suggested that the process should in every case be directed at the right, and further, that even if the distinction between right and remedy is retained, consequences which are now said to follow need not and should not follow.[62]

Where a provision affects only a remedy it is labelled 'procedural' but where it affects a right it is called 'substantive'. Important general consequences flow from this classification in the fields of statutory interpretation and conflicts of laws. In addition two particular rules, outside those fields are connected with it. Firstly there is a well established rule that where a remedy only is barred, a defendant must plead the statute if he wishes to rely on it. Secondly, there seems to be a linking of the effect of waiver, estoppel and agreement on the effect of the statute with the 'procedural' barring of the remedy.

Extinguishment of Right or Remedy?

As we have said, our limitation process consists of three areas. First, incorporeal hereditaments may be acquired by prescription. Second, an interest in land or chattels may be extinguished by the expiry of the limitation period. Third, certain specified causes of action may be rendered unenforceable by the expiry of the period.

It has been argued that the basic principle of the limitation process should be acquisitive and that the expiry of the limitation period should, where appropriate, result in the transfer of part of the holder's interest to the beneficiary of the process. But even if this is not accepted, it is suggested that the process should focus on rights rather than remedies.

The concentration on remedy rather than right is in keeping with the historical emphasis on procedure. It is consistent, however, with only one of the three grounds on which rules of limitation of actions have been

[61] *I.e.* all the provisions except the rules of prescription and the provisions for extinguishment of title to land and chattels. The English Law Reform Committee as recommended the abolition of prescription as it applies to easements and profits *Fourteenth Report* (1966) Cmnd 3100. The Wright Committee retained the rule of barring of remedy saying only that no case had been made out for changing and noting that a number of substantive consequences would follow (Cmd 5334 para. 24). The New South Wales Law Reform Commission recommends that the process (apart from prescription) should always extinguish the right, disagreeing with the Wright Committee that the substantive consequences are worthy of retention.

[62] A distinction imparting some of the flavour of the right/remedy distinction is that drawn between 'essential condition of the right' and 'prevention of enforcement of rights of action'. See *infra*.

said to rest. The maintenance of a right which has some degree of protection but cannot be judicially enforced is hardly a situation of 'repose'. Legal proceedings concerning the dispute are not out of the question. Presumably, if the holder of the right secures compliance and is then attacked, the right is a relevant element. The creation of a right by the extinguishment of a remedy means that the holder retains something of value. Questions of protectability, alienability and taxability therefore arise. There is no judicial peace and, when such peace as exists is disturbed, the difficulty of proof remains.

The extinguishment of remedy only is not inconsistent with the view that the limitation concepts depend on the principle that a holder must not sleep on his rights. It is defensible to say that the penalty for so delaying is the removal of the 'right' from the enforcement to the permissive sphere. But the extinguishment in reality changes the nature of the right.[63]

THE JUDICIAL ATTITUDE

The objections to the maintenance of a right which depends, in enforceability terms, on actual compliance are that it encourages further legal disputes about the permissibility of actions taken, and may lead to a form of legal blackmail.

The courts may make the enforcement of other remedies conditional on the fulfilment of statute barred obligations. So a mortgagor of an interest in land seeking to redeem must pay the full amount of arrears of interest even though some or all are statute barred. The right to bring an action to recover the arrears has been extinguished but the mortgagee has a right to insist on compliance with the obligation in other proceedings.[64] A creditor who is owed money by a debtor on different debts may, if one debt becomes statute barred, appropriate any money paid to satisfy the barred debt.[65] Here the courts allow 'compliance' with an obligation even though there is no positive evidence suggesting voluntary compliance. There is a back door enforcement of one 'obligation' because of another, possibly entirely independent legal obligation.

The courts therefore, exhibit a kind of split personality in their attitude to the rules of limitation, and they are encouraged in this by the concentration on remedy. Even if the ground of not sleeping on rights were to be accepted as the sole basis for the limitation rules, the uncertainties caused by the compromise of extinguishment of remedy rather than right may render the compromise of little overall benefit. Further, even if the avoidance of the limitation rules is itself defensible, which is doubtful, it is hard

[63] *Cf. infra.*

[64] See (construing the corresponding provisions of the Real Property Limitation Act 1833) *Edmunds v. Waugh* (1866) L.R. 1 Eq. 418; *Dingle v. Coppen* [1899] 1 Ch. 726.

[65] *E.g. Mills v. Fowkes* (1839) 5 Bing. N.C. 455. *Cf. Friend v. Young* [1897] 2 Ch. 421, 432-7.

consistent to allow it simply because of the existence of other proceedings; and, it is even less consistent when it is only certain kinds of proceedings which attract the benefit.

Limitation Rules—Substance or Procedure?

The general feature of extinguishment of remedy has led to the classification of limitation rules as 'procedural' rather than 'substantive', a classification which has practical consequences in the spheres of statutory interpretation and conflict of laws. The legal analysis of statute barred rights as 'unenforceable' or 'imperfect' rights[66] helps towards the conclusion that the extinguishment of remedy does not affect the core of the right to which it relates.

But it is suggested that the extinguishment of remedy does not only change the quality of a right, it changes the right. It removes the unconditional ability to enforce and replaces it with the conditional ability to protect. It simply allows the holder to protect his gain once he has acquired it. This right is no different in theory, and therefore no more imperfect or unenforceable, than a right dependent on acts rather than promises. A right dependent on representation does not arise unless the claimant has acted in reliance on the representation.[67] Where a remedy is statute barred, the relevant right arises only if the obligation is complied with, or on extra judicial assertion of the right.

The view that the effect of the extinguishment of remedy changes the nature of the right supports the conclusion that the operation of the limitation rules is as 'substantive' as any rule of the legal system. The dichotomy of 'substance' and 'procedure' illustrates, as much as any classification, the disadvantages of general labels, and how the consequences of employing them for purposes quite separate from their creation can lead to indefensible results.

One can appreciate the description of remedies as matters of procedure in the sense that they are the means by which interests or rights granted by the legal system are enforced. But it is difficult to agree that they are in any sense non-substantive, for in the end the right must be defined by the action which the system 'enforces', using that word in its widest sense. The ability to protect by judicial process a particular activity is surely the focal point of the legal system.[68]

'Enforceability' questions are classified as procedural not only in the context of the limitation rules but also where the sanction for the omission

[66] *E.g. Salmond on Jurisprudence* (12th ed. 1966) 233-4.
[67] As to such rights *cf.* n. 5 *infra.*
[68] So a claimant before a Victorian court, basing his claim on a foreign right must be able to fit the remedy for which he asks into the Victorian framework. See *Phrantzes v. Argenti* [1960] 2 Q.B. 19 and *cf. infra.* For an example of where the distinction between a defence to a suit and the denial of a right was essential see *Simpson v. Smith* [1966] 1 Q.B. 426. But the bar was said by Diplock L.J. to be 'procedural', *ibid.* 439.

of formality is 'unenforceability'.[69] One result has been the denial of quasi contractual remedies in situations where there was an unenforceable con tract. It is said that such remedies could not operate where a contrac existed, and an unenforceable contract remained a 'contract'.[70]

But this is too technical a view. To a holder, there is all the difference i the world between a right directly enforceable and one which is enforce able, if at all, only on actual compliance.[71] To say that the right remain is to ignore the definition of the 'right' itself. It is to confuse the existenc with the continuation of the right, and it is to say that because a righ exists, it is the same right which *would* exist even though its characteristic are quite different.

The High Court considered the effect of limitation provisions in a serie of decisions in which the issue was the effect of an amending statute whic extended the time within which an action must be brought. The particula question was whether the amending statute was retrospective or prospec tive, to which question under present rules, the labelling of the provisio as 'procedural' or 'substantive' was relevant.[72] In addition, the issue pose the problem of the effect on a right of the removal of its remedy.

In *Maxwell v. Murphy*,[73] the question concerned the ability to bring a action under the Compensation to Relatives Act 1897-1946 (N.S.W.). The plaintiff's cause of action accrued before the relevant amendment an the limitation period applicable to the plaintiff's cause of action under th unamended statute had expired before the amendment. But if the amen ment applied it was open to the plaintiff to bring an action.

The majority of the Court held that the plaintiff had no right of actio Fullagar J. dissenting, took the traditional line that the statute was pr cedural and, therefore, applied the presumption of retrospective oper tion.[75] Kitto and Taylor JJ. held that there was no evidence that th amending statute was intended to be applied other than to causes of actic accruing after its enactment.[76] Dixon C.J. and Williams J. discussed th nature of statutes of limitation in some detail, both taking the view th the amendment was substantive rather than procedural.

[69] *E.g.* (for conflicts purposes) *Leroux v. Brown* (1852) 12 C.B. 801. As to t classification of requirements of writing generally see Dicey and Morris, *T Conflict of Laws* (8th ed. 1967) 1098-9.

[70] *E.g. Matthes v. Carter* (1955) 55 S.R. (N.S.W.) 357, 362.

[71] An example of an even more extreme view of the non-essential nature of t power of enforceability is the decision of the House of Lords in *Bell v. Lever Br Ltd.* [1932] A.C. 161 that an unenforceable contract was not 'different in kind' an enforceable contract.

[72] *Maxwell v. Murphy* (1957) 96 C.L.R. 261, 267 *per* Dixon C.J., 285-91 Fullagar J.

[73] (1957) 96 C.L.R. 261.

[74] *Ibid.* 267-8.

[75] *Ibid.* 290-1.

[76] *Ibid.* 293.

Dixon C.J. thought that, although there are rights which have an existıce and purpose without a remedy, this was not one. It could not be parated from the remedy of damages. 'If the passing [of the amending gislation] revived [the plaintiff's] remedy that means it revived a right hich had ceased to exist and reimposed a liability on the respondent 'hich had been discharged.'[77] His Honour did not elaborate on the statement that there are rights which can exist without a remedy. There are ghts which are the basis of other rights. So an interest in land is the urce of a number of particular rights, but if one takes away *all* ability protect a right or an interest there will be nothing left. It is hard to iagine a right or an interest without a measure of protection.[78] Conrsely a right can exist where the ability to protect is severely restricted is not, *ex hypothesi* the same right as might exist without the restriction, it by reason of some protection in some circumstances there is, it suggested, a right defined by that protection.

If, in *Maxwell,* the defendant had paid agreed damages in ignorance at the claim was statute barred, could not the plaintiff resist any claim r repayment by reliance on her 'right'? Despite her inability to enforce yment, if she were able to retain it when made, this is a 'right', just as e creditor who can appropriate a payment to a statute barred debt has right' because of that ability. The removal of the active ability to enforce es not mean therefore that all rights are destroyed, only a particular ght. But as Dixon C.J. says, this in turn means that the effect of the struction is substantive. This applies wherever the limitation process ects a remedy, for if a remedy is destroyed the destruction must evenlly affect the right to which the remedy is attached. But it does not cessarily destroy all the interest or relationship out of which the rights ring. Simply because it does not destroy the relationship, however, does t mean that it is 'procedural'.[79]

In *Maxwell,* Williams J. expressed the view that 'the right to enforce a ıse of action . . . is an existing substantive right', and that there was a tinction between the extension of the limitation period while it was still ning (which 'might be classed as procedural') and an extension when ıad expired.[80] Other members of the Court did not agree that the quesn of the effect of the amending legislation could turn on whether the

[77] *Ibid.* 268-9.

[78] It may be that any disagreement depends on how the 'right' is defined. So a ation when A may do an act but B may prevent it leads to a 'right' in both A B defined according to the ability to act.

[79] As Williams J. said in *Maxwell v. Murphy* (1957) 96 C.L.R. 261, 281 the rts seem to support the substantive view in holding that pleadings cannot be nded out of time where the amendment will create a new cause of action in the se of a new head of claim (see *Harris v. Raggatt* [1965] V.R. 779), although in *riguez v. Parker* [1967] 1 Q.B. 116, 136 the rule of court permitting amendment r a limitation period was held valid because the expiry of the period operated to bar the remedy if the defendant chose to plead the statute. It was therefore cedural and within the empowering statute.

[80] *Ibid.* 277-8. The learned judge thought the original provision was an essential dition of a right rather than a limitation provision (*ibid.* 282-3). *Cf. infra.*

particular limitation period had or had not expired.[81] But if the distinctio between substance and procedure is banished from consideration it arguable that the statute would not operate to *create* a right but wou extend the period of enforcement of an existing one.

This situation arose in two later cases when the Court considered ti limitations specified in Workmen's Compensation legislation. In 1959 *Chang Jeeng v. Nuffield (Australia) Pty. Ltd.*[82] the Court held that whe the original time limit had not expired the amending Act applied lengthen it. In *Australian Iron & Steel Ltd. v. Hoogland*[83] the origi period had expired but an additional period when a suit would be p mitted at the discretion of the court had not. It was held that the extensi of the first period allowed the action to be brought. Dixon C.J. thou that until the substantive right had been completely lost by final ext guishment of all remedy its subsistence should be recognized and enlar ment of the period treated as referable to it.[84]

There is a hint of the substance/procedure generalization in the vi that if there is a remedy there is a substantive right, and *therefore* a cha in remedy does not alter the substance. But the change in the remedy m available to the claimant by the amending legislation was in characte not in degree as substantive as in *Maxwell v. Murphy*.[85] On the ot hand, in the *Chang Jeeng* case,[86] the nature of the remedy available to claimant on the date when the amendment came into force was changed by the amendment but the time within which it could be brou extended. The distinction is better expressed in terms of change of rem than in terms of substance and procedure. The matter becomes one degree. Can the statute be said (in the claimant's case) to create a right only to affect one which he holds? This may depend on how fundament it changes the existing right, and the question cannot be effectively a wered by the application of rigid and artificial distinctions between ri and remedy and substance and procedure.[87]

CONSEQUENCES OF THE CLASSIFICATION IN THE CONFLICT OF LAW

The classification as procedural of limitation rules that provide for barring of remedy decides the choice of the law which will govern issue within that area.[88] It is arguable that the classification pattern

[81] *Ibid.* 285 *per* Fullagar J., 293 *per* Kitto & Taylor JJ.
[82] (1959) 101 C.L.R. 629.
[83] (1962) 108 C.L.R. 471.
[84] *Ibid.* 476.
[85] (1957) 96 C.L.R. 261.
[86] (1959) 101 C.L.R. 629.
[87] In *Rodriguez v. Parker* [1967] 1 Q.B. 116 Nield J. thought that the be gained by a defendant from a provision that an action could not be brought the limitation period 'is not I think properly described as a substantive benefit really is merely a right to plead a defence if he chooses to do so that the plaint barred from prosecuting a claim'. But how can a successful defence be non stantive?
[88] *E.g. Pedersen v. Young* (1964) 110 C.L.R. 162, 166-7 *per* Menzies J.

hich we base our choice of law rules is not only overgeneralized but to large extent based on domestic concepts ill-fitted to conflicts purposes. he classification of substance/procedure has slight domestic influence mpared, for example, with that of contract/tort. But the labelling of a rovision or rule as substantive or procedural is nevertheless based on its omestic effect.

All questions of procedure are, by our conflicts rules, governed by the omestic law of the forum, whereas substantive rights are referred to the gal system directed by the choice of law rules of the forum (domicil, tus *etc.*).[89] The reference of 'procedure' to the forum is understandable so r as 'machinery' questions are concerned. A person asking a Victorian urt for a remedy must be prepared to fit his case into the tracks of the ictorian legal system. So he must use the procedure provided in order to t the dispute to court and accept the method by which the dispute is cided. Further, he must be prepared to fit his case to one of the domestic medies available and cannot expect the Victorian court to make an order sed on a foreign right to which a Victorian remedy could not be fitted.[90]

Is a rule that a suit will fail if it is not commenced within a certain time in to a rule which specifies that for liability in contract there must be nsideration? Or is it similar to a rule which specifies that the paper used r court proceedings must be of a certain measurement? A failure to tisfy any of the three requirements may result in the non-suiting of the aintiff.

One arguable view is that any rule is substantive where non-compliance ads to failure as distinct from the necessity to repair the omission and art again. But the fundamental point is that the labels of 'substance' and rocedure' simply hide the issue before the court. The question of which w governs a situation should not be decided on the classification of a mestic rule as 'procedural' on grounds which originally have nothing do with a question of choice of law. The question for the court is ether, assuming a conflicts system, and assuming that some issue of bility may be referred to the rules of other systems, the limitation rules e to be classed as 'liability' rules, or matters of policy of the forum state plying to any actions brought in that state.

The first question is to define the foreign 'right' and the second to decide e extent of the domestic limitation rules. If these rules are specified in a tute the matter becomes a question of statutory interpretation. It should t be beyond the wit of a legislature to include in statutes an indication

[89] See *e.g. Huber v. Steiner* (1835) 2 Bing. N.C. 202, 210. Rules of limitation ecting rights appear to be, as they should in principle be, classified as substantive. tutory provisions of time limits held to be essential conditions of rights are equally stantive. See Dicey and Morris, *op. cit.* 1097-8.

[90] *Supra* n. 89.

of policy in order to help the court. It should, however, be recorded th even in Australia, where there are bound to be interstate conflicts que tions, this is rarely done.

To hold that the law of the forum governs a question of limitati because it is procedural (in that it affects remedies only) is to base t decision on an indefensible dichotomy used in an indefensible way. It to refuse to face the actual issues before the court—that of the extent recognition given to the foreign definition of its own 'right' and the exte of operation of the forum's own rules.

The Law Reform Commission of New South Wales has recommend that, at the expiry of the limitation period, not only the remedy but t right of the holder shall be extinguished. In the sphere of conflict of la in traditional terminology, by this recommendation the limitation questic become matters of substance and not procedure. A Victorian court fac with such a provision would presumably hold that a plaintiff relying o right governed by New South Wales law and destroyed by the New So Wales legislation had no basis on which he could ask for a Victor remedy. Such a plaintiff, if the substance/procedure dichotomy is follo ed, loses his remedy (where both sets of rules apply to his claim) accord to whichever rule applies the shorter period, for if the Victorian per governs, the rules would apply as *procedural* matters, but if it is that New South Wales, they will apply as *substantive* provisions.

In dealing with the consequences of its general recommendation in field of conflict of laws, the Commission has tried, it is suggested, to h it both ways. It supports the conclusion that the reform will mean tha person cannot enforce a statute barred New South Wales right in anot jurisdiction. But, it says, the reform will have no effect on the enforcem of foreign rights in a New South Wales court as the statute may still pleaded.[91] However, this ignores the central question. Does the sta apply to all actions brought in the courts of New South Wales, or doe apply subject to the conflicts of laws rules of that jurisdiction?

The need to make it clear that the statute governs all actions and the conflicts rules do not take precedence over it is shown by the Eng decision of *Re Cohn*.[92] In that case Uthwatt J. took the view that he to decide whether English and German statutory provisions relating to presumption of order of death were substantive or evidentiary in e jurisdiction.[93] His Lordship decided that according to English law, English provision was substantive and therefore as the question before

[91] See *Report of the New South Wales Law Reform Commission on the Limit of Actions* (L.R.C. 3), notes para. 321. The separate provisions for destructio remedy and right do not, it is suggested, mean that the rules are both substa and procedural. The provisions have been enacted by Limitation Act 1969 (N.S.

[92] [1945] Ch. 5.

[93] It is arguable that this question should not be asked. See *infra*.

;as governed by German law it did not apply. Fortunately, he was also ble to decide that, according to German law, the provision was also ubstantive and therefore it applied.

A New South Wales judge faced with the Commission's recommendaons and, for example, the Victorian provisions relating to remedy would, ssuming Victorian law to be the governing law, have more difficulty. ccording to the law of the forum the matter is substantive but according) the governing law it is procedural. Does neither provision apply? A ictorian judge, on the other hand might, as we have said, apply both :ts of provisions.

This is not to approve the approach of Uthwatt J. in classifying accordg to both the law of the forum and the foreign law. It is strongly argule that classification, if it is to be maintained, should be by the law of e forum alone.[94] Once the forum has referred a matter to the foreign law should allow that system to answer the question put to it. The question it, however, should be specific so that any general classification is irrelent. So, for example, the forum might ask whether a plaintiff has a right action in negligence having decided that this is a question for the foreign w. It then should accept the answer given.

All that is stressed here is that, taking into account the present approach courts to conflicts questions it is essential that each and every statute early indicate its own conflicts rule.[95] The Commission's view would leave e courts of New South Wales the unenviable task of deciding the reionship between the statute and conflicts of laws rules; if it applies only bject to those rules, the whole issue of classification, its method and the rt it plays in the conflicts process is opened up.

DEFECTS OF GENERALIZATION

The labels of 'procedural' and 'substantive' tend to hide particular issues. e judicial use of labels can be justified only if the concept which they intended to represent can be defined. Further, the cause of the applition of the label must be distinguished from its consequence. So 'coneration' is a cause of 'contract'. Privity is a consequence.

The dichotomy of procedural and substantive has clear consequences in field of conflict of laws and statutory interpretation. It is arguable that question it is designed to answer in those fields can, despite the differe in purpose, be answered by the drawing of a similar distinction. The ical question is the extension of 'procedural' matters from those of

[94] *Cf.* Inglis, 'The Judicial Process in the Conflict of Laws' (1958) 74 *Law Quart Review* 493.

[95] The issue would then concern only the ability of the state to legislate. The liminary processes of classification of the cause of action and statutory interpreon would be rendered unnecessary. For example of such problems see *Koop v. b* (1951) 84 C.L.R. 629; *Plozza v. South Australian Insurance Co. Ltd.* [1963] S.R. 122. On the general question of choice of law clauses in statutes *cf.* Morris, Choice of Law Clause in Statutes' (1946) 62 *Law Quarterly Review* 170.

machinery to include questions of the nature of the right itself. This stem largely from the distinction drawn between right and remedy, and th artificial lengths to which the courts have taken it.

The permanent removal of all judicial remedy clearly affects the hea of a right which by its nature depends for its enforceability on the exis ence of that remedy. Where the remedy is changed (for example whe the amount recoverable is raised or lowered), the change may be almost essential as that between non-existence and existence. On the other han it is arguable that a slight change may not be so vital. The matter cann be solved by the application of a rigid test. It is one of degree, and it do not in the end depend on a machinery/non-machinery distinction. A though the answer will in most cases turn upon such a distinction sure it is based rather on the effect on the 'right' itself of any failure to comp with a rule.

A failure to submit pleadings in the required form might be considered 'non-essential' rule since the right may be enforced by complying with t rule. But a time limit on the ability to enforce is essential simply becau enforceability depends on compliance. The question therefore is specifica addressed to the *degree* to which the right is affected. A decision on t point would, if the present approach is retained, be the basis of a decisi on whether the issue should be referred to foreign or domestic law, could be used in answering the question of whether a statute operat prospectively or retrospectively.

If the limitation process is based on acquisition of rights, it would hard to deny that the effect of the process was any different from a other method of transfer of rights. If the present classification of procedu substance is retained questions of limitation, it is suggested, would substantive. But it has been argued that this generalized classification unhelpful and that the courts should answer the specific question bef them by assessing the legal effect of the limitation process on the existe of the right for the purpose of the particular inquiry. If the limitati process remains partly in terms of extinguishment but is geared to rig and not remedies, it is no less substantive. But even the maintenance the distinction between rights and remedies would not, it is suggest change the nature of the process.

Need to Plead the Statute

Within the limitation field, where the remedy only is barred a defend must plead the statute if he wishes to rely on it. As it affects only remedy, 'it is optional whether the defendant will insist upon the sta or waive it. If he intends to insist upon it he should plead it to pre

surprise, and if he does not, it should be presumed he intends to waive it'.[96]

In *Dawkins v. Lord Penrhyn*,[97] Lord Cairns set out the principles of the distinction drawn between cases where, at the expiry of the limitation period title was extinguished and those where the remedy only was barred. In the former a plaintiff has to prove his title and, if on the pleadings, the plaintiff's title is shown to be extinguished that is sufficient for the defendant to succeed. But where only the remedy is barred 'it cannot be predicated that the Defendant will appeal to the Statute of Limitations for his "protection" '[98] and only the defence can show this.

The rule is itself a matter of policy. It reflects to some extent the judicial attitude to the limitation process as a necessary evil. It has been argued that the limitation process should refer to rights only in all cases, and, if this were so, that the basic principle of the necessity to plead the statute would be destroyed.

But it is suggested that even if the present distinction between remedy and right is maintained the 'pleading' rule cannot be justified by that distinction. This is so whether the justification relies on the classification of procedure and substance, or relies directly on the distinction between right and remedy. If, as has been also argued, the extinguishment of the remedy fundamentally affects a right, there is no ground for distinguishing between remedy and right. Any consequences following from that distinction would therefore fall.

Effect of Conduct of Person Relying on the Statute

Although it is said that failure to plead the statute where it must be pleaded leads to a presumption that it has been waived, it does not follow that waiver has no place where the statute extinguishes a right. In the *Hoogland* case[99] Windeyer J. seemed to think that the ability to rely on waiver or estoppel was a consequence of the 'procedural' character of a limitation provision. In His Honour's view it operated where it was 'a condition of the remedy rather than an element in the right'.[1]

[96] *Chapple v. Durston* (1830) 1 C. & J. 1, 9. *Cf. Rodriguez v. Parker* [1967] 1 Q.B. 116, where the barring of the remedy was held 'procedural' because of the need to plead the statute. The need to plead the statute has been connected with the distinction between essential conditions and limitation provisions. See *Australian Iron and Steel Co. Ltd. v. Hoogland* (1962) 108 C.L.R. 471. As to such distinction see *infra*.

[97] (1878) 4 App. Cas. 51.

[98] *Ibid.* 58-9.

[99] (1962) 108 C.L.R. 471.

[1] *Ibid.* 488-9.

It appears that a defendant may waive the statute where the remedy only is barred.[2] Further, an agreement not to plead the statute is enforceable in such circumstances.[3] But whether waiver, estoppel or an agreement has any force where the statute extinguishes the right depends on whether a new right can be created on those grounds. In substance it does not matter whether this is expressed in terms of prevention of reliance on the statute or whether it is, in effect, the reinstatement of the right destroyed by the statute. If it is viewed as prevention of reliance on the statute, the issue is whether any of the specified grounds can succeed against the express provisions of the statute.[4] On the second approach the issue is whether any of the grounds can be a basis of the creation of an interest. In reality, this is identical with the question of whether the operation of the statute is prevented; for in both cases what is being asked is where the rights lie. The effect of the expiry of the limitation period is 'substantive' it is suggested, if it causes a change in the nature and character of rights held. The question then is whether any of the grounds specified can operate either to prevent such a change or, alternatively, to reinstate the situation as it was before the change.

It is easier to accept the ability to prevent the statutes' operation if they are viewed in some way as providing machinery only. But, it is suggested that this is not the way in which the statutes work; nor is it necessary to connect the effectiveness of waiver, estoppel or agreement with that view. There is considerable authority supporting their operation as grounds of creation of interests.[5] In other words, they may be substantive and not merely procedural concepts, and should not be linked necessarily with the procedural view of part of the limitation process.

(To be concluded)

[2] See *Wright v. John Bagnall and Sons Ltd.* [1900] 2 Q.B. 240; *Lubovsky v Snelling* [1944] K.B. 44. It would seem that he may also be estopped from pleading the statute, *e.g. Paterson v. Glasgow Corpn.* (1908) 46 S.L.R. 1, a case concerning a public authority and the special limitation period then applicable thereto. Limitation periods may be restarted in certain cases by an acknowledgement of the obligation. See Limitations of Actions Act 1958, ss 24-6.

[3] *E.g. Board of Trade v. Cayzer, Irvine and Co. Ltd.* [1927] A.C. 610; *Lubovsky v. Snelling* [1944] K.B. 44.

[4] As to the general question of estoppel against a statute *cf.* Andrews, 'Estoppel against Statutes' (1966) 29 *Modern Law Review* 1: *Ives Investment Ltd. v. High* [1967] 2 Q.B. 379, 405 *per* Winn L.J.

[5] Obviously a *contract* can create a proprietary interest (as *e.g.* the principle of *Walsh v. Lonsdale* (1882) 21 Ch. D. 9). It is suggested that waiver (when non-contractual) and estoppel are particular applications of the principle that conduct can create an interest. *Cf.* Jackson, 'Estoppel as a Sword' (1965) 81 *Law Quarterly Review* 84, 223. Contrast the effect of acknowledgement of a right under the statute —which simply extends the period but does not create a fresh cause of action. See *Busch v. Stevens* [1963] 1 Q.B. 1.