REPORT TO THE INSTITUTE OF LAW RESEARCH AND REFORM ON LIMITATION OF ACTIONS

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INTRODUCTION

The subject of Limitation of Actions is a procedural one. It has, however, many ramifications in terms of practical results. The reasons for the existence of limitation periods are easily available and it is not proposed to recite them here. This Report is more of an attempt to articulate the advantages and disadvantages of the modern Alberta Statute. The attempt has been made to cover the whole body of statutory provisions. However, it is readily admitted that attention has been devoted to some parts of the Act more than others.

There may be some merit in considering having no limitation rules whatsoever. If there were no such rules at all then there might be a certain amount of prejudice to the persons against whom claims were brought after what was thought to be a reasonable period. A judicial officer might well be empowered to make a decision as to the period within which any action may be brought and the discretion could be exercised on the sole ground of whether prejudice might be caused to the defendant. Such a system would either lead to arbitrary and capricious rulings which would be to the prejudice of the plaintiff or else would harden into a well recognised set of time-limits (embodied not in a statutory code but enshrined in judicial decisions) and this would be a comparable system to what we have now. The latter alternative would have the merit of certainty that we now enjoy but this may be tempered slightly more with some degree of flexibility as a result of the more ready intervention of the judge, but it would not have quite the same clarity (which may come with rigidity) that a statutory formulation would yield.

Recommendations are appended to the Report in Appendix C.

LIMITATION PERIODS

Part I of the Limitation of Actions Act contains a mixture of limitation periods for many diverse causes of action. The Limitation of Actions Amendment Act 1966 S.A. c.49 created a new Part of the Act (Part IX) to impose limitation periods on "Tort and Related Actions." This Part has been carved out of what was formerly Part I of the 1955 Act.

The import of s. 5(1) of the Act is limited to a one year period for actions for statutory penalties and similar actions:

> "(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> (a) actions for penalties imposed by a statute brought
>
> (i) by an informer suing for himself alone or for the Crown as well as for himself, or
>
> (ii) by a person authorized to sue for the same, not being the person aggrieved,
>
> within one year after the cause of action arose;"...

It seems reasonable that a relatively short period should be allotted to actions the outcome of which might be the levying of a penalty upon the defendant. A person should not be exposed to the possibility of a penalty being exacted from him for a long time.

Subsequently, a distinction is made between different sorts of penalties. Whereas, under s.5 (1)(a) a penalty recovered by an informer or by a person authorized to sue who was not the person aggrieved was subject to a one year limitation period other sorts of penalties are subject to a two year limitation period by s.5(1)(b);

> "actions for penalties, damages or sums of money in the nature of penalties given by a statute
>
> (i) to the Crown,
>
> (ii) to the person aggrieved, or
>
> (iii) partly to one and partly to the other,
>
> within two years after the cause of action arose;"

It seems entirely supportable to make a distinction between the penalties previously enumerated in s.5(1)(a) and other penalties. The basis of distinction is that the less worthy claims are barred after a delay of one year but the worthier claims are barred only after the lapse of two years. However, it is suggested that the wording of this paragraph is infelicitous. Not all actions for damages brought by the Crown or by the person aggrieved are intended to be subject to the two year limitation period. Nor are all such

actions which are founded on a statute. It would be preferable if the wording of the section qualified "damages" so as to include only those damages in the nature of a penalty. Even here, one must be careful for it is not all statutory claims for damages in the nature of a penalty that are intended to be covered. The Court must still be free to award exemplary damages as a mark of disapprobation of the defendant's conduct even where the claim is based upon a statute. [This is especially so since it appears from McElroy v. Cowper-Smith and Woodman (1967) 62 D.L.R. (2d) 65, that the circumstances in which exemplary damages may be awarded will not be confined to those enumerated by Lord Devlin in Rookes v. Barnard [1964] 1 All E.R. 367.] The general intention and aim of the provision is good but to enable it to be secured a little clarification ought to be introduced.

Section 5(1)(c) and (d) have now been repealed by the Limitation of Actions Amendment Act of 1966. They are replaced by s.51 of the 1966 Act which reimposes the limitation period of two years. Administratively it is tidier to have a Part of the Act expressly dealing with torts. The now repealed section read:

> "(c) actions for defamation, whether libel or slander,
> (i) within two years after publication of the libel or the speaking of the slanderous words, or
> (ii) where special damage is the gist of the action, within two years after the occurrence of such damage;
> (d) actions for
> (i) trespass to the person, assault, battery wounding or other injury to the person, whether arising from an unlawful act or from negligence,
> (ii) false imprisonment,
> (iii) malicious prosecution, or
> (iv) seduction,
> within two years after the cause of action arose;"

It has been replaced by s. 51 of the 1966 Act;

> Except as otherwise provided in this Part, an action for
> (a) defamation, or
> (b) trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from negligence or from breach of a statutory duty, or
> (c) false imprisonment, or
> (d) malicious prosecution, or
> (e) seduction, or
> (f) trespass or injury to real property or chattels, whether direct or indirect and whether arising from an unlawful act or from negligence or from breach of a statutory duty, or

(g) the taking away, conversion or detention of chattels,

may be commenced within two years after the cause of action arose, and not afterwards.

It will be seen that despite the improved approach of the 1966 amendment there are still some difficulties with the application of this section. The most obvious is that of the hidden cause of action. The English legislature attempted to remove the harshness that a hidden cause of action might work in the Limitation Act, 1963, 12 Eliz. 2 c. 47, but this attempt has not been altogether happy. [See Ontario Law Reform Commissioners' Report at pp. 92, 100 and 114.] A similar problem arises with the question of a change of parties to an action after the expiry of the limitation period, but this subject too has been well canvassed.

[Incidentally, the method by which the 1966 amendments of non-Limitation Act statutory provisions were effected leaves something to be desired. Section 4 of the 1966 is quite unnecessarily difficult to follow. If a replacement of a statutory provision is desired the Act should state that the former provision is repealed and should be followed by a statement of the new law. Instead amendments are effected by the Act stating that two words are to be struck out and replaced by two other words. This necessitates consulting the former provision in order to render the amending Act intelligible. It is realized that Office Consolidations of statutes serve this purpose to some extent but it is suggested that statutes should be readable and clear.]

The possibility of an extended limitation period in the case of Nuclear Installations should be explored. Section 15 of the English Nuclear Installations Act, 1965, allows a period of thirty years for the commencement of an action to establish the claim under section 7 to 11 of the Act. See also section 15(2). This probably covers also those granted by the government a nuclear site licence. If such an extended period were to be bestowed on such actions it ought to be a section of the Limitation of Actions Act that bestows it.

Section 5(1)(e) has also been repealed and replaced by s.51 of the 1966 Act. However, in this case a substantive change was involved. The limitation period was reduced from six years to two years. Subject to this reduction, the section still reads substantially as it did in 1955;

"(e) actions for

(i) trespass or injury to real property or chattels whether direct or indirect and whether arising from an unlawful act or from negligence, or

(ii) the taking away, conversion or detention of chattels,

within six years after the cause of action arose;"

The gist of these actions is damage and not entitlement to the property concerned. On this basis the shorter limitation period may be justified. Actions involving matters of entitlement are usually evidentially better supported and thus, in those cases, a longer limitation period may well be justified.

Section 5(1)(f) reads;

> "(f) actions
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
> (ii) for an account or for not accounting,
> within six years after the cause of action arose;"

In this paragraph is found a collection of diverse causes of action. Some of these claims may be very formal in nature and might be expected to be attended with a substantial body of evidence for presentation to the court. Other causes of action included within this paragraph may be most informal. Thus actions on bonds and covenants are treated in the same way as an incident of shortchanging in a grocery store. However, since the tendency is to create fewer limitation periods the six year period would seem to be appropriate for these causes of action. This is exemplified by the refusal to give specialties a longer limitation period than that devoted to simple contracts. [The Ontario Commissioners Report at p. 47 proposed that deeds should have a longer period devoted to them.]

Paragraph (g) sets the limitation period for actions for fraudulent misrepresentation at six years:

> "(g) actions grounded on fraudulent misrepresentation, within six years from the discovery of the fraud;

However, it is noticeable that the time does not start to run until actual discovery of the fraud. The sort of fraud here contemplated is not merely the procedural type of fraud; it is substantive. This paragraph contemplates fraud as the cause of action. In such cases it follows almost automatically that since fraud is the cause of action there must additionally be fraudulent concealment. Whereas this section does not cover fraudulent concealment of another cause of action that situation is contemplated by s. 6. It is necessary to cover both procedural and substantive fraud and so there is no duplication of these two provisions.

It is debatable whether the limitation period should begin to run upon actual discovery of the cause of action or from the time at which reasonable diligence would have made the cause of action apparent. The question of which formulation is preferable is discussed elsewhere in this Report. It must be admitted, however, that the paragraph now under consideration has given rise to little dissatisfaction. It seems more reasonable here to let a potential

plaintiff have the benefit of the doubt as to when the limitation period commenced. It seems more appropriate here than in the case of trustees to accord the plaintiff the benefit of the doubt. Nevertheless, fraud has some characteristics common to all cases and presumptions ought, perhaps, to be made against the party engaged in it.

Section 5 (1)(h) is the counterpart of s. 5(1)(g) but it deals with mistake;

> "actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;"

The expression "or other equitable ground of relief" appears to limit the generality of the preceding words. This would seem to have the effect that actions founded on accident or mistake had to be equitable causes of action before they would fall within the section. The import of this is that this paragraph applies only to equitable causes of action. Thus an action at common law for money paid under mistake of fact is clearly not within the section. Equity will entertain the analogous action, however, even though the mistake was one of law; Re Diplock [1948] Ch. 465, at pp. 515-516. The cases in which there is an equitable action grounded in accident or mistake are numerous. The most important equitable actions covered by paragraph (h) will be the recovery of money paid under a mistake and rescission. [The equitable jurisdiction to set a contract aside on terms is disputed. The widest statement of the jurisdiction is that of Denning L.J. in Solle v. Butcher [1950] 1 K.B. 671.]

Actions on judgments ought generally to have a fairly long period accorded to them. By paragraph (i) the period now in force is ten years;

> "actions on a judgment or order for the payment of money, within ten years after the cause of action therein arose;"

Judgments are one of the most durable forms of record. The English Limitation of Actions Act, 1939, provides that actions on judgments may be brought within 12 years and arrears of interest on such a judgment may be recovered for six years. The spirit of the Alberta legislation is that interest generally should not be recovered after the expiry of six years; s. 5(1)(j) and s. 15. However, interest on judgments is not specifically contemplated. The position thus seems to be according to s. 5(1)(i) that interest and arrears on judgments ordered to be paid in instalments ~~that~~ a ten year limitation period will be accorded from the time of the failure to pay. Ontario proposes to retain its twenty year period and N.S.W. its twelve year period, but neither provide for arrears of interest.

It would seem to be desirable to treat orders in the same

way as judgments, but foreign judgments ought only to be treated in the same way as simple contact debts. (See Ontario Law Reform Commission Report on Limitation of Actions (1969) at p. 47, Uniform Limitation of Actions Act and Report of the Law Reform Commission of New South Wales (1967) at p. 109) It is admitted that there is a fiction involved in treating any judgment as a contract debt. However, there is something to be said for having foreign judgments subject to a shorter limitation period than those of Alberta. However, for the sake of administrative uniformity the statute would be easier to apply if the same limitation period applied to foreign as to domestic judgments. This has hitherto been the position in Alberta. If any foreign judgment is capable of enforcement in this Province it will be subject to the same limitation period as the Alberta Judgment. [See Reciprocal Enforcement of Judgments Act, 1958, S.A. c. 33 and the Reciprocal Enforcement of Maintenance Orders Act, 1958, S.A. c. 42.]

Where at the end of the period an unexpired writ of execution is still outstanding, such a writ may be renewed indefinitely provided that it is not allowed to expire. Under s. 128 (3) of the Land Titles Act the currency of a writ of execution lodged with the Registrar of Land Titles is six years but may be renewed. This period might be somewhat easier to administer if the period for such a writ and for a judgment corresponded. The Land Titles Act provision is essentially administrative and could be amended to make the writ of execution endure for ten years. There is no reason why it should not retain its renewable character.

Paragraph (j) of s. 5(1) contains a general sweeping-up clause following that of the Uniform Act;

> "any other action not in this act or any other Act specifically provided for, within six years after the cause of action therein arose."

The general period of six years is imposed upon those actions that are not otherwise disposed of. This is a general provision which is found buried in a section dealing principally with torts but also with other miscellaneous actions. This is perhaps not the proper place for a provision such great importance. It might better be placed in Part VIII.

The substance of the provision is that a general sweeping-up period is to be provided and that that period is to be six years. This is probably a useful provision. It will often eliminate a consideration by the Court as to whether the statute should be applied by analogy. The Ontario Commissioners (Report (1969) at p. 61) recommended the inclusion of a "catch-all" provision but the New South Wales Commissioners did not. A "catch-all" provision may often be useful. If there is to be such a provision in Alberta the proper period would be six years, since the two other basic periods are two and ten years. [However, such a period will no doubt tend to promote the introduction of fine points of distinction

in argument with the aim of obtaining the benefit of the longer six-year period. No doubt, the courts would reject any specious arguments but it may be that some energy and ingenuity would be lost in trying to formulate such arguments.]

There are many other statutes which provide their own limitation periods and these are preserved by s. 5(2);

> "Nothing in this section extends to an action where the time for bringing the action is by statute specially limited."

A number of the other statutes which do impose their own limitation periods impose a shorter period than that which would otherwise be applicable. Some statutes exempt governmental and other bodies from the operation of such a provision altogether; s. 9 Public Lands Act 1955 R.S.A. c. 259, s. 731 City Act 1955 R.S.A. c. 42 (now repealed by the Municipal Government Act 1968 S.A. c. 68) s. 420 Municipal Government Act 1968 S.A. c.68. It is suggested that the whole question of statutory provisions outside the Limitation of Actions Act should be re-opened. Clearly, until this is done the Limitation of Actions Act will have to give way to the special needs of a particular statute. Indeed, this is the reason for the existence of the special rule of statutory construction. However, it is apparent that limitation provisions are all too blithely written into special statutes. This ought not to occur as a matter of course. If there is any point in the existence of limitation periods, and it is suggested that there is, then these periods ought also to cover particular statutory creatures unless some truly different policy applies.

It should be noticed that a good start towards tidying up other statutory provisions and removing the most pernicious of them was made by the Limitation of Actions Amendment Act, 1966. However, there are other provisions which ought to be enacted to prevent the proliferation of limitation periods in other places than the Limitation of Actions Act.

There is another matter which is relevant to the previous item, and that is the almost automatic exemption of the Crown, governmental organizations and local government bodies from the rules of limitation of actions. It is suggested that the rule of the Nullum Tempus Act, 1794, apply except insofar as they have been replaced by more modern statutes. Thus it is not necessary for the Limitation of Actions Act to bind the Crown if the earlier Act does so. There is no proper regulation of the limitation rules relating to the Crown and other governmental agencies and it is suggested that there should be a collection of such rules in the Limitation of Actions Act, in a Part to be specially devoted to it. [Meredith v. A.G. of Nova Scotia (1968) 2 D.L.R. (3d) 486 demonstrates the obscurity surrounding the question of the applicability of limitation periods to the Crown.]

Section 5(3) deals with the question of claims against the estates of deceased persons;

> "Where a person has a claim against the estate of a deceased person, and the claim was not barred at the date of death of the person under the provisions of this Act or any other Act limiting the time within which an action could be brought, an action may be brought to recover the amount of the claim
>
> (a) within the time otherwise limited for the bringing of the action, or
> (b) within two years from the date of death,
>
> whichever period is the longer."

This subsection allows the longer of ordinary limitation period or two years from the death, whichever is the longer. It applies to all causes of action and such a general subsection is necessary. This general provision is still in force although it has been affected by other legislative changes. The period within which a Fatal Accidents Act claim may now be brought is two years; s.54 Limitation of Actions Amendment Act, 1966. The time limits specified in ss. 32(3) and 33(2) of the Trustee Act 1955 R.S.A. c. 346 have now been repealed by the 1966 Act. [It is noteworthy that no limitation period was specified in Part 3 of the Administration of Estates Act 1969 S.A. c. 2, which has apparently still not yet been proclaimed.] Two years is now limited for the bringing of an action under s. 32 or 33 of the Trustee Act. However, the general provision limited in the subsection under consideration is useful and should remain.

Section 6 allows an extension of time for so long as the cause of action has been fraudulently concealed;

> "When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered".

It is not confined to fraud which is actionable per se; Beaman v. A.R.T.S., Ltd. [1949] 1 K.B. 550; Kitchen v. R.A.F. Association & Others [1958] 1 W.L.R. 563; Hackworth v. Baker [1936] 1 W.W.R. 321 and Zbryski v. City of Calgary (1965) 51 D.L.R. (2d) 54 and note at (1966) 4 Alberta L. Rev. 488. Usually, the mere fact that a plaintiff is ignorant of his rights does not entitle him to an extension of time. The Law Revision Committee (Cmd. 5334, p. 32) did not intend that this basic proposition should be altered. Apart from s. 5(1)(h) there is no extension for a plaintiff who is ignorant or mistaken about the existence of a cause of action. However, for a potential defendant to either encourage or take advantage of the mistake of the plaintiff may amount to a fraudulent concealment; Clark v. Woor [1965] 1 W.L.R. 650 and Eddis v. Chichester-Constable 24th. April, 1969 The Times. It will not be enough, however, for the right of

action to be concealed by a mistake for this is not included within s.6, above. See also Phillips-Higgins v. Harper [1954] 1 Q.B. 411. Nevertheless, actions grounded on mistake will fall within s. 5(1)(h) and will be subject to a six year limitation period commencing with the discovery of the cause of action. [Thus an equitable action for recovery of money paid under mistake of fact will be within the section.]

Section 7 is designed to prevent the existence of running accounts from reviving debts which would otherwise be barred. The section is designed to cover all parts of the Act and the existence of this section must be borne in mind when considering the limitation periods applicable in other Parts, perhaps particularly those relating to conditional sales;

> "No claim that is in respect of an item in an account and that arose more than six years before the commencement of the action is enforceable by action by reason only that some other claim that is in respect of another item in the same account arose within six years next before the commencement of the action."

This provision seems worthwhile and fair. Furthermore, its existence would tend to facilitate a general scheme of extinction of a cause of action on expiry of the appropriate limitation period. Thus, it is concluded that this section should be retained.

Before the enactment of this section there might have existed a lawful exercise of an option by a creditor to appropriate a payment to a statute barred debt rather than a debt which was not yet outside the limitation period. This might occur where a debtor owed the same creditor several debts but some were statute barred and some were not. The prevailing opinion now seems to be that an extinct debt should not now be capable of being revived at the option of the creditor. Thus, there is a measure of justice in the provision.

Section 8 reads;

> "If a person entitled to bring an action mentioned in clauses (c) to (i) of subsection (1) of section 5 is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such action or at any time within two years after he first ceased to be under disability."

It would appear to be reasonable that in all cases in which a person suffered from a disability at the time of accrual of the cause of action (or at such other time as the limitation period would normally start to run) there should be a time specified for the bringing of the action after the potential plaintiff ceased to

be under a disability. In effect, s. 8 gives the plaintiff under a disability a choice of bringing the action within the normal limitation period or within two years of the cessation of the disability. If a person is under disability he may be able to bring an action through a parent or next friend. It is wise not to force a disabled person to sue if he has a guardian within the normal limitation period because so many disputes as to whether he has a guardian may arise; see s. 22(d) of the Limitation Act (Imp.) 1939 and Kirby v. Leather [1965] 2 Q.B. 367

Section 9 relates to acknowledgments and part payments;

"(1) Whenever a person

(a) is, or would have been but for the passing of time, liable to an action on a judgment or order for the payment of money or for the recovery of money as a debt, and

(b) by himself or his agent in that behalf

(i) conditionally or unconditionally promises his creditor or the agent of his creditor in writing signed by the debtor or his agent, to pay the debt,

(ii) gives a written acknowledgment of the debt signed by the debtor or his agent, to his creditor or the agent of his creditor, or

(iii) makes a part payment on account of the principal debt or interest thereon to his creditor or the agent of his creditor,

then an action to recover the debt may be brought within six years after the date of the promise, acknowledgment or part payment, as the case may be, notwithstanding that the action would otherwise be barred under the provisions of this Act.

(2) A written acknowledgment of a debt or a part payment on account of the principal debt or interest thereon has effect

(a) whether or not a promise to pay can be implied therefrom, and

(b) whether or not it is accompanied by a refusal to pay."

It is in a very common form. The principle is that the acknowledgment or part payment revives the cause of action and starts time running again. This section is based purely on the premise that any admission made in a formal way ought to operate in favour of a plaintiff. This is demonstrated by s. 9(2) which was enacted to reverse some rather odd common law principles. The section is based on a sound principle and is clear in meaning.

Section 10 provides that an acknowledgment or part payment

of one joint defendant will not necessarily bind the others;

> "Where there are two or more
>
> (a) joint debtors, joint contractors, joint obligators or joint convenantors, or
> (b) executors or administrators of a debtor, contractor, obligator or covenantor,
>
> no such joint debtor, joint contractor, joint obligator or joint covenantor, or executor or administrator shall lose the benefit of this Act so as to be chargeable in respect of or by reason only of a written acknowledgment or promise made and signed, or by reason of a payment of any principle or interest made, by any other or others of them."

This provision seems unobjectionable and is to be found in other parts of the Act.

Section 11 reinforces the previous provision by making it clear that judgment may be recovered against only those joint defendants who are not entitled to the protection of the statute;

> "If, in an action commenced against two or more such joint debtors, joint contractors, joint obligators or joint covenantors, or executors or administrators, it appears at the trial or otherwise that the plaintiff, though barred by this Act as to one or more of the joint debtors, joint contractors, joint obligators or joint covenantors, or executors or administrators, is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise or payment, judgment shall be given for the plaintiff as to the defendant or defendants against whom he is entitled to recover, and for the other defendant or defendants against the plaintiff."

Section 12 expressly provides that certain sorts of self serving acknowledgments or memoranda shall not prove the truth of the statements contained therein;

> "No endorsement or memorandum of a payment written or made upon a promissory note, bill of exchange or other writing by or on behalf of the person to whom the payment has been made shall be deemed sufficient proof of the payment so as to take the case out of the operation of this Act."

This seems quite reasonable in its effect. However, it may be questioned whether any written instrument referred to in the section would be regarded as probative today in a court of competent jurisdiction. The section does no harm but it may be wondered whether it is superfluous.

This Part of the Act applies to counterclaims and set-offs. This is a usual provision as recorded in s. 13;

> "This Part applies to the case of a claim of the nature hereinbefore mentioned alleged by way of counterclaim or set-off on the part of a defendant."

This is undoubtedly a provision worthy of retention. It does effect a change in what might otherwise be the law and it is a change that is in the interests of justice. It would be improper for the statute not to apply to all forms of claim though they might be cloaked in different procedural forms.

LAND

Actions for the recovery of land have Part III of the Limitation of Actions Act, 1955, R.S.A. c. 177 devoted to them. Because of the long history surrounding such actions this Part is undoubtedly the most complicated in the Act. However, this had had the result that many of the difficulties have been litigated and there is now a substantial jurisprudence on the subject.

Actions for the recovery of land have a limitation period imposed upon them by Part 3 of the Limitation of Actions Act, 1955, R.S.A. c. 177. The principal provision is contained in section 18. This section provedes a ten year limitation period in the following words:

> "No person shall take proceedings to recover land except
>
> (a) within ten years next after the right to do so first accrued to such person (hereinafter called the claimant), or
>
> (b) if the right to recover the first accrued to a predecessor in title, then within ten years next after the right accrued to such predecessor."

The length of the limitation period established by the statute appears to be unobjectionable. Ten years is a convenient length of time. With respect to the registered owner, ten years of inactivity on his part could invariably (except in the case of his suffering from a disability) be said to estop him morally from asserting his title. With respect to the occupier, ten years is a long enough period to enable an objective determination to be made as to whether the acts of possession are referable to an assertion of ownership and are reasonably continuous. Bearing in mind the objectives of a limitation period it must be judged whether a ten year limitation period works any substantial detriment to either the owner or the occupier.

It is often said that limitation stautes are statues of repose. It is clear that a claim on which no action has been taken for a long time may cause hardship to a defendant. It may even be that a claimant could take advantage of a lapse of time to press a claim that never had any merit in the first place [See Preston & Newsom Limitation of Actions (3rd ed.; 1953) at p. 2.] It has been suggested, both judicially and extra-judicially that to plead the statute is usually dishonest; Weaver Limitations (1939) at p. 3. However, since the imposition of time limits takes away vested rights it is to be applied with fairness. On the other hand, it has been said that to plead the statute must have some degree of merit for the claimant must have delayed an unconscionably long time before attempting to enforce his rights. The implication of this is that the dilatory are to be punished. However, it might be suggested that the emphasis is inapplicable to cases involving vested proprietary rights. In this case it has been the policy of the law to reqrd those who utilize the property in as full a way as possible. In the case where even the possessor does little with the property he has, at least, done more than the owner who, ex hypothesi, has done nothing at all. The utilisation of land is valuable to society as a whole. It may be incidentally beneficial to those who happen to see it being used. The second useful attribute of a limitation system involving real and personal property is that it fortifies the title of the possessor. It is axiomatic that it becomes increasingly difficult to prove a certain act after a lapse of time. On the other hand, it becomes easier after the effluxion of time to prove a longer possession of property. This feature of time, if employed in a limitation system, can be used to correct errors of conveyancing, which may be useful in such matters as boundary disputes. Any simple rule determining ownership which is dependent upon easily discerned criteria should facilitate an accurate and quick appraisal of the relative rights of claimants. This, it turn, should tend to diminish breaches of the peace. However, it may not be claimed that all these arguments apply with the same force on the case of recovery of land where the land is in fact registered. Registration of land has several additional advantages but the feature with which we are here concerned is that it can provide an accurate description and plan of the land registered and that it may not be subject to the rights of third parties. This feature is not utilized to its fullest extent in Alberta.

If the notion that the claimant who does not comply with the limitation period is guilty of some moral turpitude and therefore ought to be deprived of what would otherwise be his right is to be extended into the sphere of vested property rights the doctrine may be seen to be analogous to that of

estoppel. In both cases a substantive right is removed by a procedural device; See Spencer-Bower and Turner Estoppel by Representation (1966) at p. 9. The same sort of inactivity that may cause the limitation period to run against the owner of property may also give rise to an estoppel preventing him from later asserting his right. Silence or inaction usually does not give rise to an estoppel without a legal (not merely a moral or social) duty being imposed upon the silent or inactive party. However, where a person having a right, title or claim to property perceives another acting inconsistently therewith he may be precluded from later asserting his right against such party. Whereas in such an estoppel the conduct of the other party must be sufficiently brought to a landowner's notice, in a case of adverse possession the landowner need have no idea of the conduct of the other party.

In view of the gravity of the consequences which presently may result from the expiry of the limitation period it should be questioned whether the period is sufficiently long. While it seems theoretically possible to accomplish all that the Limitation of Actions Act impliedly contemplates should be achieved during the limitation period it will be beneficial to examine the common cases in which one otherwise entitled to recover land is prevented from doing so by the operation of the limitation period. The common situations in which a person otherwise entitled to recover land is prevented from doing so are as follows;

(1) Encroachment by an adjacent landowner. This may be intentionally or innocently perpetrated by one landowner upon his neighbour. [On the importance of the intention of the occupier see Goodman Adverse Possession of Land in the Law of Limitation of Actions (unpublished thes s; 1967)]. Although the accuracy of this proposition can never be verified it would appear to be the case that encroachment over a boundry is more often innocent; Hopgood v. Brown [19552 1 W.L.R. 213, Chisholm v. Hall [1959] A.C. 719.

Although it will always be an encroachment in the eye of the law for one party to occupy part of his neighbour's land, there is a considerable practical difference between encroachments are often the result of the agreement of landowners that the boundary fence between them should not pass through a piece of land useless for farming, such as a wood, thicket or gulley.

In a city or heavily populated district the reason for non-compliance with the boundary is more often a mistake in surveying or a misdescription. This may be very costly in terms of the use to which the land is presently being put. For example, commercial office space in a ten storey building situated in Edmonton or Calgary might well be worth $6 per square foot. An encroachment of such a building on the neighbouring property, if continued throughout the useful life the building, might well bring a profit to the owner of the encroaching building of $90,000 to $100,000 dollars or more.

(2) Situations in which a formal relationship at one time existed between the parties. These might include circumstances where a tenant or mortgagor held land adversely to the interests of his landlord. Occasionally a purchaser of land enters into possession of land enters under an incomplete agreement for sale or does not register a transfer to him of the land. In these cases the holding of the purchaser, tenant or mortgagor may well be adverse to the interest of the registered owner. In these cases, adverse possession throughout the limitation period would entitle an occupant to claim a transfer of the title to him.

The typical situations may be classified as follows;

> (a) The lease or tenancy which is followed by a period of adverse possession. That the character of the possession may change is recognized by sections 29 and 30 of the Limitation of Actions Act 1955 R.S.A. c. 177 which read as follows;
>
> 29. Where a person is in possession of land, or in receipt of the profits thereof, as tenant from year to year or other period without a lease in writing, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued.
>
> > (a) at the determination of the first of such years or other periods, or
> >
> > (b) at the last time, before his right to take proceedings became barred under any other provisions of this Act, when any rent payable by the claimant or his predecessor or the agent of either,
>
> whichever happens last.

30. (1) Where a person is in possession of land or in receipt of the profits thereof as tenant at will, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued either

(a) at the determination of the tenancy, or

(b) at the expiration of one year next after its commencement, at which time if the tenant was then in possession the tenancy shall be deemed to have been determined.

(2) No mortgagor or cestui que trust under an express trust shall be deemed tobe a tenant at will to his mortgagee or trustee within the meaning of this section.

These statutory rules were first introduced by the 1833 Act to reverse the former rule that the possession of a tenant at sufferance or a tenant at will was deemed to be that of his landlord and therefore could not be adverse to the landlord. These provisions are fairly standard and almost all common law jurisdictions have corresponding provisions. Section 9 of the English Limitation of Actions Act, 1939, 2 & 3 Geo. 6 c. 21 contains provisions identical in their effect but does recognize that there might be non-payment of a sum which it would not be economically feasible to collect. This recognition of a rather salient fact is made in the following words;

> s. 9 (3) Where any person is in possession of a land by virtue of a lease in writing by which a rent of not less than twenty shillings is reserved, and the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease, and no rent is subsequently received by the person rightfully so entitled, the right of action of the last-named person to recover the land shall be deemed to have accrued at the date when the rent was first received by the person wrongfully claiming aa aforesaid and not at the date of the determination of the lease.

It is clear that this statutory section permits the person rightfully entitled to the receipt of

the sum of rent mentioned in the lease to consistently waive receipt with immunity until such time as another person wrongfully receives it. The section embodies a clear effort on the part of the legislators to ensure that someone is actually in adverse receipt of the rent before time will begin to run. Thus the section preserves the competitive aspects of the doctrine of limitation of actions to recover land, and of the doctrine of estates itself. The section, and others like it, preserves an intermediate stage between statutorily disregarding the limitation period and letting the limitation period have its full and unmitigated effect. Section 28 of the Alberta Limitation of Actions Act has the same effect;

> 28. Where any person is in possession of any land, or in receipt of the profits thereof by virtue of a lease in writing, by which a rent amounting to the yearly sum or value of four dollars or upwards is reserved, and the rent reserved by such lease has been received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease, and no payment in respect of the rent reserved by the lease has afterwards been made to the person rightfully entitled thereto, the right of the claimant or his predecessor to take proceedings to recover the land after the determination of the lease shall be deemed to have first accrued at the time at which the rent reserved by the lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of the lease to the person rightfully entitled.

It would seem appropriate to retain such a statutory section and to require the person entitled to collect the rent to do so only where there is actual competition. Wherever the limitation period applies this would seem to be a beneficial modification of its operation. The section does not apply where the rent reserved is less than a certain amount. The question of what is a suitably small rent remains. The amount specified should be the smallest sum that in an ordinary commercial transaction it could conceivably be economical to collect. The sum should be a standard minimum specified in the Act or a regulation made thereunder. The introduction of a sum assessed in a regulation would have

the advantage of allowing the figure to be kept up to date and allow the economic circumstances of the Province to be taken into account. However, it is felt that the amount specified must be to some extent arbitrary and that neither a regulation nor a statute is likely to be altered without some pressure. It is felt that such pressure is unlikely to be felt with respect to a section of the Limitation of Actions Act or a regulation made thereunder and that, as a consequence, the regulation is likely to remain as unaltered as the statute would be. The third alternative is to allow the sum to be assessed judicially in each case. There might be, in this case, some rather arbitrary variation in the maximum economic sum and any disparities would be deleterious. Therefore, it would seem that the sum concerned ought properly to be fixed by statute. The amount at which it out to be fixed is a matter for conjecture but it is apparent that four dollars per annum is a rather small sum for this purpose.

There are many reported cases in which a tenant has altered his causa possidendi and begun to hold adversely to his landlord. The position is that whenever the cause of action may be said to accrue, whether it does so as a result of the operation of sections 28, 29 or 30 of the Limitation of Actions Act or as a result of the acts of the parties, then from that time the possession may be said to be adverse and time begin to run. The Court automatically regards any possession by the lessee subsequent to the accrual of the cause of action as being adverse . This is so, even though the lessor may be practically or legally prevented from bringing his action; Moses v. Lovegrove [1952] 2 Q.B. 533. In that case the lessor was prevented from bringing his action by the Rent Acts. The test of adverse possession was decided by the English Court of Appeal not to be necessarily that the owner should have an unqualified right to sue for possession. [However, if the rule preventing recovery of the land were a limitations rule postponing accrual of the cause of action then the owner would not be similarly prejudiced.] In Moses v. Lovegrove [1952] 2 Q.B. 533 at 544 Romer L.J. stated;

"In my opinion, if one looks to the position of the occupier and finds that his occupation, his right

> to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings."

In the case of a tenant (or anyone else who held originally by lawful title, referable to the grant of an owner) it must be demonstrated unequivocally that the acts relied upon were quantitatively and qualitatively sufficient to have this effect; Williams Bros. v. Raftery. [1958] 1 Q.B. 159; Kynoch v. Rowlands [1912] 1 Ch. 527. Bramwell L.J. made this point in Leigh v. Jack (1879) L.R. 5 Ex. D. 264 at 273;

> "I do not think that there was any dispossession of the plaintiff by the acts of the defendant; acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed, nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment."

The onus is on the claimant to demonstrate that a possession which began by being derivative has become adverse and independent. This he may do by the adduction of sufficiently strong evidence. This evidence must show that the possession became adverse and independent from a particular point in time; which was when the possession ceased to be derived from the landlord. An arbitrary date at which the law recognises that the possession is no longer derivative is set out in sections 29 and 30 of the Limitation of Actions Act. Those provisions apply to tenancies at will and periodic tenancies and set out times from which such tenants shall be deemed to possess adversely to their landlords.

Sections 29 and 30 read as follows;

> "29. Where a person is in possession of land, or in receipt of the profits thereof, as tenant from year to year or other period without a lease in writing, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued
>
> (a) at the determination of the first of such years or other periods, or
>
> (b) at the last time, before his right to take proceedings because barred under any other provisions of this Act, when any rent payable in respect of the tenancy was received by the claimant or his predecessor or the agent of either,
>
> whichever happens last.
>
> 30. (1) Where a person is in possession of land or in receipt of the profits thereof as tenant at will, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued either
>
> (a) at the determination of the tenancy, or
>
> (b) at the expiration of one year next after its commencement, at which time if the tenant was then in possession the tenancy shall be deemed to have been determined..."

These provisions are standard. Section 29 relates to periodic tenancies and allows accrual of the cause of action at the later of two times;

(1) the end of the first period of the tenancy, or

(2) on the last receipt of rent within the limitation period.

Thus the period for the recovery of land will usually be ten years from the end ofthe first rent period or from actual receipt of rent. It will be noticed that s. 29 (b) is cautiously worded so as to avoid revival of a right that has been extinguished. A. 30(1) is somewhat simpler in that the point of it is that the cause of action shall accrue when the tenancy has actually

determined or when it is notionally determined after the possession of the tenant for one year. Since there is rarely an explicit arrangement for determination s. 30 (1)(b) provides, in effect, a limitation period of eleven years dating from the first taking of possession by the tenant at will. These provisions appear to be effective and useful.

Section 30 (2) preserves the rights of mortgagees and trustees who are in a fiduciary relationship but would otherwise be vulnerable;

> "No mortgagor or cestui que trust under an express trust shall be deemed to be a tenant at will to his mortgagee or trustee within the meaning of this section."

Mortgagors and beneficiaries under express trusts should not normally be held to be tenants at will anyway. This subsection precludes the beneficiary being permitted to hold land adversely as tenant at will to his trustee. [This affects the discussion below, in the section relating to trustees, as to the situations in which a beneficiary may be permitted to hold adversely to his trustee.] The effect of this subsection is probably to preclude the beneficiary from holding land adversely to his trustee in all cases where there is an express trust. It may also apply to certain cases of constructive trust [see title on "Trusts and Trustees."] Thus, in the case of any trust to which this subsection applies its effect will be to preclude the beneficiary from ever holding adversely to his trustee. This is because the status of tenant at will is the only convenient one for an adverse beneficiary to assume.

(b) In some circumstances a mortgagor may occupy land. In almost all circumstances it is for his own benefit but it depends upon the agreement between himself and the mortgagee as to whether the possession is adverse or not. Normally, s. 30(2) will apply to prevent the possession being adverse while the mortgage is on foot. It is common for a mortgagor to occupy land and this provision is designed to keep the mortgage on foot while the mortgagor takes possession. In addition, such a mortgage would be kept in full force and effect by any acknowledgment or any payment of principal or interest. These provisions of the Act both tend to keep the mortgage alive. Although

these provisions do not refer to the same subject matter they will have the same effect. In effect, they seem to be repetitive. However, they may well be useful.

The effect of s. 30(2) is to limit the situations in which a m ortgage may be removed from the register to those situations in which it has been fully performed. Provision is then accorded by the Land Titles Act for its removal (see title on "Mortgages of Real and Personal Property"). Because of the operation of s. 30(2) of the Limitation of Actions Act possession by a mortgagor could not usually be adverse to that ofhis mortgagee. However, if the possession could be shown to be truly adverse without involving an allegation that the mortgagor had the status of tenant at will then title might be able to be acquired by long possession by a mortgagor claimed to be adverse to that of his mortgagee. The taking of possession by a mortgagor will usually have to involve an allegation that he was at some stage a tenant at will and this runs counter to s. 30(2).

(c) Possession may have its origin in a licence and in this case too the licensee may wish to hold adversely to the interest of the licensor. The only real question to be determined here is whether, and if so when, possession ceased to have reference to a licence and became adverse. It is clear that during the currency of the licence there can be no adverse possession. Thus, in Hughes v. Griffin [1969] 1 All E.R. 460 Harman L.J. said at 463;

> "Time cannot run, as I see it, in favour of a licensee and therefore he has no adverse possession."

Some situations of this sort may be remedied by the application of s. 183 of the Land Titles Act. These cases might also be dealt with according to the ordinary rules of estoppel licenses. Whereas s. 183 will usually be invoked in the case of partial encroachments the doctrine of estoppel licences may be relevant in the case of an encroachment or of a total occupation.

gives back 6(2) on p 18

(3) Occasionally, a situation arises in which an adverse possessor occupies land in an ostensibly deliberate way. This may happen in the case of abandoned land, and where it does then it is manifestly to the benefit of society. Such possession may be deliberate, and in the case of otherwise unused land, this is beneficial. If possession is referable to a mistake it may not be so advantageous to society as a whole. [see Alberta examples such possession noted in Williams (1967) 6 Alberta L. Rev. 67.]

Sometimes possession may be taken in an ostensibly deliberate way when it is in fact referable to a lawful title in the possessor. For instance, a person may take by transmission or purchase and lose all evidence of the transaction. Sale for arrears of taxes are available to correct this in all Provinces, but these do not satisfactorily cover all the problems. There are additional provisions in Alberta and all the other Provinces but these are not entirely adequate either. [see provisions such as s. 111 of the Alberta Land Titles Act, mentioned below, and the Curators Act and s. 50 of the Trustee Act of British Columbia.]

(4) Other, informal, arrangements may lead to an adverse possession. This may be the case where one with permission, for example a licensee of some type, might hold adversely to the person strictly entitled. Thus, one who was originally tolerated or encouraged to occupy land may eventually claim the land for himself. In Alberta, it seems to happen with some regularity that a relative may farm the land of a deceased registered owner. One relative may farm alone although several others are entitled to a share in the land. At first the farmer may share out the proceeds and profits of farming the land but after some time he may realise that he has put a lot of effort into the land and has made various improvements and now regards himself as morally solely entitled. The question as to whether he is legally entitled will often depend upon the quality of his possession; that is as to whether he held adversely to the interests of the other persons entitled for the requisite period.

Informal arrangements of this and other types are not uncommon. Rarely, however, do they lead to adverse possession between the original parties to the informal arrangement. A remote party who succeeds to the interest of the beneficiary of the informal agreement is usually the party claiming to have adversely possessed. While feelings of gratitude exist in the original occupier of the land these may not extend to his successors. Then, in Hayward v. Challoner [1967] 3 All E.R. 122 a gift of land had been made for the use of successive vicars. The English Court of Appeal decided that the present incumbent was entitled to the land. The vicar entitled was not the original recipient, who might have been more gracious. It is interesting that in this case the Court of Appeal regarded the adverse occupier as the corporation sole and it was then able to find the present incumbent entitled although no individual had occupied the land for the statutory period. Another example of a claim of this type being made by one who was not a party to the original transaction is to be found in Hughes v. Griffin [1969] 1 All E.R. 460. In this case the deceased testator devised land to the plaintiff but the testator and his wife (the defendant) continued to live there. After the testator's death the plaintiff brought action to recover the land from the defendant. The defendant countered with the argument that both she and the testator had lived on the property for twelve years subsequent to the conveyance of the property and that she had, therefore acquired a title by limitation. The Court of Appeal held that she had occupied the land as a licensee of the plaintiff and, as such, had been incapable of acquiring a title by long possession.

Thus, it should be noticed that there are various situations in which adverse possession now occurs and that these may be classified in different ways. Nevertheless, the situations in which adverse possession is effected are recognisable. Aside from the classification attempted above a classification could be based on the state of mind of the possessor.

The situations are classified by Ruoff, First Registration of Titles Acquired by Adverse Possession (1963) 27 Conv. (N.S.) 353 on the basis of the intention or state of mind

of the adverse possessor. The classification is three-fold;

(1) The intentional squatter. This refers to the entrant who deliberately encloses the land of another and fences and uses it an his own. If he does so successfully, his title by adverse possession is easily proved.

(2) The casual squatter is one who is originally a tentative trespasser who later alters and increases his occasional use of land. He becomes less cautious and may use the land in a permanent way or spend money upon it. There is some difficulty in discovering when he first occupies adversely to the owner.

(3) The innocent squatter may be a man who believes land to be his own. If this turns out to be a mistaken assumption such a person will nevertheless acquire the land at the expiry of the limitation period. It is common for encroachments to be made in this fashion.

The foregoing classifications should be borne in mind when considering the persons acquiring title to land by limitation and the utility of their actions. Section 18 is the most important section of this Part in that it lays down that actions to recover land must be brought within ten years. The other sections of the Part hinge upon this. The first enquiry must be as to whether all that is to be accomplished may be effectively done within this period. It should be remembered that this enquiry is to determine not only what is the appropriate maximum length for the bringing of actions to recover land but also, on the present state of Alberta law, after the lapse of what time ought a possessor to become entitled to the land.

Section 18 of the Alberta Limitations of Actions Act provides a ten year limitation period for all actions for the recovery of land except for those actions which fall within sections 29 and 30 and those for which the commencement of the running of time is postponed in accordance with some other section of the statute. This is certainly consistent with the period in operation in other Provinces in Canada. In Manitoba, Saskatchewan, Ontario and the Yukon and Northwest Territories the period is the same; see s. 16 Limitation of Actions Act 1954 R.S.M. c. 145, s. 18 Limitation of Actions Ordinance 1956 R.O.N.W.T. c. 59.

The period in British Columbia, New Brunswick, Nova Scotia, Nowfoundland and Prince Edward Island ~~the period~~ in operation is the one that applied in England before 1874, namely that of twenty years; s. 16 Statute of Limitations Act 1960 R.S.B.C. c. 145, s. 17 Statute of Limitations 1951 R.S.P.E.I. c. 81.

Since 1874 the limitation period in England has been twelve years; section 1 of the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57. Prior to the enactment of this section the limitation period was almost always longer. The English legislative history is scheduled in Appendix A.

It is noteworthy that the Ontario Law Reform Commission could see no reason for changing the ten-year period. They stated, at page 67 of their Report on Limitation of Actions (1969) that, "There appears to be no dissatisfaction with it."

There are several arguments for a legal system to allow acquisition of title to land by adverse possession. They include the following:

(1) The desire to reward the diligent. Of course, this argument cannot be extended very far or it will assist all sorts of people to help themselves. The converse proposition is that those who have merely left land to lie fallow should be punished. Again, this ought not to be extended too far.

(2) The encouragement of the full use of the land. It is regarded as generally desirable for any society to have its assets used to full advantage. This is probably the most important justification for the doctrine.

(3) The claim that allowing a squatter to gain title has been responsible for the introduction of certainty as to the ownership of land. While it is true that the institution assimilates possession with ownership to some extent it is a claim that can only be made until a more certain method is available. It may well be that the better method of ascertainment of title to land is the registration system in operation in many jurisdictions. Nevertheless, there is some residual advantage in giving a factual state of affairs the force of law in that expectations are not disappointed. Also the institution

is such that it corrects errors in conveyancing by consistently and openly adjudicating land to the possessor after a certain length of time. Any method claiming to introduce certainty ought to be attended by a reduction of breaches of the peace.

(4) Although either to allow or disallow acquisition of title by possession would result in some injustice it is commonly thought that anyone who occupies land for a longtime has more of a moral right to it than the owner. This may be because it is thought that those who delay for a long time whould be deprived of the right they seek to enforce. Furthermore, lapse of time after accrual of a cause of action tends to destroy proof, positive or negative. He who has allowed the proof to be destroyed has less of a moral claim to enforce his right.

On the other hand, there are several reasons why it is not desirable for adverse possession to ripen into ownership. Some arguments which might be levelled against the doctrine are:

(1) That it is morally wrong to upset vested property rights. In operation it is the abrogation of a substantive right by a procedural device. Mere silence or inaction is felt not to afford a sufficient reason for depriving a person of his land. There should at least be a duty on the silent or inactive party before harmful consequences are visited upon him. That such a duty ought to exist before penalising a landowner is recognized in the doctrine of estoppel, which has a rather similar policy. It is implicit in the argument that such a duty ought not to be imposed upon a person merely because he owns land.

(2) The doctrine of acquisition of land by adverse possession has become, in modern times, more of a threat to certainty of title than a support of it. This may be especially true anywhere a registration system operates.

(3) The landowner may be deprived of land without having a practical opportunity to defend himself against loss. This situation, particularly relevant to encroachment and boundary mistakes, may be thought to be morally repugnant. The argument may be countered with the approach that a landowner ought to look after his land.

(4) The result of a successful occupation for the requisite time may be irrelevant to the needs of the occupier. Although the occupier will gain only the portion of land he occupies he will acquire that land for whatever estate the owner had. The occupier will gain the full estate of the person against whom the occupation was successful. This will have the advantage of not multiplying estates in land but it may be thought that it is unfair in some cases for an occupier to obtain a larger estate than is necessary. The estate obtained is not tailored to meet the circumstances as it would be in the case of acquisition by estoppel.

After the expiry of a period of ten years adverse possession of land the dispossessed owner not only is barred from pursuing his remedy in the courts but loses his right of ownership. Section 44 of the Limitation of Actions Act provides that, "At the determination of the period limited by this Act to any person for taking proceedings to recover any land, rent charge or money charged on land the right and title of such person to the land, or rent charge or the recovery of the money out of the land is extinguished". By means of this section an owner is precluded from asserting what would otherwise by a better right to possession than that of the occupier for more than ten years. It is noteworthy that this section applies only to the recovery of land, rent charges and money charged on land, There is no comparable provision for chattels. see 1966 am.

There appears to be little dissension from the notion that title to land should be extinguished at the expiry of the limitation period. This feature has been a part of English law continuously since the enactment of section 34 of the Real Property Limitation Act, 1833. Recent deliberation of provisions relating to the extinction of title have approved the continuation of this feature. [Furthermore, it is noteworthy that the possibility of extension of the scheme of extinction of the right on barring of the remedy has been widely canvassed.] In Alberta, the extinguishment of the title of the registered owner leaves the possessor as the nominal, though unregistered, owner. A procedure for the registration of the new nominal owner is provided by Alberta legislation.

Since section 73 of the Land Titles Act has been incorporated in the statute, the proper course for a squatter to take is to obtain a judgment declaring that he "is entitled to the exclusive right to use the land or that he be quieted in the

exclusive possession thereof." Since the judgment does not alter, but merely declares pre-existing rights in the land, it ought, on principle, to be unnecessary. Often the registered owner will be concerned to contest on a factual basis the granting of a declaration of entitlement to an occupier. If the registered owner cannot be found service may be made substitutionally by serving relatives or publishing notices in newspapers, as it was effected in Wallace v. Potter, (1913) 10 D.L.R. 594, subsequently followed in Saturley v. Young, [1945] 3 W.W.R. 110. All those who appear to have a real interest in objecting to the grant of the declaration should generally be joined as defendants. This is so that they will have a chance to be represented and because the declarations concerning the rights of absent parties: See New Brunswick Railway Co. v. British and French Trust Corporation, [1939] A.C. 1. For this reason, it may be desirable to join all parties. It is conceivable that a defendant may not wish to go to the expense of entering a defence, and then the courts may not wish to make a declaration on the grounds that there is no live issue or real dispute between the parties. It is however, probably in the public interest that there should be a declaration. The Registrar could hardly act if there isn't. (He can't be judge

Sec. 73 (2) provides further that:

> "At the expiration of three months after the filing thereof, the Registrar shall, unless he is satisfied that an appeal from the judgment is being taken, make, upon the certificate of title, either wholly or prtially, according to the tenor of the judgment and setting forth the particulars of the judgment."

This would seem to be a measure exhorting the Registrar to let the register declare the established right of the sqatter. Whereas the act of the Registrar in making the entry usually creates the right, here it follows the existence of the right. However theoretically unimportant the judgment and the registration thereof may be with respect to the rights of the parties, the cases show that until the judgment is obtained and registered the squatter is liable to lose the land; Dobek v. Jennings [1928] 1 D.L.R. 736 and Boyczuk v. Perry [1948] 1 W.W.R. 495. (In the meantime, however, he may protect his interest by registering a caveat.)

The squatter obtains a new estate of his own but it is subject to any third party rights, such as easements or restrictive

S.A. 1906 c. 24

"The Land Titles Act"

s. 50. If a transfer purports to transfer the transferor's interest in the whole or part of the land mentioned in any certificate of title, the transferor shall deliver up the duplicate certificate of title of the land and the registrar shall make a memorandum thereon and upon the certificate of title in the register cancelling the same, either wholly or partially, according as the transfer purports to transfer the whole or part only of the interest of the transferor in the said land, and setting forth the particulars of the transfer.

This reiterates with immaterial differences s. 67 of The Territories Real Property Act.

covenants which run with the land and have not been extinguished. The estate obtained will generally be a fee simple, but it may not be. It is possible for a squatter to occupy against a tenant and obtain a leasehold estate. The limitation period for the landlord's action to regain possession will commence on the determination of the original lease. The adverse occupant of leasehold land will nearly always be obliged to pay the rent and, according to the basis on which the rent is paid, will become a periodic tenant. If he takes advantage of the previous tenant's lease he may be estopped from denying that he has adopted it, and will therefore make himself subject to the convenants therein.

The Land Titles Act is designed to substitute a system of absolute ownership in land for the common law arrangement of competing rights to possession of the land, and it might, therefore, have been preferable to exclude the doctrine of title by limitation as this is merely a facet of the older system. It would be impossible without legislation now to expunge the anachronism in Alberta since it has been received in several decisions and many obiter dicta, as well as by the Land Titles Act itself. The provision for registration of the adverse possessor at the expiry of the limitation period has existed in the North West Territories since section 67 of the Territories Real Property Act, 1886, S.C. c. 26 was enacted. At the time the limitation period was the twelve year period of the Imperial Real Property Limitation Act of 1874 which was adopted by the North West Territories. On Alberta's attainment of Provincial status the forerunner of the modern section 73 was enacted as section 50 of the Land Titles Act, 1906, S.A. c. 24.

There is a further difficulty in that the person who possesses for the statutory period, despite the operation of sections 18 and 44 of the Limitation of Actions Act R.S.A. 1955 c. 177 and section 73 of the Land Titles Act R.S.A. 1955 c. 170, is liable to have his title defeated at the hands of a bona fide purchaser for value without notice of the interest of the squatter in the property; Dobek v. Jennings [1928] 1 D.L.R. 736 and Boyczuk v. Perry [1948] 1 W.W.R. 495. The registered proprietor has lost his own estate but may act as vendor and pass a good title to the unsuspecting purchaser. It appears that the registered owner may act in this manner so as to pass a good title to a purchaser where his only purpose is to defeat the right acquired by the squatter and the purchaser has notice of this fact. The purchaser of land is presumed to have taken property subject to the rights of the adverse possessor wherever the purchaser can be identified with the vendor; Zbryski v. City of Calgary (1965)

51 D.L.R. (2d) 54. Thus, the present Alberta rule may be summed up as follows: (a) as between the immediate parties, the adverse possessor is to be preferred to the registered owner because the Land Titles Act is subject to the Limitation of Actions Act, but (b) as between the adverse possessor and a third party purchaser from the registered owner the latter prevails where the transaction was conducted at arm's length.

It seems rather odd that the ordinary rules of nemo dat quod non habet should be disregarded in Alberta. This is especially so in view of the fact that that rule applies in the converse situation, thus rendering it impossible for the adverse possessor to bestow on any purchaser from him a better title than he himself had. However the idea of a party being able to pass more than his own interest should not be regarded as all that strange; sections 3 and 4 of the Factors Act, 1955, R.S.A. c. 106 and personal property passing under contracts voidable at common law (Phillips v. Brooks (1919) 2 K.B. 243). However situations in which a person may give a better title than he himself has have usually arisen for a specific and good reason and proliferation of such situations is not lightly to be countenanced.

The only means the adverse possessor has of protecting his estate in the land is by application to the court for a declaration of title or by registering a caveat against the property. This procedure may be seen by some to be objectionable for the caveat or declaratory judgment is merely declaratory of what already belongs to the possessor. However, this argument may be countered by pointing out that the basis of the Torrens system is that the individuals involved have to take some steps to advise others of their estates and interests in the property.

Various solutions have been employed in other jurisdictions to settle three party disputes involving an adverse possessor, a registered owner and a purchaser from him. Certain jurisdictions regard freedom to enter commercial dealings in reliance on the register as the paramount interest and others require the purchaser to take an interest subordinate to that of an adverse possessor (against the presence of whom the purchaser may always protect himself by adequate inspection and by taking a covenant from the vendor that indemnity will be made where an adverse possessor is actually in existence). Different jurisdictions have adopted

different approaches towards allowing claims of adverse possession to succeed against the registered owner and any purchasers from him; Ruoff An Englishman looks at the Torrens System (1957) at p. 22 et seq.

In England the position is that the Land Registration Act, 1925, made provision for a system of registration of title to land. Since the reliability of the register and the allowing of the fullest use of land by anyone wishing to do so are inconsistent aims in such a system, one of them has to be sacrificed. The statute has permitted acquisition of title by possession at the expense of the certainty of the information supplied by the register. Section 5 of the Land Registration Act, 1925, allows reliance upon the register subject to any overriding interests that may affect the registered land. Section 70(1) outlines the overriding interests recognised by the Act and paragraph (f) reads;

> "Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts."

This paragraph is followed by paragraph (g), which provides that the rights of persons in actual occupation are also exceptions to the indefeasibility provision:

> "The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed;"

Thus it may be said that the Limitation Acts apply to registered land just as they do to unregistered land, unfettered by the Land Registration Act, 1925. The machinery, however, is slightly different: See Curtis & Ruoff Registered Conveyancing (1965; 2nd. ed.) at p. 120, Lewis & Holland Principles of Registered Land Conveyancing (1967) at p. 75 and Farrand Conveyancing Contracts (1964) at p. 204. Section 75 provides that where an adverse possessor has occupied for the requisite time the registered owner shall hold the property on trust for the possessor. The unextinguished rights of other persons shall continue undiminished. Section 75(2) permits such an adverse possessor to apply to be registered as owner. The registrar may register the applicant with such title as is appropriate, always saving the unexpired rights of third parties. Compensation may also be paid to those injuriously affected by virtue of s. 75(4). Payment is to be made at the discretion of the registrar but the claim for compensation must be made within a reasonable time, as specified by s. 83 (11) of the Land Registration Act, 1925.

Thus, it is clear that a purchaser of registered land in England could never rely exclusively upon the register. Such a purchaser could never acquire notice of such rights as are specified in s. 70(1)(f) and (g) through the register. Incorporeal hereditaments either gained or in the course of being gained by prescription are much less susceptible of discovery by inspection of the premises than actual occupation would be. It is improbable that the rights of other persons in land, whether acquired prescriptively or by limitation, will be disclosed by a vendor at the time of sale. Often he will not realise that such rights exist, but whether he does or not, it will not be in his interest to disclose any such rights. The imposition of a trust upon the registered owner will exact some fairly stringent conduct from him vis-à-vis the squatter but will not help a purchaser very much.

In 1930 the Court of Appeal ordered retification of the register by way of removing from the plaintiff's registered title the land which had been acquired by the defendant by adverse possession; Chowood Ltd. v. Lyall (No. 2) [1930] 2 Ch. 156. A subsequent action, In Re Chowood's Registered Land [1933] 1 Ch. 574, was brought by the party who had lost the land as a result of the rectification. This subsequent action was brought to obtain indemnity out of the Land Registry insurance fund. Clauson J. held that, as the applicant's registered land was always subject to the overriding rights of the adverse possessor, the rectification of the register had not altered the applicant's position. The applicant had not been deprived of anything to which he was entitled by the rectification and was not entitled to be indemnified. Clauson J. stated at p. 582;

> "The loss was occasioned by paying Ralli for a strip to which Ralli could not make title. The rectification of the register merely recognised the existing position, and put Chowood in no worse a position than they were in before.
>
> In these circumstances I must hold that Chowood have suffered no loss by reason of the rectification of the register".

The statement is literally true but it nevertheless remains the fact that purchasers are more likely to pay on the faith of a registration than on that of title deeds which are so well known to be fallible. See the pious endorsement of Clauson J's sentiments by Curtis and Ruoff in Registered Conveyancing (1965) at p. 121.

In other common-law jurisdictions the Act setting up the registered system has often made no mention of adverse possession and whether or not it creates an overriding interest. The Courts are then faced with the question of whether the Limitation Act or the appropriate Act establishing a Torrens system is to prevail. The case of Belize Estate & Produce Co. v. Quilter, [1897] A.C. decided by the Privy Council, has been taken in some jurisdictions as authority for the proposition that the Limitation Act should prevail. It should, however, be noticed that the Land Registry Act there in question provided only a facility for optional registration. Any statement concerning an Act providing only for optional registration must tend to diminish in force when applied to an Act establishing a true Torrens system. The result has been that most Australian jurisdictions have favoured a compromise allowing adverse possession, while most Canadian provinces have favoured a system in which more reliance may be placed upon the register, and in which no adverse possession is allowed. The fact that both solutions have been accepted by almost equal numbers of common-law jurisdictions tends to lead one to believe that the merits of both are of almost equal strength. Some jurisdictions are undecided and some have reached a judicial conclusion only after hesitation. See Schmeiser Prescription under the Saskatchewan Land Titles Act (1966) 31 Sask. B. Rev. 54, The Statute of Limitations and the Land Titles Act (1911) 47 Can L.J. 5 and Ruoff First Registration of Titles acquired by Adverse Possession (1963) 27 Conv. (N.S.) 353. In England the first Act establishing a registration system (the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 21) made it impossible to acquire title by adverse possession but now the philosophy has completely altered. The modern position whereby the nominal owner is able to remain the legal owner enables it to be said that the register does not tell a lie; but it may be guilty of a misleading half-truth as far as a purchaser is concerned. The nominal owner who is rendered a trustee should then convey the legal estate to the adverse possessor and allow the latter to be registered as owner. No very precise burden seems to be placed upon the trustee as to when, where and at whose expense the conveyance should be made. The only words relevant to this question seem to be those of Harman J. in Bridges v. Mees, [1957] 2 All E.R. 577, at p. 581, where he said:

> ". . . For the defendant is a mere trustee of the legal estate and must convey it to the plaintiff."

Thus, in England acquisition of title to land does not differ much in principle whether it is acquired under the Land Registration Act, 1925, or under the common law. The machinery does, however, differ and this has a few important effects upon the facts which may sometimes significantly alter the position of the squatter, the registered owner and the potential purchaser of the property.

Several possibilities exist for the resolution of the conflicting aims of the registration system and the acquisition of title by limitation. Either system might be subordinated to the other. The present position in Alberta is that the Land Titles Act scheme is subordinate to the acquisition of title to land by possession. In Saskatchewan and in other Provinces the converse is true; see Schmeiser Prescription under the Saskatchewan Land Titles Act (1966) Sask. B. Rev. 54, Turner v. Waterman (1965) 53 W.W.R. 595.

If the choice is made in favour of the registration system and all adverse possession is made subordinate to it further problems will undoubtedly arise. The Court, or other appropriate body, would have to be empowered to deal with certain situations which may from time to time arise. The court would seem to be the tribunal most fitted to determine who has the best right to be registered as owner. Although the rights to be determined in such cases would be moral rights if adverse possession for a certain period were not to bestow ownership automatically a tribunal able to apply principles of law would be well-versed in the legal background to such claims. Since a determination of conflicting claims would have to be made and since matters of policy would necessarily have to be decided the decisions ought not to be left to a Registrar of Land Titles or equivalent officer. Since the Courts are the only bodies available and equipped to perform these tasks it seems logical that they should be the bodies appointed to decide such questions.

The courts would then be empowered to decree that a certain applicant was to be registered as owner of the land. Statutory or practical rules would be almost inevitable and in accordance with them the court would exercise its descretion to order that a particular person be registered as owner. Thus the discretion would be exercised in a regular way. However, it should be noted that the applicant would be at the mercy of the court's discretion and the direction to register the applicant

involved would derive its authority from that order and not from the prior rule. The situations in which it is envisaged that the court might make an order directing the Registrar to register a person as the registered owner would be fairly well circumscribed and would consist of the situations in which it is now difficult to come to a solution without invoking the aid of the doctrine of adverse possession. Among such cases are the following;

(1) Abandonment by the registered owner where it has been found impossible to trace the registered owner after a diligent search.

(2) Purchasers and mortgagors in possession who have either discharged all outstanding obligations against the property or where the vendor or mortgagee has lost the right to recover any further payment as a result of the lapse of the statutory limitation period.

A compromise between the aims of the registration system and allowing title by adverse possession would seem to be desirable. It has been suggested above that one method of preserving certainty of title to land while promoting its most intensive use might be afforded by court order. Such a court order might be discretionary and take into account the justice of the case but it is envisaged that the discretion of the court would be exercised along well-established lines. Such a declaration of title by the court would have the advantage of certainty but would have the built-in disadvantage of expense. Declarations of title are now made by the courts from time to time and are effective but there seems to be little chance of altering their haphazard and sporadic character. Unless this method were the only one in use to reconcile the two policies it would be ineffective because the declarations would merely be examples and would not amount to an exhaustive record. Also, at best, such a system would be arbitrary.

An alternative method of compromising the aims of the two institutions seems preferable.

The effects of adverse possession might be reduced if registration by one in the process of claiming an adverse estate in land were required. The institution would be then a well-defined incursion into security of title. The machinery required

for such an innovation would be simple. A short statutory provision would need to be enacted to the effect that no interest might be acquired in any landby long possession unless the occupier registered the land occupied at the outset of such occupation. The administration machinery necessary could be amalgamated with that of the Land Registration Act and then should cause little inconvenience. Such a system should have the added advantages of inducing people to be careful about the boundaries of their own property and ensuring that adverse claims are openly made. Such a system, or a modification of it, would seem to be a convenient compromise it that it would amalgamate the best features of the registered system of conveyancing and the acquisition of title by limitation. This reform would really amount to a method of dovetailing the institutions so that their aims would not conflict so violently.

Such an innovation would, however, alter the character of acquisition by long possession. It would practically eliminate surreptitious encroachment and all types of acquisition originating in mistake. This would allow only those intending to acquire land by this method to do so. However, while the institution loses some of its usefulness it would allow a greater reliance upon the register. Also, such a procedure would require, in effect a warning to be given to the registered owner of land. This might encourage an accomodating arrangement between the registered owner of land. This might encourage an accomodating arrangement between the registered owner and the trespasser or it might encourage the merely negative act of ejectment. Thus, although such a proposal might be met with the charge that the wrong sort of people would be encouraged, that charge may be admitted with the qualification that they were at least being required to indulge in the right sort of conduct. They would have to notify the owner first, but subsequently they could use the land.

Without such a system of registration of land being occupied with a view to its acquisition adverse possession does and would continue to create a large insecurity in the security of title afforded by the registered conveyancing system. The coexistence of both institutions is an obvious compromise but the quid pro quo need not be excessive. It is obviously a value judgment as to whether certainty or utilisation of land is to be preferred. However, with such an intermediate registration system it may be seen that the benefits of both may be realised. This would seem to be dictated by the balance of convenience.

If such a compromise cannot be reached, the choice will be clear. There is no doubt that registration of title is the solution to may problems arising in the laws of real property. The registration system is generally beneficial. If no solution can be worked out along the lines suggested above, adverse possession will have to be abandoned in favour of registration. Compared with registration of title, acquisition by adverse possession will be found in most countries to be an expensive luxury in the latter part of the twentieth century.

Thus, the solutions to the problem of the conflicting aims of the statutes may be summarised as follows;

(a) The retention of adverse possession for ten years as a recognised incursion into the indefeasibility of the title as registered.

(b) Abolition of the doctrine of adverse possession with a correspondingly increased indefeasibility of the register. It would in this case be necessary to permit the courts in certain minor specified cases to declare persons other than the registered owner to be entitled to be registered. This would merely be an arrangement for the disposal of certain cases that are now habitually dealt with according to the doctrine of adverse possession but which should be dealt with in a different way.

(c) Permitting the courts an unfettered discretion as to whom they should direct to be registered as owner.

(d) Provision for registration of trespassers proposing, at the expiry of the ten-year period, to acquire an estate or interest in the land. The trespasser, under this scheme, would be required to occupy premises for a full ten years subsequent to registration of his possession. This is the solution which is preferred.

The last of the foregoing possible solutions [that is solution (d)] might be effected by an additon to s. 73 of the Land

titles Act. This would be to the effect that; no person shall be entitled to obatin a judgment declaring that he is entitled to the exclusive right to use the land or that he be quieted in the exclusive possession thereof unless he has registered a caveat protecting his possession at least ten years previously. Provision will also have to be made to permit protection of a bare possession by caveat. It may be argued that such a provision, if enacted, would merely put the dispute as to who was entitled to be in possession further back in time. This would be the case if two persons wished to possess at the same time. Then, no doubt, the court would have to decide between them on common law grounds if neither was the registered owner. The court would also be involved at two stages. However, it is suggested that this would not be a real difficulty because most of the cases in which an adverse possessor acquires title are cases in which there is no dispute. An additional advantage is that possession referable to any lawful title at all will take precedence over a bare possession. [This does happen at the present time as well.]

Transitional provisions would have to be supplied if this procedure were to be adopted.

If the foregoing proposal is thought to be too cumbersome and too complicated it would seem to be preferable to enact a provision subordinating the Limitation of Actions Act to the Land Titles Act. This would be an alternative proposal to refrain from permitting title to land to be acquired by adverse possession. [This alternative conclusion is prompted partly by the impasse developed in relation to third party rights. If title to land were to continue to be acquired by long possession a dilemma would ensue as to whether to prefer the bona fide purchaser for value without notice or the possessor.] Furthermore, if this alternative were chosen some legislative machinery would have to be provided to allow those persons to be registered who had gained title by lawful transmission or transfer but had no direct evidence of it. There is, at present, no adequate machinery except for the possibility of sale for arrears of taxes. In addition, a registered owner of land does sometimes disappear. To cover all these situations it might be desirable, if this alternative proposal were enacted, for the courts to be able to declare a person entitled. This is put succinctly by Mr. D.W. Lamont, Registrar General of Manitoba (in a letter date January 12th, 1970);

> . . . "It would be an advantage if the Courts had authority to vest a title in this situation in the person who appears to have the best claim to the land. This might be someone who has been in adverse possession for an extended period of time, but it must be clear that his title is not derived from the adverse possession, because if that was admitted then no one could safely deal with the registered owner.

It must be remembered that the most important feature of this alternative solution is that third parties should be entitled to deal with the registered owner in full reliance upon the certificate of title until such time as a vesting order (issued by the Court as proposed above) is made and a new certificate of title issued. [This alternative proposal corresponds with the conclusion drawn by Hogg in a rather outdated article; The Relation of Adverse Possession to Registration of Title (1915) 15 Jo. Comp. Leg. 83. See also a note at (1964) 1 N.Z.U.L.R. 330, Curtis & Ruoff Registered Conveyancing at p. 734, Land Law in the Phillipine Islands (1918) 19 Jo. Comp. Leg. at p. 272, (1962) 35 A.L.J. 408 and Land Registration in Singapore and the Federation of Malaya (1959) 1 Malaya L. Rev. 318.]

Having canvassed the central question as to whether title to land ought to be acquired by long possession, the next question is whether the other provisions of Part III are adequate. Of course, they are all geared to the present system, whereby land may be acquired by ten years adverse possession. This necessitates a preoccupation with the time at which the cause of action accrued. [This has already been seen in connection with sections 28-30 above.]

Section 19 deals with the paradigm situation;

> "Where in respect of the estate or interest claimed the claimant or a predecessor has
> (a) been in possession of the land or in receipt of the profits thereof, and
> (b) while entitled thereto
> (i) been dispossessed, or
> (ii) discontinued such possession or receipt,
> the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits were so received."

This is expressive of the usual situation is which adverse possession occurs. It clearly marks the beginning of the running of time in the ordinary situation. This is a section directly descended from the Real Property Limitation Act, 1833. It is a useful section and one that could not easily be dispensed with. It may be noticed that dispossession is the usual case and that discontinuance (which usually amounts to abandonment) is a rather more rare occurrence. [As to whether the majority of cases produce a just result see Goodman Adverse Possession of Land - Morality and Motive (1970) 33 M.L.R. 281 and Wylie Adverse Possession: An Ailing Concept (1965) 16 N.I.L.Q. 467.] [Reference may also be made to Krishnaswami Law of Adverse Possession (1969; 6th. ed.) and Smith Adverse Possession (1870).]

Section 20 of the Act relates to a circumstance that is not directly included within the previous section;

> "Where the claimant claims the estate or interest of a deceased predecessor who
>
> (a) was in possession of the land or in receipt of the profits thereof in respect of the same estate or interest at the time of his death, and
>
> (b) was the last person entitled to the estate or interest who was in such possession or receipt,
>
> the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the death of the predecessor."

The import of this section is that the running of time is not to be interrupted by a transmission. It assimilates the position of the deceased with that of his successor. It is quite sensible and fair. It does not assimilate the interests of the claimant and of the deceased entirely but allows a further ten years from the time the interest fell into possession. The earliest time the interest would actually fall into possession is the death, sometimes there would be no right to recover the property until after this. However, the right of the recipient to recover is unlikely to be postponed more than a year and the limitation period would then seem to be adequate in length for such a delay.

Section 21 is the logical extension of s. 20 for successors who are not deceased. It applies for alienations rather than transmissions:

> "Where
>
> (a) the claimant claims in respect of an estate or interest in possession, granted, appointed or otherwise assured to him or a predecessor by a

person being in respect of the same estate or interest in possession of the land or in receipt of the profits thereof, and

(b) no person entitled under the assurance has been in such possession or receipt,

the right to take proceedings to recover the land shall be deemed to have first occrued at the time at which the claimant or his predecessor became entitled to possession or receipt by virtue of the assurance."

This section appears also to be quite just. It does seem somewhat repetitive. It could perhps be amalgamated with the next preceding section.

Section 22 applies to land. It relates to both freehold and leasehold estates. It covers both leases and tenancies and freehold estates. The latter designation would include both conditional and determinable fees;

"Where the claimant or the predecessor becomes entitled by reason of forfeiture or breath of condition, the right to take proceedngs to recover the land shall be deemed to have first accrued whenever the forfeiture was incurred or the condition was broken."

This section operates along similar lines to the two sections immediately preceding it.

Section 23 is designed to ensure that where the estate or interest of the claimant is a reversionary or other future estate which has not been subjected to adverse possession then the cause of action shall be deemed to accrue when the prior estate determines. At the end of the limitation period the possessor will take an estate that qualitatively and quantitatively corresponds with that of the person against whom he has possessed. This is an important principle. The function of this section is to preserve the rights of any reversioner or remainderman who may not have inspected the land during the currency of the prior estate. Section 23 limits the accrual of the cause of action to a claimant whose own estate is in jeopardy at any given time;

"Where

(a) the estate or interest claimed has been

(i) an estate or interest in reversion or remainder,

or

(ii) some other future estate or interest,

including an executory devise,

and

(b) no person has obtained the possession of the land or is in receipt of the profits thereof in respect of such estate or interest,

the right to take proceedings to recover the land shall be deemed to have first accrued at the time at which the estate or interest became an estate or interest in possession by the determination of any estate or estates in respect of which the land has been held or the profits thereof have been received, notwithstanding that the claimant or the predecessor has at any time previously to the creation of the estate or estates that has or have determined been in possession of the land or in receipt of the profits thereof."

The possessor takes only the estate against which he possessed. At the outset he may not know qualitatively or quantitatively what that state is. This is a matter of external fact over which the adverse possessor has no control, as is the possibility that a reversioner or remainderman (with rights preserved by s. 23) may exist.

The possessor, at the end of the limitation period, acquires only the land itself and not any positive rights appurtenant to it. Thus, in Wilkes v. Greenway (1889-90), 6 T.L.R. 449, it was held by the English Court of Appeal that no rights of way had been acquired by a squatter to enable him to reach the land to which he had gained a good title. This was simply because of the time difference between the prescription and the limitation periods since the squatter had possessed the land, and walked over the approach road to it, for more than twelve and less then twenty years. The court was not satisfied that all the requirements of the Prescription Act, 1832, had been satisfied but it was certain that there was nothing in the Statute of Limitations to create ways of necessity. Lord Esher M.R., delivering the judgment of the court, pointed to a fundamental distinction between prescription and limitation;

"The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created wither by express grant or statutory enactment. The title to the premise is not a title by grant. The doctrine of a way of necessity is only applied to a title

by grant, personal or Parliamentary."

The reasoning is supported in Iredale v. Loudon (1908), 40 S.C.R. 313, See also Lewis v. Plunket [1937] 1 All E.R. 530 and Handley v. Archibald (1899) 30 S.C.R. 130. The extent and quality of the title acquired by the possessor depends upon how much of the land he has possessed and upon how much was owned by the person against whom he possesses. Thus a leasehold, or other reduced interest, may be acquired; Tichborne v. Weir (1892), 67 L.T. 735. This is one of the features of adverse possession that gave rise to the now exploded theory of a parliamentary conveyance. An acquirer of a term of years will not be liable upon the covenants in the lease of the person he has dispossessed. There is merely a liability on the part of the original lessee to perform the covenants in the lease. This liability is capable of being transferred to assignees and those who are estopped from denying their liability. The converse of this proposition is that the barred leaseholder has been held by the House of Lords to have something that he may surrender. In Fairweather v. S. Marylebone Property Co. Ltd. [1936] A.C. 510. [See Wade 78 L.Q.R. 541. See also Taylor v. Twinberrow [1930] 2 K.B. 16, Tickner v. Buzzacott [1965] 2 W.L.R. 154.] It was held that a former leaseholder whose title has been extinguished could determine the interest of a squatter by surrendering the lease and causing the reversion to fall into possession. This reduces the desirability of acquiring a leasehold interest by adverse possession.

Although the better view would appear to be that leasehold covenants do not bind an adverse possessor, it is clear that freehold restrictive covenants may do so. This will be so whether the possession has been for the statutory period or not. [In re Nisbet and Pott's Contract [1905] 1 Ch. 391. See also Redfern The Limitations Act, 1939 (1939) 4 Conv. (N.S.) 180] The reason is that the right of enforcing such restrictive covenants is not part of the estate or interest extinguished by the Limitation Act. Although a similar argument could be made our for leasehold covenants there may often be an action in breach of contract in the case of a lease. (Although this may well be extinguished earlier than the right to recover the land.) Additionally, it may be stated that the person entitled to secure performance or a restrictive freehold covenant had no right to "recover the land" and so was not liable to have his right extinguished by operation of the Limitation Act. This is so even though the phrase "action to recover land" is wide and includes foreclosure actions, actions for declaration of title

(contra Duncan v. Joslin (1964) 49 W.W.R. 393) and any other action in which the plaintiff claims possession.

Acknowledgments and re-entries after the specified period has run are ineffective to revive the right of the former owner. Furthermore, a statute-barred former owner has nothing to convey to a purchaser. If such a person purports to convey as beneficial owner he commits a breach of the implied covenant that he has the right to convey; Eastwood v. Ashton [1915] A.C. 900. As for the possessor, at the expiry of the period he can make out a good title to the property; Re Atkinson and Horsell's Contract [1912] 2 Ch. 1. Cozens Hardy M.R. stated". . . and there is nobody who can challenge the presumption which his possession of the property gives."

Section 24 supplies two limitation periods. Whichever is the longer in any case may be selected;

> "If the person last entitled to a particular estate on which a future estate or interest was expectant was not in possession of the land or in receipt of the profits thereof at the time when his interst determined, no proceedings to recover the land shall be taken by a person becoming entitled in possession to a future estate or interest except
>
> > (a) within ten years next after the right to take proceedings first accrued to the person whose interest has so determined, or
> >
> > (b) within five years next after the determination of the particular estate,
>
> whichever of these two periods is the longer."

It seems fair to provide an alternative but somewhat shorter limitation period dating from the falling into possession of the plaintiff's estate. This section seems to be unobjectionable. The only difference is the practical one that five years from the time at which the future estate falls into possession is somewhat shorter than the time allowed in other cases. To promote consistency a ten year period might be substituted for the five year period (s. 24(b)).

Section 25 of the Act refers to instruments executed during the running of the statutory period. It applies only to rights that have actually been barred where reliance is being placed upon instruments drawn during the time that the limitation period was running.

> "If the right to take proceedings to recover the land has been barred, no proceedings shall be taken by a person afterwards claiming to be entitled to the same land in respect of any subsequent estate or interest under a will or assurance executed or taking effect after the time when the right to take proceedings first accrued to the owner of the particular estate whose interest has so determined."

Thus, s. 25 appears to affect both situations like Boyczuk v. Perry (supra.) and Fairweather v. St. Marylebone Property Co. Ltd [1963] A.C. 510. However, it has not been applied in such cases in Alberta although the section is s. 23 of the Uniform Act and has been part of the Alberta Act since first adoption. It seems that the section could be better publicised.

Sections 28-30 inclusive deal with landlord and tenant situations and deal, for the most part, with presumptions as to when a possession may be deemed to be adverse. They have been dealt with more fully above. Where there is an adverse possession it commonly has its origin in a landlord-tenant relationship.

Sections 26 and 27 reinforce the idea that the limitation period is a personal one. The limitation period begins to run on the accrual ofeach distinct cause of action. However, the effect of s. 26 is to allow only one limitation period to each individual affected except where a person entitled to an intervening estate has taken possession, actual or constructive. Section 27 supplements this principle;

> **"26.** Where
>
> (a) the right of a person to take proceedings to recover land to which he might otherwise have been entitled for an estate or interest in possession has been barred by the determination

of the period applicable to such a case, and

(b) such person has at any time during that period been entitled to any other estate, interest or right in the same land whether in reversion, remainder or otherwise,

no proceedings to recover such other estate, interest or right shall be taken by such person or by a person claiming through him, unless in the meantime the land has been recovered by some person entitled to an estate, interest or right therein that has been limited or taken effect after or in defeasance of the estate or interest in possession.

27. When

(a) the right to take proceedings to recover land first accrued to a claimant or a predecessor by reason of a forefeiture or breach of condition in respect of an estate or interest in reversion or remainder, and

(b) the land has not been recovered by virtue of such right,

the right to take proceedings shall be deemed to have first accrued at the time when the estate or interest became an estate or interest in possession."

This is a good statement of principle consistent with the present system. It need not exist, but it is a useful statement in the context of the other provisions now in force. If the system were to be radically altered these sections would have to be modified.

Section 31 is a simple provision relating to concealed fraud. It relates to a substantive fraud rather than a procedural fraud only. That is, the section is concerned primarily with fraud as a cause of action. It also contemplates that the potential plaintiff will have difficulty in discovering the cause of action. It may be noticed that time starts to run either upon

discovery of the fraud or when reasonable diligence on the part of the plaintiff might have discovered it. [The question of providing such starting points for the limitation period is referred to below in connection with Trustees.]

> "(1) In each case of concealed fraud on the part of
>
> (a) the person setting up this Part as a defence, or
>
> (b) some other person through whom such first mentioned person claims,
>
> the right of a person to bring an action for the recovery of land of which he, or a person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which the fraud was or with reasonable diligence might have been first known or discovered.
>
> (2) Nothing in subsection (1) enables an owner of land to bring an action, for the recovery of such land, or for setting aside a conveyance thereof, on account fo fraud, against a purchaser in good faith for valuable consideration who
>
> (a) has not assisted in the commission of the fraud, and
>
> (b) at the time that he made the purchase did not know, and had no reason to believe, that a fraud had been committed."

In subsection (2) of s. 31 it is provided that the bona fide purchaser for value of the land without notice of the fraud is to be preferred to the innocent party who has suffered as a result of the fraud. [This corresponds to what is often the position in the law of contracts.] The innocent party originally deprived by the fraud may have facilitated the commission of the fraud in a non-culpable way.

Section 32 refers to the possibility of a written acknowledgment reviving the accrual of the cause of action and

allowing the limitation period to start to run anew. This can only occur within the time originally limited or kept alive. An acknowledgment cannot be given of an extinct title. The acknowledgment must be given to the person entitled for it to be effective. An acknowledgment does not affect the status of the possessor against all the world but only vis-à-vis the recipient of the acknowledgment who is lawfully entitled;

> "When an acknowledgment in writing of the title of a person entitled to any land signed by the person in possession of the land or in receipt of the profits thereof or his agent in that behalf has been given to the person entitled to the land or his agent before his right to take proceedings to recover the land has become barred under the provisions of this Act, then
>
> (a) The possession of the land or receipt of the profits by the person by whom the acknowledgment was given shall be deemed, for the purposes of this Act, to have been the possession of or receipt by the person to whom or to whose agent the acknowlegment was given at the time of giving the same, and
>
> (b) the right of the last mentioned person, or of a person claiming through him, to take proceedings shall be deemed to have first accrued at, and not before, the time at which the acknowledgment, or the last of the acknowledgments, if more than one, was given."

The section is useful, It is very similar to acknowledgment sections in other Parts of the Act. It may be considered whether they could be combined in one general section. All these sections contain similar provisions, but in relation to different subject-matter and this does occasion a difference in the wording.

The provisions of this Part of the Act form a statutory code which has been refined and remodelled over a long period of time. Hence, it is quite cohesive. However, it may be questioned, on several grounds, whether a time limit should be set on actions to recover land. This is the central question of this Part.

MORTGAGES OF REAL AND PERSONAL PROPERTY

Part IV of the Limitation of Actions Act 1955 R.S.A. c. 177 deals with mortgages. It must be remembered that throughout the Act, according to s.2(f) "mortgage" includes a charge. This includes charges on real and personal property but as far as the former are concerned Part II of the Act is also applicable. Thus the three sections of Part IV deal only with the remedies that are particularly applicable to mortgages. This Part applies principally to the relations between mortgagor and mortgagee but may also affect the rights and liabilities of strangers. Part IV of the Alberta Act is substantially Part IV of the Uniform Limitation of Actions Act, but there have been some slight modifications.

The assimilation of real and personal property is consistent with the general attempt in the English property legislation of 1925 to integrate the two types of property then governed by substantially separate bodies of law. This was extended by s. 18(1) of the English Limitation of Actions Act, 1939, which deals only with foreclosure but which relates to all charges and for the first time covered both real and personal property:

> "No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land, after the expiration of twelve years from the date when the right to receive the money accrued."

This assimilation of real and personal property was endorsed by the Ontario Law Reform Commission in their Report on Limitation of Actions (1969) at p. 72:

> "This Commission recommends therefore that the ten-year period applicable to charges on real property be extended to cover charges on personal property in the same way, except as to unmatured life insurance policies. The provision should cover all liens on personal property..."

There is a general tendency to assimilate all forms of property. However, this ideal should not be carried out where important differences exist or where unexpected results would ensue. Furthermore, different considerations apply with respect to redemption from those which apply to personal covenants or to foreclosure.

Forms of mortgage are various but characteristically they imply a debt with a remedy against the property in default. The mortgagor retains an equity of redemption which may be extinguished

by foreclosure. Now it is not always, as it was in earlier times, the case that the mortgagee (creditor) takes possession. A good general definition of a mortgage of land may be found in Falconbridge Law of Mortgages of Land (1942; 3rd ed.) at p. 6;

> "A mortgage is a conveyance of land as a security for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation."

However, it will be observed that that definition is too narrow for our present purposes since it is concerned with the common law mortgage of land alone. In the present context we are concerned with the application of the Torrens system to land and chattels real and with all mortgages of personalty. It is the expressed intention of the Limitation of Actions Act that these matters should be covered. Whereas, according to s.2(0) of the Land Titles Act, 1955 R.S.A. c. 170;

> "mortgage means any charge on land created merely for securing a debt or loan",

this is somewhat extended by s.2(f) of the Limitation of Actions Act which provides that mortgage includes any charge. Thus not only is personal property included within the scope of the latter Act but a charge to secure any obligation or service is contemplated. It is, however, not the concept of the mortgage that differs as between mortgages of real and personal property but rather the object of the mortgage and this may be bound by some special rules relating to the property mortgaged. Since the nature of a charge or mortgage is constant this may be an argument for the application of one general provision for all charges on property. Furthermore, intangible property and choses in action may also be subjected to a mortgage and here again different considerations concerning the limitation period accorded to such actions apply.

It should be remembered that a mortgage may be imposed upon a mixture of assets. If the time limits vary according to the nature of the property mortgaged then a legal quandary will ensue as to the period appropriately to be applied. It may be settled but it will not be settled without an incubus of legal decisions being superimposed on the statutory provision. [Under the English R.P.L.A. 1833, s. 28 the mortgagor of land lost his right of redemption when the mortgagee had been in possession for twenty years. There was no corresponding limit for pure personalty although the rules as to laches and acquiescence applied. The rule was developed that a mixed security would attract the operation of the twenty year period; Charter v. Watson [1899] 1 Ch. 175. Where the security was mostly personalty redemption might be allowed as to the personalty; Re Jauncey [1926] Ch. 471. This provision has not been supplanted in English law by s. 18(1) Limitation Act, 1939.

It does demonstrate the difficulties attendant on setting different limitation periods for mortgages on different types of property. There is then, in England, still no statutory limitation period in respect of actions to redeem personal property. The statute will not be applied by analogy; Weld v. Petre [1929] 1 Ch. 33. Thus the problem of redemption of mixed funds does persist in England to some extent. It may be avoided by the imposition of the same limitation period on both types of property.]

(1) One of the principal matters which should concern anyone analysing this part is whether mortgages of real and personal property should be accorded the same limitation period. The periods allowed for the recovery of real and personal property differ. While by s. 18 a period of ten years is allotted for the recovery of land according to s. 51(f) and (g) Limitation of Actions Amendment Act, 1966 S.A. c. 49 actions to recover chattels will almost always have a limitation period of two years. Thus, the philosophy of the Act is to recognise the irreplaceability of land by giving the person entitled to it a longer period within which to claim it. Chattels are recognised as being more fungible, though before 1966 the person entitled to them had a six year limitation period. It is therefore, arguable that if the recovery periods for the objects differ then mortgages of those objects should differ in a similar way. Not only is there a difference in the intrinsic nature of the property but, what is more important for the law of limitation of actions, there is also a difference with respect to the facility of proof of the transaction. In the case both of chattels and of land there is some rather complicated legislation which affects the probative aspects of the transaction. In the case of mortgages of land the prescribed form and the effects of its use are set out in ss. 103-122 of the Land Titles Act , 1955, R.S.A. c. 170. The effect of these sections is to replace the common law form of mortgage with a statutory form. The result is stated in s. 106 of the Land Titles Act;

> "A mortgage or encumbrance under this Act has effect as security but does not operate as a transfer of the land thereby charged."

Thus the mortgage is treated as a mere accessory to the debt and not as a transfer of the security. If a mortgage is effected in the appropriate statutory form it will bind all transferees of the property (see s. 116 Land Titles Act) and all others who come into contact with the property are given constructive notice of the mortgage. This is so in the case of a statutory mortgage but this institution has not entirely supplanted the equitable mortgage. An equitable mortgage may be created by a contract to make a legal mortgage or by a contract that property shall stand as security for a certain sum. Deposit of the certificate of title as security for a loan also constitutes an equitable mortgage (Fialkowski v. Fialkowski and Traders Bank (1911) 1 W.W.R. 216). Without lodgement of a caveat or other proper reason to postpone the priority of a third party who becomes entitled to the land such a person has a priority over the equitable mortgagee.

In the case of mortgages of land it is possible to encumber the land with an equitable mortgage and it is possible to impose a statutory mortgage without a great degree of solemnity. [Although Forms 19 to 26 of the Land Titles Act are formal in character they do not require a seal - nor, in Alberta, would the presence of a seal extend the limitation period.] However, despite the slight relaxation of the formalities the comments of the Ontario Law Reform Commission (Report on Limitation of Actions, 1969, p. 70) are nonetheless apposite;

> ..."Mortgages are usually of a long term nature and involve what, at least to the ordinary man, are relatively large amounts. A mortgage is made under seal: it therefore is not inappropriate that actions to enforce them against the particular security should be subject to the same period as actions brought on a deed."

The formalities involved in creating a legal mortgage of land are calculated to make the transaction more easily susceptible of proof and thus to give a definite point in time for the limitation period to start running. However, it is clear that although, equitable mortgages do have the same definite point of origin they may be much more informally effected. Therefore, it might be legitimate to create a distinction between legal and equitable mortgages but nevertheless it is important not to multiply and exaggerate differences unless an important purpose is thereby served. Furthermore, the intervention of the rather flexible equitable doctrines of limitation incidental to equitable institutions and remedies is preserved by s. 4 of the Alberta Limitation of Actions Act.

(2) Chattels may also be mortgaged or charged with the payment of certain sums in various ways. In the case of pure personalty the position is clear even though mortgages of such property are often made more informally than their counterparts for realty, even though they may involve substantial sums. In addition, various intangible forms of property fall within this category. Furthermore, because the consequences of the Act are the same for both personalty and realty it has not been necessary to decide, for the purposes of the Act, whether chattels real should be treated in one category or the other.

Special provisions have been made in other jurisdictions with respect to ships. These are chattels which have many of the characteristics of real property; Lord Strathcona Steamship Co. v. Dominion Coal Co. [1926] A.C. 108. However, the normal presumption is that dealings with ships are governed by the ordinary law of personal property. In England s. 18(6) of the Limitation Act, 1939, exempts ships from the operation of the normal provisions as to mortgages in these words;

> "This section shall not apply to any mortgage or charge on a ship."

The Report of the Law Reform Commission of New South Wales (at p. 124) recommended that a similar provision should be included in the New South Wales Limitation of Actions Bill. It should be noticed that the purpose of such an exemption is to allow the registration system for vessels to take full effect. [This registration system is rather like that of the Torrens system]. In the Prairies it is unlikely that the limitation period for a registered ship could ever be in contention. However it may be possible for such a registered vessel to be on a navigable waterway in Alberta. The laws of Alberta might for some other reason govern the mortgage. The only sort of ship for which this type of indulgence is contemplated is a ship of the type to be registered under Part I of the Canada Shipping Act 1952 R.S.C. c. 29, as amended. Very few such ships would enter Alberta through navigable waterways. It is an even more remote possibility that there should be a dispute involving the limitation period to be applied to a mortgage on such a ship. Furthermore, if such exemption were to be allowed in favour of registered ships the Alberta Act would have to specify a limitation period in lieu of that now applicable because the Canada Shipping Act 1952 R.S.C. c. 29 does not specify, except in sections 546 and 729, limitation periods for civil suits. Furthermore, there may be some doubt as to whether the Federal Act could so specify a limitation period for the enforcement of mortgages on ships. In view of all of the foregoing, it is recommended that no exception should be expressed for ships.

(3) Certain intangible property and choses in action may be mortgaged or charged. Strictly speaking, these securities are often pure personalty. The nature of the property charged in this case is quite different and so, often, is the act of charging it with the result that the date of execution of the mortgage or charge may not be very clear. Future interests in tangible property and life insurance policies which have not yet matured or been determined are probably two of the most commonly mortgaged forms of intangible property. Quite clearly an equitable mortgage of such property, although it is created at a specific time, is not easily susceptible of proof because there is not necessarily any formal memorandum or record. These two sorts of property have been particularly dealt with in the English Limitation of Actions Act, 1959, by s. 18(3);

> "The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined."

There is no provision similar to this in the Alberta statute. Property of this sort is not exempted from the operation of the limitation period. The question is whether these two sorts of property merit different treatment. It seems evident that mortgages are made of rights in property and future interests and unmatured life insurance policies are rights which are vested in

interest but not in possession. Sections 27 and 24(b) of the Act recognize that interests depending on some intervening estate or on the breach of a condition may have the running of time postponed until the estate or interest falls into possession. Admittedly these sections apply only to actions for the recovery of land but it is recognised in Part VIII of the Act that a postponement may occur for other reasons in the case of chattels. In Part IV of the Alberta Act the provisions talk in terms only of mortgage of a present vested estate in land or chattels. When there is any question of future interests being mortgaged they must be treated as interests in possession for this is what is contemplated by s. 33(1) and s. 34 of the Act. Thus, the Alberta Act regards the mortgage rather than the nature of the property mortgaged. Future interests both in land and in property may quite conveniently be dealt with in this way. Unmatured life insurance policies could be dealt with in this way. The question is whether it is felt to be better to extend that indulgence to the mortgagee. If a provision like that of the English Act were adopted it would postpone the commencement of the statutory period. However, it should be remembered that the size of the debt secured by a mortgage of a future interest in property or an unmatured life insurance policy ought to be related to the commercial value of the property mortgaged at the time of the mortgage. If this were the case then there would be no need for the mortgagee to wait before realizing this security. If there is not a commercial market for the mortgaged property then the mortgagee will be taking a risk when he accepts the property as security. Thus, the mortgage ought to be limited to a proportion of present value of property even where that property may become more valuable later on. Commercial value or the value to the mortgagee can be conclusively presumed to be the size of the debt secured.

The Part of any Limitation of Actions Act which deals with mortgages must deal particularly with two sorts of conduct by the parties to a mortgage; namely, redemption by the mortgagor and foreclosure by the mortgagee. The present position in Alberta is that the mortgagor and those claiming through him may not bring an action to redeem except within ten years where the mortgagee is in constructive or actual possession of the property. Section 33 of the Limitation of Actions Act specifies;

> "(1) When a mortgagee or a person claiming through a mortgagee
>
> (a) has obtained possession of any property real or personal comprised in a mortgage, or
>
> (b) is in receipt of the profits of any land therein comprised,
>
> neither the mortgagor nor a person claiming through him shall bring an action to redeem the mortgage except within ten years next after the time at which the mortgagee or a person claiming through the mortgagee obtained possession or first received any profits."

It should be noticed that these provisions apply to equitable mortgages effected, for example, by deposit of documents of title. It seems appropriate with formal mortgages of land that the time period allotted should approximate to that accorded to recovery of land. However, this period would not seem to be appropriate in the case of a deposit of securities for a loan. This section corresponds to the twelve year limitation period in the New South Wales draft Bill (in s. 44). The wording of the Alberta provision seems, on the whole, preferable. The English Limitation Act, 1939, by s. 12 provides a similar twelve year period for redemption in similar circumstances;

> "When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him."

This section is couched in more simple and direct language. The intention of all these sections is that time should start to run when the last act of taking possession is effected by the mortgagee. If the mortgagor regained possession or secured an acknowledgment then the time within which an action for redemption could take place would begin to run again. The mortgagee should take and retain possession as mortgagee before this section will apply; Hodgson v. Salt [1936] 1 All E.R. 95, Franks Limitation of Actions (1959) at p. 149. The Ontario Law Reform Commission in its Report (at p. 69) puts the principle in a succinct way;

> "1. A mortgagor's right to redeem:
> (a) is not subject to any limitation period so long as he remains in possession;
> (b) is subject to a ten-year limitation period, under section 19, where the mortgagee has obtained possession."

This reflects the Alberta position, although the major premise (1.(a) in the Ontario report) is implicit rather than to be found in the Alberta Act. It is not a serious defect of the Alberta Act that this is not stated provided that it is well understood. It is recommended that there should continue to be no limitation period imposed on actions for redemption where the mortgagor is in possession of the mortgaged property.

Section 33(2) of the Alberta Act reads:

> "The provisions of subsection (1) do not apply where before the expiry of the ten years mentioned in that subsection an acknowledgment in writing of the title of the mortgagor or of his right to redeem signed by the mortgagee or the person claiming through him or the agent in that behalf of either of them is given to the mortgagor or some person claiming his

> estate or interest or to the agent of such mortgagor or person, and in that case the action to redeem the mortgage shall not be brought except within ten years next after the time at which the acknowledgment, or the last of the acknowledgments, if more than one, was given."

This is the typical acknowledgment provision which may be found in various places throughout the Act. Obviously, this subsection does not contain any reference to a part-payment. It would appear to be a defect of the Act that a provision substantially similar to this should have to be so often repeated throughout the Act. Only the types of acknowledgment specified in the subsection operate to restart the running of time. This means that some mortgages might be subjected to the passage of time where this is an odd result. For example, a customer of a bank may deposit securities with the bank to secure an overdraft. An equitable mortgage may be effected and the mortgagee may be in possession of the mortgaged property. From time to time overdrafts may be granted and discharged under this arrangement. What is the position at the expiry of ten years from the date of the original arrangement or agreement? There seems little doubt that a literal construction of the Act would produce the result that the mortgagor was barred from redeeming the security unless he had received an acknowledgment in the form contemplated by s. 33(2). This may be a rather alarming result in a relationship that was intended to be continuing by all the parties to it. This result was one which prompted the Law Revision Committee (U.K. - often referred to as "the Wright Committee") in its fifth interim report (1936; Cmd. 5334; at pp. 15 and 16) to recommend that no limitation period be fixed for actions for the redemption of mortgages of real property;

> "We do not recommend, however, that section 7 of the Real Property Limitation Act, 1874, which bars the right of the mortgagor to redeem mortgaged property after it has been in the possession of the mortgagee for twelve years, should apply in the case of personalty."

They went on to notice one of the differences between a mortgage of land and a mortgage of personal property, namely, that although the mortgagee of land does not ordinarily take possession of the land (unless it is to enforce this security) the mortgagee of personalty may have possession from the outset in the ordinary course of the transaction. The English Act of 1939 accordingly does not assimilate the two types of property in this respect although it does set a limitation period for simple contracts and torts relating to personalty [s.2(1)(a)] and provides for extinction of title on expiry of the period set [s.3]. There would appear to be no provision of the Alberta Act corresponding to the provisions of the successive English Acts in this respect. Section 35(1) of the Alberta Act may have some effect, for it provides that;

> "(1) Subject to subsection (2) when a person bound or entitled to make payment of the principal money or interest secured by a mortgage of property real or personal, or his agent in that behalf, at any time before the expiry of ten years from the accrual of the right to take proceedings for foreclosure or sale or to take proceedings to recover the property, pays part of the money or interest to a person entitled to receive the same, or his agent, the right to take proceedings shall be deemed to have first accrued at, and not before, the time at which payment or the last of the payments, if more than one, was made."

Thus the effect of this section is that if any payment of interest is made within any ten year period then the time begins to run again. This, to a very large extent, eliminates the problem adverted to above since there can be no cause of action while there is no mortgage debt secured on the property.

There is one further question that is relevant to the deposit of chattels as security and that is whether such chattels can ever be recovered when there is no debt in fact but the security is left with a banker or other person to secure any debt that might arise. Where there is a voluntary bailment of the personal property no action might be brought for its recovery until the possession of the defendant has formally changed character and becomes tortious. Thus the possession of a banker may become a conversion on a demand and refusal see Salmond (1969; 15th ed.) Torts pp. 116-152, Clayton v. Le Roy [1911] 2 K.B.1031, Devoe v. v. Long [1951] 1 D.L.R. 203 and Cote Prescription of Title to Chattels (1969) 7 Alberta L. Rev. 93. After the possession of land can be said to be adverse and when the possession of chattels becomes tortious a cause of action is said to accrue. Part II of the Limitation of Actions Act regulates actions for the recovery of land and the Land Titles Act covers the removal of defunct mortgages. With respect to chattels however, s. 51 of the Limitation of Actions Amendment Act 1966 S.A. c.49 provides a two year period commencing with the accrual of the cause of action. Thus an action for the taking away, conversion or detention of chattels may be brought within, but not after, two years. It seems probable that a subsequent regaining of possession of the chattels will revive the right of the depositor to sue for their recovery at any time within two years from his last possession of them. In other words, that the title to chattels is not extinguished (as it is for land) by the effluxion of time. Mr. Cote, in the article referred to above, espouses the converse argument. Thus, the position would seem to be that as long as there is a debt secured by mortgaged personal property that property may be redeemed by the mortgagor at any time within ten years after the mortgagee took possession of the property. If, however, payments have been made in respect of principal or interest the last of such payments shall be taken as the date for the accrual of the cause of action for the purposes of foreclosure, sale and redemption. Where possession

of the security is pursuant to an agreement and there is no debt secured there can be no suit to recover the property until there is an act inconsistent with the agreement (such as a demand and refusal) which marks the origin of a tortious possession. In the case of a tortious possession there may be no recovery of chattels but within the space of two years. Whether or not chattels can ever revert to their former ownership as a result of possession of the former owner appears to be a moot point. The orthodox view is that title to the goods is not extinguished; Cote's argument, supra, is that the statutes ought to be interpreted as if it were.

A mortgagee may retain and enforce his security despite the fact that his personal remedy against the mortgagor is barred; London and Midland Bank v. Mitchell [1899] 2 Ch. 161, In re Girton [1919] N.Z.L.R. 138 and Warren v. People's Finance Corp. Ltd. (1961-2) 36 W.W.R. 627.

Section 33 of the Alberta Limitation of Actions Act limits the right of the mortgagor to redeem the mortgaged property, real or personal. The action for redemption is very similar to the action for recovery of property. Thus, it seems suitable that the same time periods should be granted. In fact redemption and recovery of real property are accorded the same limitation period - ten years - but the period allotted recovery of chattels is only two years. It would seem appropriate for a shorter period to apply in this case. [In the English Act of 1939 there is the same correspondence between redemption of land and recovery of land; s. 12 and s. 4(3)]. The Report of the Law Reform Commissioners of New South Wales (at p. 123) emphasised that;

> "the main thing about a mortgage is the principal sum and the personal remedies (if any) for the recovery of the principal sum."

The other remedies of the mortgagee, namely possession, foreclosure and sale, were regarded by them as merely accessory and ancillary. The New South Wales Commissioners regarded this as a somewhat novel concept although they concluded by adopting s. 18(1) of the English 1939 Act. The Alberta Act dwells mainly on the accessory remedies in the section concerning mortgages. The rules as to the disposition of the security are quite clear; he who has possessed it for a period of ten years without acknowledgment or payment over to the other party may treat the security as his own unfettered property. The provisions of the Land Titles Act permit effect to be given to this arrangement in the case of land and the same position applies to chattels; Warren v. People's Finance Corp. Ltd. (1961-2) 36 W.W.R. 627.

It may be that many of the remedies associated with mortgages might be subjected to the invocation of an equitable remedy. These equitable doctrines are preserved by s. 4 of the Alberta Act;

> "Nothing in this Act interferes with a rule of equity that refuses relief, on the ground of acquiescence or otherwise, to a person whose right to bring an action is not barred by virtue of this Act."

What are essentially equitable remedies are regulated by Part IV of this Act and the effect of this is to exclude the operation of equity where the statute makes a particular provision. For a general discussion of the equitable limitation principles see Franks Limitation of Actions (1959) pp. 233-262, Preston and Newsom Limitation of Actions (1953; 3rd. ed.) pp. 256-264 and Warren v. People's Finance Corp. Ltd. (1961-2) 36 W.W.R. 627, per Schultz J.A. at p. 635. This principle may be invoked to require a mortgagor who wishes to redeem his land to pay all arrears of interest, even statute barred interest. Both the Ontario Law Reform Commission (Report at p. 70) and the New South Wales Commissioners (pp. 121 and 124) proposed abolition of the rules by which a mortgagee can require statute - barred interest as the price of redemption and in other instances. It is likely that the words of s. 15(1) of the Alberta Act are appropriate to restrict collection of mortgage interest to six years although the words of that section are not peculiarly well expressed to include mortgages as well as "money charged on or payable out of land". [S.18(5) of the English Act specifically mentions mortgage interest.] However, in s. 15(3) of the Alberta Act redemption actions are specifically exempted from the six year limit;

> "This section does not apply to an action for redemption or similar proceedings brought by a mortgagor or by a person claiming under him."

So that,it is clear that there is no limit on the amount of the arrears which may be recovered in a redemption action. This means that, in effect, a condition of redemption is that all arrears should be paid. The practical limit is, of course, the value of the security. There are some other situations in which the full arrears of interest will have to be paid; see Franks Limitation of Actions (1959) pp. 159-162.

The succeeding provisions of s. 33 of the Alberta Act deal with situations in which there is more than one mortgagor or mortgagee. Subsection (3) follows logically from the preceding subsection and appears to be unexceptionable;

> "Where there is more than one mortgagor or more than one person claiming through the mortgagor or mortgagors the acknowledgment if given to any of the mortgagors or persons or his or their agent is as effectual as if the same had been given to all the mortgagors or persons.

This subsection is merely a recognition of the community of interest of the mortgagors, who must each have had some interest in the mortgaged property. It would seem to be insupportable that some causes of action should be statute-barred while others might be revived by the acknowledgment of the mortgagee.

But it is further provided by subsection (4) that an acknowledgment shall be good only against the party that makes it. This is effected by the following words of the Alberta Act;

> "Where there is more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees an acknowledgment signed by one or more of such mortgagees or persons or his or their agent in that behalf is effectual only as against
>
> (a) the party or parties signing as aforesaid,
> (b) the person or persons claiming any part of the mortgage money or property by through or under him or them, and
> (c) a person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests,
>
> and does not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to an undivided part of the money or property."

It seems an undeniable proposition that one party, by his act, should not be able adversely to affect another. Whereas the parties who are mortgagors must have a considerable amount in common those who are mortgagees need not be in at all the same position. Although a subsequent or puisne mortgagee will know of the existence of the first mortgagee the subsequent mortgage will be a commercial transaction conducted at arm's length between mortgagor and second or subsequent mortgagee. This seems to be a fair proposition but one which has not been equally apparent in other sections of the Act relating to acknowledgments.

Subsection (5) follows logically from the preceding subsection;

> "Where such of the mortgagees or persons aforesaid as have given such acknowledgment are
>
> (a) entitled to a divided part of the property comprised in the mortgage or some estate or interest therein, and
> (b) not entitled to an ascertained part of the mortgage money,

> the mortgagor or mortgagors may redeem the same divided part of the property on payment with interest of that part of the mortgage money that bears the same proportion to the whole of mortgage money as the value of the divided part of the property bears to the value of the whole of the property comprised in the mortgage."

It is, in addition, expressed clearly.

Section 34 of the Act deals with actions for foreclosure;

> "No mortgagee or person claiming through a mortgagee shall take proceedings for foreclosure or sale under a mortgage of real or personal property or proceedings to recover the property mortgaged except
>
> (a) within ten years next after the right to take the proceedings first accrued to the mortgagee, or
>
> (b) if the right did not accrue to the mortgagee, then within ten years after the right first accrued to a person claiming through the mortgagee."

It is couched in the same terms as s. 18 of the Act, which deals with recovery of land. Moreover, the same limitation period applies to both actions which is proper since this action is one for the recovery of land. If no special provision had been made it would have been dealt with under the general provision. Killam J. said in Stover v. Marchand (1895) 10 Man. L.R. 322, at p. 325, with respect to an action for foreclosure;

> "it appears to me that the view...that such a suit is one for the recovery of land, is the correct view."

Section 35(1) of the Alberta Act delays the running of time where there is a payment attributable to principal or interest until the date of the last payment of principal or interest, at least where such payment occurred within the limitation period. The Act needs a provision such as this, especially in the case of mortgages of personalty. The purpose of the section is to allow payments which amount to acknowledgments to stop the running of time. The paradigm case is the one in which the mortgagor pays a sum to the mortgagee within the period. Complications arise, as they did in Manufacturers Life Ins. Co. v. Hodges [1947] 1 D.L.R. 195, when acknowledgments or payments are made by persons other than the mortgagor in possession. The question is whether the mortgagor can be identified with their acknowledgments or payments. Strictly, there ought be an agency relationship, express, implied or constructive, before a payment or acknowledgment could be attributed to the mortgagor in possession. Whether a person who makes

a payment makes it in accordance with s. 35(1) so as to stop the running of time depends upon the relationship betwen him and the person "bound or entitled to make payment." The entitlement to make payment referred to may include persons one would not normally think of as bound to make payment. There has been some doubt as to whether payment by a governmental agency which is a stranger to the mortgage arrangement will have the effect of stopping time from running under the statute. In Manufacturers Life Ins. Co. v. Hodges [1947] 1 D.L.R. 195 a payment was made by a government body to the mortgagee of land as a bonus for wheat acreage reduction. The trial judge (Clinton J. Ford J.) and two members of the Appellate Division (W.A. Macdonald J.A. and Parlee J.A.) thought that such a payment, considering its source, did not furnish a fresh starting point for the running of time. Harvey C.J.A. dissented and Frank Ford J.A. expressed no opinion on this point. The opinion of the majority was also taken by Cameron J. in Morris v. M.N.R. [1963] C.T.C. 77, at pp. 84 et seq. That there ought normally to be a payment by the person bound is shown in Official Guardian v. Sadecki [1946] 2 D.L.R. 733. See also Campbell v. Imperial Loan Co. (1907) 6 W.L.R. 481 and Rutherford v. Mitchell 15 Man.L.R.390.

Section 35(1), as mentioned above, postpones the running of time until the last payment of principal or interest within the ten year limitation period. Section 35(2) continues as follows;

> "If an acknowledgment of the nature described in section 32 was given at any time before the expiry of ten years from the accrual of the right to take proceedings, the right to take such proceedings as are contemplated in sub-section (1) shall be deemed to have first accrued at the time at which the acknowledgment or the last of the acknowledgments, if more than one, was given."

This refers to an acknowledgment in writing by a possessor of land of the title of anyone who is, in fact, entitled. If such an acknowledgment is given within ten years of accrual of a cause of action by a mortgagor to a mortgagee then the cause of action is postponed to the date of the acknowledgment. Since the acknowledgments referred to are only those to be given by "the person in possession of the land or in receipt of the profits thereof" (see s. 32) this would refer normally only to a mortgagor or to a mortgagee who was enforcing his security. Since, however, the "proceedings contemplated" in s. 35(1) are proceedings available to a mortgagee being the person to give the acknowledgment is cut out in this maze of statutory references. Furthermore, whereas the part-payment referred to in s. 35(1) is relevant to mortgages of both personal and real property, s.35(2), by its terms confines its operation to acknowledgments by a person in possession of land. However, all of this results from looking at what is an unnecessarily difficult and tortuous section. Section 35(2) could be made considerably easier.

This subsection was criticised by the Alberta Court of Appeal in Manufacturers Life Ins. Co. v. Hodges [1947] 1 D.L.R. 195 and Harvey C.J.A. said at p. 205;

> "It seems somewhat singular that while acknowledgments are dealt with in eight other sections, viz.: 9, 14, 15, 32, 33, 36, 38, 41, in no one is the nature of the acknowledgment left to be determined by reference to any other but in each case it is specified what the acknowledgment is and to whom and by whom it is to be given."

There is, in addition, the argument that where the mortgage is one of land the Registrar of Land Titles keeps a register that is an impartial acknowledgment of the existence of a mortgage throughout the subsistence of the mortgage. Obviously, this is not the sort of acknowledgment contemplated by the Limitation of Actions Act and this statute must be taken to derogate from the Torrens system. The object of this argument would be to say that s. 35(2) is unnecessary. However, it should be recognised that the Land Titles Register only keeps a record of the state of the title of property. What the parties do about enforcing their rights is a different matter and one which is the basis of the Limitation of Actions Act. This argument is part of the larger contention that s.35(2) is inappropriate in a Province which has no common law mortgages of land. Section 35(2) applies only to land. Nevertheless, if part-payments are to be retained as a method of stopping the statutory time from running acknowledgments in writing ought also to be retained for the same purpose.

Section 35 of the Act, taken together with its statutory construction, seems to be necessary. However, both subsections have caused a disproportionate amount of difficulty and ought to be simplified.

ACTIONS WITH RESPECT TO CHARGES ON LAND, LEGACIES, ETC.

Part II of the Limitation of Actions Act deals with a miscellaneous group of actions. The actions that are enumerated in this Part are;

(a) actions to recover sums of money charged on or payable out of land,

(b) actions to recover legacies, and

(c) actions to recover from a personal representative the personal estate, or a share thereof, of an intestate.

This does not correspond to any similar grouping of actions to be found in the English Limitation Act of 1939. In fact, s.18 of the English Act covers actions to recover money charged on all property and foreclosure actions on mortgaged personal property and this grouping may be found to be more cohesive than that found in Part II of the Alberta Act.

The one feature of Part II of the Alberta Limitation of Actions Act that is common to all the different actions enumerated therein is the six year limitation period. Otherwise, these actions do not seem to have much in common.

Part II of the Limitation of Actions Act contains a provision limiting actions for the recovery of money charged on land and actions for the recovery of legacies or shares of an intestate's estate to a six year period from accrual of the cause of action. Section 14 of the Act does this in the following terms;

> (1) No proceedings shall be taken to recover
> (a) a sum of money charged on or payable out of land,
> (b) a legacy whether it is or is not charged on land, or
> (c) the personal estate or a share of the personal estate of a person dying intestate that is possessed by his personal representative,
>
> except within six years next after the present right to recover the same accrued to a person capable of giving a discharge therefor or a release thereof."

This section clearly sets out which actions are to be included within its scope.

Two fundamental questions arise with respect to section 14, which is the principal section of Part II. They are;

> (1) whether the actions specified in the section require particular limitation periods or whether they may be conveniently assimilated into the other Parts of the Act, and
> (2) if particular limitation periods are found to be necessary, this Part contains a convenient grouping of actions.

(1) Integration with the rest of the Act

Integration with the other Parts of the Limitation of Actions Act may be considered on both the substantive and procedural planes. Normally, there is considerable merit in treating in the same way those actions to which substantially similar policy considerations are relevant. Furthermore, those matters which are substantively treated in the same way should generally be grouped together in an Act. If they are so grouped together, however, there should be a clear labelling. [It may be noted that the labelling of the Part of the Limitation of Actions Act now under consideration, namely Part II, is unclear]. The converse of this proposition is that essentially different types of action and

those to which substantially different policy considerations apply should be treated differently and separately.

(a) The consideration of charges on realty with respect to its substantive treatment should take into account the nature of a charge on land. A charge on land partakes of some of the elements of a debt and is in other ways similar to any mortgage covenant for which a specific limitation period for foreclosure is provided by section 34 of the Limitation of Actions Act. Since the action to recover a sum of money charged on land is confined by s. 14 of the Act to charges on real property it has some connection with the general provision in s. 18 of the Act which provides a ten year limitation period for actions to recover the land itself. Thus the charge on land has affinity with;

(1) Simple contract debts,
(2) Mortgages, and
(3) Actions to recover land. However, in the case of the last two actions there are clear and obvious differences.

The question of whether a particular covenant was more akin to any of the above three institutions was canvassed in Belgian Soc. d'Entreprises Industrielles v. Webster [1928] 1 D.L.R. 465; [1927] 3 W.W.R. 817. In that case the Alberta Appellate Division decided that an action on the personal covenant in a mortgage which is registered against land but which is not under seal is an action on a simple contract debt. (Now the distinction between specialties and other transactions no longer exists according to Alberta law and the added solemnity of a seal has now no greater effect).

The sums of money "charged or payable out of land" include rent charges (which are statutorily defined by the English Limitation Act, 1939, as "any annuity or other periodical sum of money charged upon or payable out of land.") Thus it makes no difference whether the sum charged is a principal sum or a periodically payable sum. The Alberta provision covers also liens on land as did s. 8 of the Real Property Limitation Act, 1874 (U.K.) and s. 40 R.P.L.A., 1833. It seems probable that the expression "charges" covers also both statutory, common law and equitable charges and those arising from judgments and judicial orders. In short, any arrangement which implies a remedy against the property as well as a personal remedy would appear to be contemplated by the context of the present provision. It may be noticed here that by s. 2(f) of the Alberta Limitation of Actions Act "mortgage" includes a charge, and "mortgagor" and "mortgagee" have meanings similarly extended. This would appear to have the consequence of rendering applicable to charges on real property both Parts II and IV of the Act, though only Part IV would apply to a charge on personal property. This result is odd, to say the least. Part II and IV are inconsistent and contradictory in their result. Because of the impossibility of applying both Parts to any given problem it is certain that the effect of Part II will be only on those charges on land which do not amount to full mortgages.

In the case of mortgages recourse may be had to the ten year limitation period specified in Part IV. There is, however, much to be said for according the same limitation periods for charges as for mortgages. To this end the Ontario Law Reform stated at p. 70 of their Report;

> "Accordingly, the Commission recommends that all proceedings brought by a mortgagee to enforce his security should be treated in the proposed statute as actions to enforce a charge and be subject to the same period as a personal action on the covenant to pay in the mortgage deed, namely ten years."

As a general matter it is undeniable that there are similarities between charges on land and mortgages. However, against the proposal for assimilation of the limitation periods it must be noted that the provisions of the Alberta Act extend to periodically payable sums. It seems that the same limitation period should be accorded for recovery of such periodically payable sums, whether secured or unsecured. If unsecured in Alberta the time limit would be six years. Thus, the time limited by s.14 of the Alberta Act for money charged on land would correspond with that.

It would appear reasonable to assume that actions to recover sums of money charged on or payable out of land would ordinarily be accorded a longer limitation period that a simple contract debt. However, this is not the case according to the provisions of the Alberta Limitation of Actions Act; s. 5(1) (f) (i) and s. 14 of the Act require that actions in each case shall be instituted within six years. A charge of money on land will almost always be the result of a simple contract debt, although they may be created unilaterally, and in that event there will usually be an extra effort on the part of the person entitled to the charge. This extra effort might be rewarded by the provision of an extended limitation period. However, the distinguishing feature of those situations which warrant an extended limitation period is not simply the solemnity of the act but its formality and susceptibility of subsequent proof. A charge on land need not be more easily proved than a contract debt, but usually it is. A difference between the limitation periods for simple contract debts and for charges on property is to be found in the English Limitation Act,1939. The objection that there might be a difference between applicable limitation periods might reasonably be countered by the interest in having few limitation periods.

It is also noteworthy that the statutes of some other jurisdictions do not distinguish between charges on land and charges on personal property; see, for example s. 18(1) of the Limitation Act, 1939 (U.K.) [That section covers both mortgages and other charges.]

The Ontario Law Reform Commission, at p. 69 of its report, discussed the actions which might be brought by a mortgagee to

recover any sum of money secured by the mortgage.

The expression of sum of money "charged on or payable out of land" seems designed to cover both capital and periodic sums. It is not confined (like s. 18(1) of the English Act) to actions for the recovery of a principal sum secured on property. It is suggested that the expression in use in the Alberta Act, like the word "secured" in the English Act, implies a remedy against the property as well as a personal remedy. However, the words of the Alberta section are not without equivocation and ambiguity.

There are several situations to which the expression "sum of money charged on or payable out of land" might be taken to refer;

(1) Equitable Charges

All burdens on the land which would be recognised by equity may be said to constitute a charge upon the land. Thus an unregistered mortgage document may be said to create a mere equitable charge upon the land; see Clarke J.A. in Belgian Soc. d'Entreprises Industrielles v. Webster [1928] 1 D.L.R. 465 at p. 479. Clearly such equitable charges will be more limited in scope than their legal counterparts; they will never bind the wide range of persons that may be bound by a legal charge. Clarke J.A. continued (Ibid.) with respect to registration of mortgage;

> "The purpose of registration is primarily, at least, to affect the land and to afford priority to the security and to constitute what theretofore was an equitable charge, a legal charge".

(2) Liens

There exist many other types of lien which impose charges. The imposition of a lien may be effected on property pursuant to a contract between the parties or by operation of law. One of the commonest of the former type is the vendor's lien and of the latter type the mechanic's lien. Such contractual and statutory liens amount to "sums of money charged on or payable out of land. The typical situation is that the creditor is in possession of the property though this need not necessarily be so. In any case it may be questioned whether a six year limitation period does not allow enforcement outside a reasonable period.

It is established that a mortgagee may retain and enforce his security despite the fact that his personal remedy is barred. In Warren v. People's Finance Corporation Ltd. (1961) 36 W.W.R. 627, Schultz J.A. delivering the judgment of the court said at p. 633

> "...the effect of the Statute of Limitations is not to destroy the debt but only to bar action being taken. A mortgagee may therefore retain and may enforce his security despite the fact

that his personal remedy against the mortgagor is barred London & Midland Bank v. Mitchell [1899] 2 Ch. 161, followed in In re Kirton [1919] N.Z.L.R. 138".

It must be remembered that the personal action and the action to enforce the security will now have the same limitation period.

(3) Charging orders and charges arising out of judgments

Sums of money secured on land by judicial orders are contemplated by the Alberta Limitation of Actions Act as a sum of money charged on land. The terms of the charge on land depend on the nature of the judicial order and the common law or statutory authority for its imposition. If a sum of money is charged on land by a judgment or charging order of a court then it will be subject to the time limit imposed by s. 14 of the Alberta Act. [This is quite apart from the limitation period imposed on the enforcement of judgments; Jay v. Johnstone (1892) 1 Q.B.D. 25 and s. 5(1) (i) of the Alberta Act]. It may be that a judgment can be attached to land by placing a writ in the hands of the sheriff and causing it to be registered at the Land Titles Office; Neil v. Almond (1899) 29 O.R. 63. Ferguson J. stated in that case, at p. 68;

> "The money mentioned in a writ of fieri facias against land is, I think, money charged upon the lands (in the county) of the person against whom the writ is and I think there can be no doubt that it is money payable out of such lands, and I am of the opinion that the right of the execution creditor in the present case was in character a lien or charge upon and for money payable out of the lands of the execution debtor lying in the county."

(4) Charges imposed by statute

Charges imposed by statute are contemplated by the words of s. 14 of the Alberta Limitation of Actions Act. Often a statutory charge is imposed in addition to a purely personal remedy. Thus Lindley L.J. said in Hornsey Local Board v. Monarch Investment Building Society (1889) 24 Q.B.D. 1 at p. 8;

> "On examining the terms of the legislation on the subject, it will be found that there are two distinct remedies for these expenses. One is the summary remedy against the person who is owner of the premises at the time when the works are completed; the other is a special period of limitation with respect to the summary remedy."

The construction of the statute imposing the charge is paramount. Normally the period limited for a simple contract debt or personal

remedy will be the same as that for money charged on land. Therefore conflict is unlikely to arise, as it did in Poole Corporation v. Moody [1945] K.B. 350. According to the current Alberta statute actions based on equitable grounds of relief are attended by a six year limitation period as are actions for the recovery of a sum of money charged on land. There is no class of action corresponding exactly with those specified in the U.K. Limitation Act, 1939, s.2(1)(d);

> "actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."

However, it is questionable whether s. 5(1)(b) of the Alberta Act might be regarded as equivalent to the provision of the English Act. The Alberta Act reads;

> "actions for penalties, damages or sums of money in the nature of penalties given by a statute
> (i) to the Crown,
> (ii) to the person aggrieved, or
> (iii) partly to one and partly to the other, within two years after the cause of action arose..."

This section of the Act (although it is not within the Part presently under consideration is of some importance to it) seems to be a little imprecise. It is not entirely certain whether the words "in the nature of penalties" is intended to qualify the word "damages". It seems fairly certain that it was the intention of the framers of the legislation that the word "damages" should be so qualified and confined. Furthermore, it is likely that the courts would so construe the word. Nevertheless, it would probably be better ex abundanti cautela to repeat the qualifying words after the word "damages". The question is whether actions for damages are intended to be included in this section if such damages are not in the nature of a penalty. It is probable that the intention of the legislators was restricted to damages in the nature of a penalty. Nevertheless, the section is somewhat unclear and this part of it has not been superseded by the Limitation Act, 1966, S.A. c. 49. Any limitation period particularly provided by the statute imposing the charge will govern but where no such period is provided the general six year period provided by s. 5(1)(j) will apply. Nevertheless, where a cause of action falls within one of the recognizable heads of tort liability listed in s.51 of the Alberta Limitation Act, 1966, the words of s. 52 may be held to apply;

> "This Part applies to every action in which the damages claimed consist of or include damages in respect of injury to the person, whether the action is or may be founded on tort, breach of contract or breach of statutory duty".

(5) Rent Charges

These are usually periodic, rather than principal sums charged on land; Preston & Newsom Limitation of Actions (1953; 3rd ed.) p. 156. They are not mentioned in Part II but are defined in s.2(i) as including annuities and periodical sums of money charged upon or payable out of land. Annuities may be charged upon land in Alberta and when the annuity ceases to be effective and a judge's order to this effect has been acquired then the Registrar shall cancel the instrument by making a memorandum upon it; s.112 Land Titles Act 1955, R.S.A. c. 170. Furthermore, it is expressly contemplated in s. 111 (1)(c) Land Titles Act that an annuity or other encumbrance may be extinguished by the operation of the Limitation of Actions Act;

> "...upon the production of a certificate signed by a judge certifying that the right of any person to recover any money secured by the mortgage or encumbrance has been extinguished by reason of the operation of the provision of The Limitation of Actions Act."

The consequences of this are spelled out in the next succeeding subsection [s.111(2) L.T.A.];

> "Upon such entry being made upon the certificate of title, the land or the estate or interest in the land, or the portion of the land mentioned or referred to in the endorsement as aforesaid, ceases, to be subject to or liable for the principal sum or annuity, or, as the case may be, for the part thereof mentioned in the entry as discharged."

(6) Miscellaneous charges

The expression "annuities or periodical sums charged upon land"(in the English R.P.L.A. 1833 s.1) has been held to cover a situation where the property could only be enjoyed subject to the payment of the sum "charged", although there was no direct remedy against the land. The words of that statute were similar to those of the Alberta statute now under contemplation although the current English statute has been modified so as to exclude the wider application. The case decided on wording similar to that of the Alberta statute was Payne v. Esdaile (1888) 13 App. Cas. 613. That case, which was decided by the House of Lords, held that tithes were "annuities or periodical sums of money charged on land" and that the Real Property Limitation Act of 1833 afforded a defence to an action for their recovery. With respect to the words now under consideration Lord Herschell said at page 622;

> "The Court of Appeal have held that the payment in question is not within this definition, because though an annuity or periodical payment it is not charged upon or payable out of land.

> I gather that they interpreted the words "charged upon" as applicable only to those cases in which there was some remedy against the land itself. It may be admitted that this is the most common signification of the words, and is the meaning that would be attributed to them if there were nothing in the context to lead to a different conclusion. But it is at least open to consideration whether they are not used in the statute in a broader sense....."

and at page 623 Lord Herschell continued;

> "Now it seems to me that the word "charge" may well be used to describe a burden imposed upon land, and if a payment has to be made in respect of land, and it can only be enjoyed subject to the liability for that payment, I cannot think that there would be any great straining of language if it were spoken of as charged upon the land. The payment which has to be made under the statute of Henry in respect of the occupation of a house in the city of London may, I think, accurately be described as a burden upon it. The home cannot be enjoyed except upon the terms of making that payment. Everyone who takes the house does so subject to the condition that if any benefit is to be derived from it, the payment must be made. If he occupies the house himself its value is diminished by the necessity of making this payment. If he lets it to another person he receives so much less rent because of the burden attaching to the premises."

To the same effect Lord Macnaghten said at page 626;

> "The liability to the payment falls upon the occupier or taker for the time being by reason of his occupation. The land carries the liability as a burthen from taker to taker. Beyond all doubt that liability subtracts something from the profitable enjoyment of the land; it must be taken into account on the occasion of a sale, a mortgage, or a lease.... It seems to me that according to the ordinary understanding of mankind that is a charge upon land which cannot be dissociated from the land and which charges the occupier in respect of the land."

To the same effect was the decision in Finch v. Squire (1804) 10 Ves. 41; 32 E.R. 758. There personal estate was lent on security of an assignment of the poor rates and county rates and was held to constitute a charge upon them. The statute applies to charges

imposed by statute in favour of a municipality (Royce v. Municipality of Macdonald (1909) 12 W.L.R. 347; Hornsey Local Board v. Monarch Investment Building Society (1899) 24 Q.B.D. 1; Lowery v. Lamont [1927] 1 D.L.R. 669).

In the case of a statutory charge the cause of action accrues at the date on which the statute imposing the charge declares that the sum of money shall be charged on the land. In the case of a charge imposed with respect to public works in favour of a public corporation the statute may state, expressly or impliedly, at what date the cause of action may be said to accrue. Thus, in Hornsey Local Board v. Monarch Investment Building Society (1889) 24 Q.B.D. 1, where a local authority had incurred paving expenses which were made by statute a charge on the land in respect of which they were incurred such expenses became a charge on the premises on completion of the works and not from the date of the apportionment of such expenses among the frontagers. Therefore, the period of limitation in respect of the charge [then set out in s. 8 R.P.L.A., 1874 (U.K.)] began to run from the prior date. When sums of money become charges on land is a matter which can be determined only by construing the statute imposing the charge. the Court will usually give such a construction to the statute imposing the charge as to prevent the body in whose favour the charge is created from delaying the running of time under the Limitation of Actions Act by being dilatory with respect to some administrative procedure. It is a simple rule of justice that a potential plaintiff ought not to be able to emasculate the Limitation of Actions Act. A sum of money may be charged on land under a statute though its exact amount is unascertained, and probably though the amount is unascertainable. However, it is clear that the right to receive the money may not be other than an immediate right. In s. 14 of the Alberta Act (which is in the form common in limitation statutes) the period allotted is described as

> "within six years next after the present right to recover the same accrued to a person capable of giving a discharge therefor or a release thereof".

This would prevent time running in the case of a future or postponed right to receive such sums of money. However, see In re Owen [1894] 3 Ch. D.220 and Hugill v. Wilkinson (1888) 38 Ch. D.480 in which the former case, and the natural meaning of the words "present right to receive" is to be preferred.

The limitation period applicable under the Alberta Act to proceedings to recover money charged on land is probably applicable even though such proceedings are not in the nature of an action or suit. Thus an action to restrain a municipality from selling the plaintiff's land in order to enforce the levy of a rate to satisfy a judgment is included in the description "proceedings to recover money charged on land"; Royce v. Municipality of Macdonald (1909) 12 W.L.R. 347. [This action had to do

with the applicability of the Manitoba Real Property Limitation Act, R.S.M. 1902 c. 100, s. 24 of which is very similar to s.14 of the Alberta Limitation of Actions Act now under consideration. Both sections apply a limitation period to "proceedings" to recover money charged on land]. An advertisement for the sale of lands has been held to be a "proceeding"; Smith v. Brown (1890) 20 O.R. 165. [The interpretation of "proceeding" was undertaken in that case for a different statutory purpose; but one which has a parallel here.] Taking steps to sell under a writ of fi. fa. is also a "proceeding"; Neil v. Almond (1897) 29 O.R. 63. In that case "proceeding" was generally defined by Ferguson J. at p. 69;

> "'Proceeding', means in all cases the performance of an act, and is wholly distinct from any consideration of an abstract right. It is an act necessary to be done in order to attain a given end; it is a prescribed mode of action for carrying into effect a legal right, and so far from involving any consideration or determination of the right pre-supposes its existence."

(b) Actions to recover legacies and actions to recover sums from the personal representatives of an intestate are also included within this Part. There are certain obvious similarities between them although they were not treated together in limitations enactments in English law. In the present English Act there is a section dealing with legacies (s.20) and this has long been the case; R.P.L.A. 1874, s. 8 and Law of Property Amendment Act, 1860, s. 13. Actions to recover shares of intestacies from the hands of personal representatives were accorded a limitation period by s. 13 of the Law of Property Amendment Act, 1860, 23 & 24 Vict. c. 38. This was the first period to be imposed upon such actions and was merely an imposition by analogy with the then current statute. This separate historical development has contributed to legacies and intestacies being treated differently. However, it is fairly clear that both actions have points in common. As a practical matter, it may well be that the person claiming a share of an intestacy may be less likely to know of his entitlement than one who claims under a will. This may not necessarily be the case since either a legatee or an intestate successor may prove difficult to trace. In any event s. 14 of the Alberta Limitation of Actions Act imposes a limitation period which starts to run from the time the right to receive the legacy or share accrued;

> "No proceedings shall be taken to recover.....
> (b) a legacy whether it is or is not charged on land or,
> (c) the personal estate or a share of the personal estate of a person dying intestate that is possessed by his personal representative,

> except within six years next after the present right to recover the same accrued to a person capable of giving a discharge therefor or a release thereof."

Similarly s. 15 of the Alberta Act allows arrears of interest on a legacy or on an intestacy (because these are arrears of interest on a sum of money to which s. 14 applies) to be claimed for only within six years next after a present right to recover. Thus six years from the date of entitlement is the operative limitation period. This entitlement accrues, as a general rule, when the legacy or share of the intestacy is payable. In the case of legacies this is usually one year from the date of death. That time may be varied by circumstances or by special directions in the will, not only as to when the legacy is to be payable but also as to the date from which interest is to be paid.

It should also be noted that the Trustee Act 1955 R.S.A. c.346 applies to executors and administrators since by s.2(a) of that Act trustee includes an executor, an administrator, or a guardian of the estate of any person. According to sections 32 and 33 of that Act executors and administrators can sue and be sued in any tort except libel and slander. By section 53 of the Limitation of Actions Amendment Act 1966 S.A. c. 49 the time within which such an action may be brought by or against the estate in two years. [There are some actions which do not survive a death and some to which special considerations apply; however, extensive treatment of these matters here would be a digression]. Contracts survive the death of either contracting party except for those founded on purely personal considerations; Hall v. Wright (1859) El. Bl. & El. 765; 120 E.R. 695. In that case Brauwell B. stated at p. 700;

> "Contracts for personal service, for matters dependent on personal capacity, as to write a book or paint a picture, are conditional on the continuance of the ability, mental or corporeal, to perform them".

In addition it should be remembered that executors and administrators have a fiduciary responsibility and may become trustees in certain circumstances. After the passage of a certain length of time from the granting of letters probate or of administration they are held to have become trustees; Harvell v. Foster [1954] 2 Q.B. 367. In addition, s. 2(a) Trustee Act, 1955, R.S.A. c. 346 extends the statutory definition of trustee so as to include both executors and administrators. Both the rule of equity and the statutory definition serve to show that sometimes personal representatives may also be trustees.

It is noteworthy that s. 14(1)c) applies the limitation period only with respect to proceedings to recover personal estate. Real estate in the hands of an intestate's personal representative is exempt from the operation of this section. The philosophy of

this Act, and of limitation Acts in general, is that the particularly unique quality of land warrants a longer limitation period being accorded to it. Thus this ten year period (as evidenced by the paradigm s. 18) is usually accorded to actions relating to land. If a shorter period were to be allowed to a person claiming land as a share of an intestacy held by a personal representative this circumstance might make the difference between recovery and no recovery although the basis of the action is essentially the same i.e. for the recovery of land. It is envisaged that s. 14(1)(c) would prevail over the more general provision in s. 40 which declares that as time limit applies to actions by beneficiaries against their trustees. This would be so even though a personal representative might also be a trustee. Normally, he would not be an express trustee. If he were such then it might be more plausibly argued that s. 40 prevailed. There is some merit to having an express trustee of personal estate being treated as other express trustees, even though appointed by will. It is recommended that an exception to this effect be added to s.14(1).

On the purely mechanical aspects of integrating this Part with the rest of the Limitation of Actions Act several points are noteworthy. A minimum number of limitation periods would appear to be advantageous. Grouping actions within the Act on the basis of the limitation periods involved would seem to be a useful method of providing a reference for the practitioner. (Such a grouping could be in addition to a classification on the basis of subject-matter or such other classification as might be deemed necessary. It would seem to be preferable that the primary grouping should be on the basis of content and subject matter since that has not only been the traditional method of classifying the limitation periods in any Act but also is a means of classification whereby practitioners have been able to find the limitation periods applicable to their problem. However, a list of limitation periods would appear to be a useful alternative indexing method). Therefore, although it is recommended that the present system of classification should be retained so that the headings of the Limitation of Actions Act should describe the subject matter of each part, it is recommended that, in addition, there should be a list of actions being governed by each statutory limitation period. Such list could form an appendix to the statute. It is envisaged that the form of such table would follow that to be found in (1962) 2 Alberta Law Review 95, as cumulatively revised in July, 1964, or that included in the Report of the New South Wales Commission. This would have the further laudable aim, and perhaps with greater success than past attempts to effect this aim, of bringing all statutory limitation periods within the ambit of the Limitation of Actions Act.

Thus, it is recommended that a schedule of limitation periods applicable to the different causes of action be appended to any Limitation of Actions Act that may be enacted and that such schedule should be as compendious as possible.

(2) Convenience of the grouping that now exists

Since the broader policy considerations of Part II have now been dealt with above it will be expedient to turn to questions of practical arrangement and layout which are relevant to this Part. While the actions grouped together in Part II are not inherently similar there is one unifying factor and that is the fact that the same limitation period is accorded to the three types of action. The argument applies broadly to all other actions having the same limitation period. However, it would be most unwieldly to place all the actions with a six-year limitation period in the same category simply because of their large number and any sub-grouping might be done on substantive considerations. If actions are grouped according to substance and a general index is provided setting out all the relevant limitation periods then most problems would be eliminated.

Section 15(1) of the Alberta Act reads;

> "No arrears of rent, or of interest in respect of a sum of money to which section 14 applies, or any damages in respect of such arrears, shall be recovered by a proceeding, except within six years next after a present right to recover the same accrued to a person capable of giving a discharge therefor or a release thereof."

This subsection extends to periodic payments charged on land or legacies and the personal estate of an intestate the six year limitation period for such periodic payments. This subsection reinforces (and duplicates) s. 14(1) in that periodic payments charged on land or legacies or the personal estate of an intestate may not by that section be recovered outside the six year period. However, s. 15(1) is specific in that it applies only to arrears of rent or interest on damages in lieu thereof. Thus no payment which is more than six years overdue may be recovered but those less than six years overdue may be recovered. However, it is likely that if any payment is more than six years overdue any capital sum charged and any periodic payment secured (which includes the rent, interest and damages contemplated by s.15 (1)) may well be barred by the operation of s. 14(1). This would probably extend to payments of rent, interest and damages in lieu thereof which were not then six years overdue. This is so because the limitation periods are the same. Neither are the lengths of the limitation period different for capital and income (as the English are by virtue of s. 18(1) and s. 18(5) of the Limitation Act, 1939), nor in the commencement of the running of time different in each case. In view of all of the foregoing, s.15(1) is probably not strictly necessary, whereas the corresponding provision (s.18(5) of the English Limitation Act) is necessary given the same broad general policy. The same meaning should be given to "proceeding" as was given to the plural of this word in s.14(1) and a corresponding meaning should be accorded to "a person capable of giving a discharge therefor or a release thereof." It is submitted that the common law construction imposed on these

expressions would be uniformly wide. It will be noticed in addition that s. 15(1) contains the only prohibition upon collecting rent that is more than six years overdue (although it must be remembered that though the rent due before the running of the six year period may not be collected the landlord would not lose his title to the land until ten years had expired; s. 18 Alberta Limitation Act).

Section 15(1) of the Alberta Limitation of Actions Act is the successor of s. 42 of the Real Property Limitation Act, 1833, 3 & 4 Will. c. 27, which is in the following terms:

> "And be it further enacted, that after the said Thirty-first Day of December One thousand eight hundred and thirty-three no Arrears of Rent or of Interest in respect of any Sum of Money charged upon or payable out of any Land or Rent, or in respect of any Legacy, or any Damages in respect of such Arrears of Rent or Interest, shall be recovered by any Distress, Action or Suit but with Six Years next after the same respectively shall have become due, or next after an Acknowledgment of the same in writing shall have been given to the Person entitled thereto, or his Agent, signed by the Person by whom the same was payable, or his Agent....."

It will be seen that this section covers the class of actions set out in s. 15(1) of the modern Alberta Act and does so in substantially the same, if slightly more archaic, language. In addition, section 15 of the modern Alberta Act includes within its scope interest on a sum of money which is the personal estate or a share of the personal estate of a person dying intestate when it is possessed by his personal representative. Since the language is so similar, cases decided on the interpretation of the older statutory provision may be applied to the modern Alberta section. In Henry v. Smith (1842) 2 Dr. & War. 381 (Ir.), Lord Chancellor Sugden explained, at 384, the general purpose of the section;

> "Now the frame of the Act is, in my opinion, perfectly clear. The legislature meant, first to deal in the 40th. section with the right to recover the principal sum. That section enacted, that if the principal sum were unpaid for twenty years, without any acknowledgment in writing, or payment of interest, the right of the creditor to recover should be barred; and when the principal is barred, of course the right to recover interest is also gone. The legislature then proceeded to deal with interest in the 42nd section, and it there laid down a different rule, that no arrear of interest should be recovered for more than six years ..."

The object of this section is not the security itself, that is to say the land, but it is the thing secured, that is the arrears of rent or interest. The section bars the right to recover such periodic sums without barring the right to recover the security itself. In the modern Alberta Act actions to enforce securities are depended upon different sections and any arrears of rent or interest are covered by s. 15(1) so as to be subjected to the six year limit for their recovery. This means, in effect, simply that no more than six years' arrears may be collected at any one time.

Section 16 of the Alberta Act is also a provision that originated in s.42 R.P.L.A., 1834, 3 & 4 Will. c. 27. The words of the modern Alberta section read;

> "Where a prior mortgagee has been in possession of land within one year next before an action is brought by a person entitled to a subsequent mortgage on the same land, the person entitled to the subsequent mortgage may recover in an action the arrears of interest that have become due during the whole time the prior mortgage was in possession or receipt, although that time may have exceeded six years."

This method of keeping alive a claim by a second, or later, mortgagee was recognised in the words of the earlier statute;

> "...Provided nevertheless, that where any prior Mortgagee or other Incumbrancer shall have been in Possession of any Land, or in the Receipt of the Profits thereof, within One Year next before an Action or Suit shall be brought by any Person entitled to a subsequent Mortgage or other Incumbrance on the same Land, the Person entitled to such subsequent Mortgage or Incumbrance may recover in such Action or Suit the Arrears of Interest which shall have become due during the whole Time that such prior Mortgagee or Incumbrancer was in such Possession or Receipt as aforesaid, although such time may have exceeded the said Term of Six Years."

This exemption from the limitation period which would otherwise be applicable is clearly granted on the basis of the community of, or at least similarity between, the interests of a first and subsequent mortgagee. The subsequent mortgagee may be as attentive as possible to his rights yet he is postponed to the satisfaction of the first mortgagee. However, the subsequent creditor must be "so vigilant as to come within one year after the determination of that possession"; per Sugden L.C. in Henry v. Smith (1942) 2 Dr. & & War.(Ir.) 381, at 390. The question may arise as to whether a subsequent mortgagee whose action has been barred by the application

ss. 14(1) and 15), can have his right revived by the application of s. 16 of the modern Alberta Act. On principle, it would seem probable that any subsequent mortgagees ought to be able to recover any arrears of interest becoming due during the possession of the prior mortgagee. If any arrears of interest relate to a time which was before the possession of the prior mortgagee and which was also more than six years before any action was brought they will be statute-barred. Furthermore, a person could not be said to be "entitled to a subsequent mortgage" where the mortgage itself was statute-barred. Thus proceedings for foreclosure and sale of a mortgage may not be taken by a mortgagee after ten years next after the right to take such proceedings first accrued; s. 34 Limitation of Actions Act (Alberta). This will, in turn, cause the mortgage to be discharged when the certificate of a judge as to the extinction of the right of any person to recover any money secured by a mortgage or encumbrance is produced to the Registrar of Land Titles; s. 111 (1)(c) Land Titles Act, 1955, R.S.A. c. 170. [There may, however, be some doubt as to whether a mortgage right could be revived on a resumption of possession by the mortgagee. Certainly proceedings for foreclosure and sale are barred and the right and title of any person to any rent charge or money charged on land is extinguished by s. 44 of the Limitation of Actions Act. It should be noticed that the extinction is of the formerly continuing right and not merely of the entitlement to particular instalments. Furthermore, "rentcharge" is defined widely by the Act (S. 2(i)) to include "annuities and periodical sums of money charged upon or payable out of Land." It might be questioned whether a mortgage which is no longer supported by the right to foreclosure or the right to receive any periodical payment is of any further use. However, before a judicial certificate recording extinction of these rights is followed by the Registrar's cancellation of the certificate the right is a personal one as between the parties to the mortgage. Therefore, the mortgage is probably still capable of binding third parties; as was the sale by an extinguished registered owner in Dobek v. Jennings [1928] 1 D.L.R. 736.]

In addition, it should be noticed that in the transition from the 1834 Act to the present Alberta provision a modification of the wording took place. Whereas the 1834 Act applied to mortgages and other incumbrances the wording of the modern section comprehends only mortgages. Taken at face value this would imply a substantial change and would indicate that the section is out of place in Part II of the Limitation of Actions Act. Since the present provision deals only with mortgages it might more appropriately be placed in Part IV, which deals exclusively with mortgages. However, it should be remembered that according to s.2(f);

> "Mortgage" includes a charge, and "mortgagor" and "mortgagee" have meanings similarly extended...

Thus, although s. 16 appears to be an odd inclusion within Part II it may properly be placed there because it does apply to charges on land. Furthermore, the modern Alberta statutory mortgage of

land has a very close affinity with a charge; much more so than the odd common law mortgage.

The words of s. 17(1) declare that no person (other than the beneficiary) shall be given an advantage or exemption from the limitation rules of Part II simply because of the interposition of an express trust. Several points may be made with respect to its wording;

1. The term "express trust" has been given a wide meaning. This expression is used both in s. 17(1) and s. 40 of the Alberta Limitation of Actions Act and its meaning should be coextensive. However, the definition section of the Alberta Act does not define "trustee" for the purposes of the Act. Furthermore, s.41(1) expressly states that;

> "In this section, "trustee" includes an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee."

The fact that "trustee is explained for the purposes of s. 41 together with the fact that s. 17(1) pointedly refers to "express trustees" is probably an indication that the meaning of the expression is to be so confined.

2. If the interposition of a trust were allowed to make a difference in the case of the non-beneficiary the existence of a trust would confer an advantage on those not privy to its creation. Whereas the law of limitations usually follows the existence of substantive institutions to reverse the rule in s.17(1) would be to create an extended (or indefinite) limitation period where there was no change in the substantive law as far as the plaintiff was concerned. In other words whether money was charged by way of express trust on land or legacies or whether it was simply charged might, if s. 17(1) were changed, made a great deal of difference to a person who was not otherwise affected by the trust in any way. [It should be noted in this connection, that s. 40 only removes the time limit in favour of cestuis que trust or beneficiaries and not for any other class of persons. Furthermore, s. 5(1)(j) provides a "catch-all" period of six years which is the same as would otherwise be applicable by Part II.]

It may be noticed that s. 17(2) preserves the right of a beneficiary under an express trust and exempts such a right from the operation of the section. This in a direct way subordinates such rights to the operation of Part VII of the Limitation of Actions Act, (the principal provision of which is s.40) to prevent any statutory period from affecting the claim of a beneficiary

under an express trust.

The problem which presents itself here is of who may be said to be a beneficiary under an express trust. Although it seems probable that a beneficiary under an express trust must be construed narrowly (despite the wide meaning that has traditionally been accorded to such an expression). The beneficiary may be anyone in whose favour the trust operates. So long as the trust itself is express, it will not matter whether the trustee is nominated, or one of a group of persons described or defined in the trust instrument (as in Oppenheim v. Tobacco Securities Trust Co. Ltd. [1951] A.C. 297) or whether the operation of law affects the matter of who the beneficiaries shall be; Re Abbott Fund, Smith v. Abbott [1900] 2 Ch. 326. Usually, anyone who turns out to be a beneficiary under an express trust should be contemplated by the section. Certainly, on this basis, a semi-secret trust would be comprehended by these words. Probably also, a fully secret trust ought to be included in that it is express thought not expressed to anyone but the trustee.

Section 17 of the Limitation of Actions Act concerns the situation in which money is secured by an express trust. It reads;

> s.17 (1) No action shall be brought to recover
> (a) a sum of money or legacy charged on or payable out of any land or rent charge, though secured by an express trust,
> (b) any arrears of rent or of interest in respect of a sum of money or legacy so charged or payable or so secured, or
> (c) any damage in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.
> (2) Subsection (1) does not operate so as to affect a claim of a beneficiary against his trustee for property held on an express trust.

This is a statutory embodiment of the principle to be found in such cases as Humble v. Humble (1857) 24 Beav. 535; 53 E.R. 464 to the effect that the running of the limitation period will be unaffected by the interposition of an express trust. Thus a testator may by his will impose a trust upon his property and such a trust will be taken to amount to a charge upon that property; Re Stephens (1889) 43 Ch. D. 39. In that case, as with the present law of Alberta, it made some difference as to whether the sum of money was charged by express trust upon real or personal property. The indication, though not the decision, of Kay J. was to the effect that one may disregard the trust and look at the nature of the property upon which the charge is imposed. In the case of a composite fund this would lead to a different period being applicable in the case of personal property from that which would

apply to real property. (This consideration would not be particularly important under the current Alberta Act since the periods applicable would usually be the same, namely the standard six year period. Therefore, even where a sum is charged by a trust on a mixed fund and is liable to be paid rateably out of the real and personal estate it is not likely that part of the claim will be barred. Thus the situation which arose in Re Raggi [1913] 2 Ch. 206 is unlikely to arise here. Both the decision of that case and the fact that here the limitation periods are the same prevent the problem from arising. Avoidance of this sort of problem is one of the incidental benefits conferred by the standardization of the limitation periods).

Repeal of s. 17 would probably cause the original common law to spring up and though the effect of that in this case would not be undesirable since the law is substantially the same repeal might offer some confusion. However, the case would be different if the legal result were to be reversed. The form of words used in s. 17(1) is precise and effective. Therefore, it may be said to be generally desirable to retain s. 17(1) of the Act. However, it may be noted that the operation of that section is confined to express trusts but not to implied or constructive trusts. The reason for creating a difference between express trustees and others may be the prevention of those who would wish to circumvent the limitation period from doing so by availing themselves of a simple and well-known device. [Nevertheless, it is possible to avail oneself of the exception in favour of persons suing implied or constructive trustees and this will be fairly easy to accomplish though somewhat less certain than the creation of an express trust]. [Only s. 41(1) of the present Alberta Act expressly includes constructive and implied trustees.]

The general conclusion with respect to Part II of the Act is that it should be preserved substantially as it is, subject to the particular recommendations already expressed.

AGREEMENTS FOR THE SALE OF LAND

In many respects agreements for the sale of land are different from other agreements. Of immediate interest is the fact that a particular Part (V) of the Limitation of Actions Act, 1955, R.S.A. c. 177 is devoted to such agreements. The substantive difference consists of the fact that whereas for all other actions in contract a six year limitation period is accorded [s.5(1)(f)(i)] actions on an agreement for sale of land need only be brought within ten years [ss.36 and 37]. This Part was added to the Uniform Act in 1932 at the instigation of the Saskatchewan Commissioners. The purpose of the addition was to enable agreements for the sale of land to be treated in roughly the same way as land and not to have the shorter limitation periods for contracts imposed upon them. It was felt that six years was not sufficiently long a limitation period for agreements for sale of land and that such agreements should be subject to the same period as mortgages. It should be noticed that such an agreement is a way of providing security for a debt. The philosophy of the Uniform Act and the Alberta Act has been not to give a special period for contracts under seal but to look more at the substance of the transaction. The solution of the Ontario Commissioners in their Report (1969) pp. 66 and 163 was to allow a longer period for deeds. There appear to be good arguments to support such a position but it would probably not now be wise to prefer them to the established tenet of the Alberta scheme. Similar to the Ontario recommendations are those of the New South Wales Commissioners (p. 108 of their Report) as well as the present law of England (s.2(3) Limitation Act, 1939) and the law of New Zealand (s.4(3) Limitation Act, 1950 and see O'Keefe and Farrands Introduction to New Zealand Law (1969) at p. 255).

The Alberta Act is not in exactly the same form as the Uniform Act for it says in two sections what the Uniform Act says in three. The Alberta Act avoids incorporation of other sections within the part by reference and this would seem to be advantageous. [See ss. 34-36 Uniform Limitation of Actions Act as recommended in 1931, and amended in 1932 and 1944.]

Part V of the Act consists of only two sections; s.36 limits the right of the purchaser to bring action to a period of ten years and s. 37 limits the right of the vendor to bring action to the same period. These sections relate to the agreement of sale and leave undisturbed the limitation period for actions for the recovery of land; s. 18, Ferguson v. McNulty (1903) 2 O.W.R. 657, Webb v. Marsh (1894) 22 S.C.R. 437, Re o'Donnell and Nicholson (1920) 54 D.L.R. 701. The same issue arises here as with all the other Parts of the Act that deal exclusively with land, namely, a confusion may arise where there is a mixture of assets. An agreement for the purchase of such a mixture occurred in Gronbach v. Brock [1952] 3 D.L.R. 490, and must be fairly common in the case

of sales of a business. [That case does not give any indication as to whether the ten year or the six year limitation period will apply.] This problem would not arise to the same degree in those jurisdictions that allow a longer limitation period for a deed or specialty. The problem that now confronts us, namely, whether the longer or the shorter limitation period may be used in an agreement to sell land and chattels, has been referred to in cases involving charges on mixed funds. By analogy, it is probable that the agreements have to be severed into the parts attributable to realty and the parts attributable to personalty. They would, if possible, have to be dealt with separately. The rule in Re Witham [1922] 2 Ch. 413 is that where one limitation period had expired there was no further right to foreclose on the mixed fund. Admittedly, in that case the limitation period for real property had expired and in Alberta the shorter period is for personalty. Furthermore, the avowed intention under Part V of the Alberta Act is to extend the time period for agreements for the sale of land. Is this to be defeated when the agreement is for the sale of land and chattels? However, that decision need not today be followed with respect to a mixture of funds since it involved an interpretation of the English Act of 1833 and seemed to work harshly. Indeed, Sargant J. in that case said, at p. 423;

> "This decision is quite contrary to my inclination, and I think it works something in the nature of a practical injustice."

Thus, for many reasons, it may prove to be a happier result to apply the six year period to that part of the agreement which deals with personalty and the ten year period to that part dealing with land. This may prove to be the equitable and practical solution but the question may still be open to a contrary judicial determination. A statutory clarification of this position might be added to the Act, if thought desirable.

Section 36 is couched in almost the same terms as s. 18 of the Act, which deals with recovery of the land. Section 36(1) limits the right of the purchaser of land to a ten year period;

> "(1) No purchaser of land and no person claiming through him shall bring an action in respect of the agreement for the sale thereof except within ten years after the right to bring the action first accrued to the purchaser, or if the right did not accrue to the purchaser, then within ten years after the right first accrued to a person claiming through the purchaser."

The section is clear and unequivocal in its setting of the limitation period. It will be noticed that the time limited is to be calculated from accrual of the cause of action to the purchaser or to the person claiming through him. Accrual of the cause of action to a person other than the purchaser may only be taken if the right never did accrue to a purchaser. [Otherwise, there might exist the

possibility of indefinitely postponing the limitation period.] In some cases the vendor may be a trustee for the purchaser and may be obliged to act in that capacity as the result of the imposition of a constructive trust. A constructive trust would probably not extend the time limit within which the trustee might be liable to an action by the beneficiary according to the terms of s. 40. [See Waters The Constructive Trust (1964) pp. 73-143, Lysaght v. Edwards (1876) 2 Ch. D. 499, Abdullah v. Shah [1959] A.C. 124.] Certainly, the existence of a constructive trust should not affect the limitation period accorded by s. 36.

Section 36 purports to cover "all actions in respect of the agreement for sale." This includes applications for registration as owner in fee simple; Re Anderton (1908) 8 W.L.R. 319. It is also wide enough to cover all equitable actions which depend on the agreement. Section 4, because of its strong language, would probably prevail so as to enable equitable points as to limitation periods to have effect. Davis J. in Turner v. Waterman (1965) 54 D.L.R. (2d) 737 thought that a claim of title based on legal possession under the agreement of sale was "an action in respect of the agreement" within s. 36(1) of the corresponding Saskatchewan Act. It is suggested that this is open to a different inference. It does not seem necessary to rely on a possession which need not be referable to the agreement. However, it is certain that the expression "an action in respect of the agreement" is sufficiently wide.

At common law a title gained by possession was still subject to encumbrances; In re Nisbet and Potts' Contract [1905] 1 Ch. 391, Taylor v. Twinberrow [1930] 2 K.B. 16, Tichborne v. Weir (1892) 67 L.T. 735 and Lewis v. Plunket [1937] 1 All E.R. 530. This point need not concern us for only those encumbrances and reservations which are registered will take effect in Alberta. Thus, third parties may only affect the land according to the tenor of the certificate.

Section 36(2) contains the usual provisions for allowing the period to run again in the case where an acknowledgment or part payment has been given;

> "(2) When at any time before the expiry of ten years from the accrual of the right to bring an action in respect of an agreement for sale of land
>
> (a) a person who is bound or entitled to make payment of the purchase money or his agent in that behalf pays a part of the money to a person entitled to receive the same or to his agent in that behalf, or
>
> (b) an acknowledgment of the right of the purchaser or person claiming

through him to the land, or to make payment of the purchase money, is given to the purchaser or person claiming through him or to the agent of either of them in that behalf, in writing, and signed by the vendor or person claiming through him or the agent in that behalf of either of them,

then the right to take proceedings shall be deemed to have first accrued at, and not before, the time at which the payment or the last of the payments, if more than one was made, or the time at which the acknowledgment or the last of the acknowledgments, if more than one, was given."

The subsection, as is usual, contemplates that the acknowledgment or part-payment shall only recommence the running of time if given within the original ten year period. The same principle applies with respect to s. 36(2) as was applied in Manufacturers Life Ins. Co. v. Hodges (supra). In Davis v. Brockway [1949] 1 W.W.R. 185 it was held by H.J. Macdonald J. that a purchaser of property was the agent and trustee of the vendor with respect to a mortgage that the purchaser had assured. Thus, payments made by the purchaser to the mortgagee fell within s.36(2)(a) so as to keep alive the limitation period as against the mortgagor-vendor. The intention of both the purchaser and the alleged agent that the latter should act as "agent in that behalf" is the crucial matter.

Section 37 makes provision with respect to the vendor of land. Again the language of the section is similar to that of s. 18. The time limited is again ten years from the conclusion of the contract or other time of accrual of the right to take proceedings:

"(1) No vendor of land and no person claiming through him shall take any proceedings

(a) for cancellation, determination or rescission of the agreement for the sale of the land,

(b) for foreclosure or sale under the agreement for sale, or

(c) to recover the land,

except within ten years after the right to take the proceedings first accrued to the vendor, or if the right did not accrue to the vendor, then within ten years after the right first accrued to a person claiming through the vendor."

This section sets out a list of actions which it is thought the vendor of land may wish to bring. The list of such actions ought to be exhaustive. Indeed s. 37 attempts to include all the common law remedies. However, there are certain equitable actions which it is thought the vendor may wish to bring, notably those for specific performance and rectification. If such actions were brought

the equitable doctrines of laches, acquiescence and application of the statute by analogy would be relevant and might be invoked. [Smith v. Clay (1767) 3 Bro. C.C. 639 n., Franks Limitation of Actions (1959) p. 233 and Preston and Newsom Limitation of Actions (1953; 3rd.ed.) p. 256] In fact, the equitable jurisdiction may obtrude so as to allow implicit reservations and conditions between vendor and purchaser to take effect; Matheson v. Murray (1919) 46 D.L.R. 264, relying to some extent on East v. Clarke (1915) 23 D.L.R. 74. In Matheson v. Murray (supra.) an even division of opinion in the Supreme Court of Nova Scotia allowed the trial judge's decision to stand so that properly executed deeds of transfer of land were rendered nugatory in equity because of the arrangements that subsisted between vendor and purchaser. Thus the deeds of transfer could later be upset many years after the expiry of the limitation period. This dubious decision was summed up by Mellish J. at p. 275;

> "The grantee could, it seems, not be entitled to possession of the lands until he paid the purchase money, and even if the deeds be regarded as naming a bona fide consideration, the mere fact of delivery to the grantee of the deeds must not be regarded too seriously, if the consideration was not in fact paid. It would be clearly inequitable to give effect to the deeds under such circumstances."

In some cases land is purchased under an agreement for sale from a registered owner and the purchaser takes possession and makes no payments or written acknowledgments for ten years. In such a case, who is entitled to the property, the registered owner or the purchaser in possession? [It should be borne in mind that s. 65 of the Land Titles Act, 1955, R.S.A. c. 170 states that the certificate of title is conclusive evidence of title in favour of the registered owner.] In a case similar to the above Hall C.J.Q.B. ordered the Registrar to cancel the existing title and register a new one in the name of the purchaser who had neither paid anything or acknowledged the vendor's title; Re Scheidt [1966] Sask. B. Rev. 59. However, a contrary decision was reached in Turner v. Waterman (1965) 53 W.W.R. 595. In that case Davis J. held that the title could not be registered in the name of the purchaser. That case too, was a Saskatchewan case and that Province has long held that the indefeasibility provisions of the Land Titles Act prevail. In Saskatchewan, and the other Provinces, there is no provision corresponding to s. 73 of the Alberta Land Titles Act. It may be different in the case of a mortgage; Re Hadwin [1954] 3 D.L.R. 79. [Schmeiser in Prescription under the Saskatchewan Land Titles Act (1966) 31 Sask. B. Rev. 54 argues in vain against this established result.] The position in Alberta is clear; no vendor may bring action to recover the land outside the period of ten years and after that time the vendor's title is extinguished (ss. 37(c) and 44 Limitation of Actions Act). Anyone wh has been in adverse possession for ten years may have himself declared owner and registered accordingly (s.73 Land Titles Act). The

agreement for sale may give some credence to a contention that all the land subject to the agreement was subsequently occupied. However, the agreement may not be substituted for proper evidence of subsequent possession; Walker v. Russell (1966) 53 D.L.R. (2d.) 509 and cases therein cited. Thus, the present Alberta position gives rise to very little difficulty. However, if there is any change with respect to adverse possession giving rise to title in the possessor then these cases of uncontested disposition or devolution will have to be considered . They are the common origins of possession adverse to the title of the registered owner. It would not be useful to embrace the sort of impasse demonstrated in the cases decided in Saskatchewan and other Provinces without the present Alberta rule. It is not useful to have one person in possession without title and another with title but no means of enforcing it so as to get possession.

Again, the usual provision for acknowledgments and part payments is to be found in subsection (2) of the section. It is expressed in the usual form of words;

> "(2) When at any time before the expiry of ten years from the accrual of the right to take such proceedings as are mentioned in subsection (1)
>
> (a) a person who is bound or entitled to make payment of the purchase money or his agent in that behalf pays a part of the money payable under the agreement for sale to a person entitled to receive the same or his agent in that behalf, or
>
> (b) an acknowledgment of the right of the vendor or person claiming through him to the land, or to receive payment of the purchase money, is given to the vendor or person claiming through him or the agent of either of them in that behalf, in writing, and signed by the purchaser or the person claiming through him or the agent in that behalf of either of them,
>
> then the right to take proceedings shall be deemed to have first accrued at the time at which the payment or last of the payments, if more than one, was made, or at the time at which the acknowledgment or last of the acknowledgments, if more than one, was given."

There does not appear to be anything exceptional in this section. Both part-payment and acknowledgment would appear to be proper reasons for re-starting the limitation period and would appear to be well expressed to be so here.

CONDITIONAL SALES OF GOODS

Part VI of the Alberta Limitation of Actions Act comprises two sections whereas the Uniform Limitation of Actions Act has three. Like Part V it was added to the Uniform Act in 1932 at the request of the Saskatchewan Commissioners. Virtually the same edicts are to be found in the Alberta Act as in the Uniform Act. However, there are again a few changes in the wording with the presumed object of clarification. The Alberta Act is to be interpreted throughout in a substantially similar way to those other Provinces which have enacted the Uniform Act or a modified version of it. Thus, a parallel interpretation is to be achieved wherever possible although sometimes alterations in the wording of a statute make this impossible. The ideal of similarity in interpretation is embodied in s. 50 of the Alberta Limitation of Actions Act:

> "This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of those provinces that enact it."

Since this section does not attempt to make travaux preparatoires admissible it operates only to urge judges of one province to notice and attempt to follow the decisions of their brethren in another Province where they have pronounced on identical wording. In this sense, it may be argued that this section does no more on statutory construction than the common law did anyway. Although it is otiose it does recognise that there was the precedent collective effort of the Commissioners on Uniformity of Legislation in Canada. Some benefits may ensue from the exhortation.

The Conference of Commissioners on Uniformity of Legislation in Canada has considered whether to recommend that a section such as that under consideration should be endorsed by them; see Proceedings (1966) at p. 26, (1967) Proceedings at p. 27, and Proceedings (1969) at p. 124. The question of a Uniform Construction section has been debated by the Commissioners for a long time since its introduction in 1921. [The history of the section and devices to attempt to secure the same end were discussed in the Report of a Committee to the Commissioners in 1969 (supra.).] As the matter now stands, the Uniform Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada resolved "that each Uniform Act have printed at the end thereof a note requesting any province or jurisdiction enacting it to add a note to the Act to the effect that the Act is, in whole or in part, based on an Act recommended by the Conference, and, if based in part only on the Uniform Act, a note of where the differences occur."

Section 39 of the Alberta Act contains the most important provision of Part VI. It reads as follows;

> "(1) No seller shall take proceedings for the sale or to recover goods the subject of a conditional

> sale except within six years after the right to take the proceedings first accrued to the seller or, if the right did not accrue to the seller, then within six years after the right first accrued to a person claiming through him."

The first question that presents itself is whether this substantive provision is necessary. Actions for breach of contract must be brought within six years of accrual of the cause of action; s.5(1)(f)(i). Sales of goods contracts, like any other contracts, are actionable when the breach occurs. The same general rule applies to conditional sales contracts. Rights and liabilities under conditional sales contracts are often assigned but this fact should not affect the necessity of having a special limitation period. The occurrence of the event and not the delivery of the goods is the relevant time at common law; Waters v. Earl of Thanet (1842) 2 Q.B. 757.

Most other common-law jurisdictions do not allot a specific limitation provision to conditional sales of goods. Since no unusual disposition is made of them in terms either of the length of the limitation period or moment at which it is to start to run it in difficult to understand why a section should have been devoted to it in the Alberta Act and in the Uniform Act.

The important matter in this section is that time runs from the date of the occurrence of the breach and the date on which the goods because subject to the conditional sale agreement is immaterial. [The more so since for the purposes of the running of time it does not matter whether they are subject to such an agreement or contract or not.] One problem that must be common in the case of conditional sales is that there is a master agreement and particular conditional sales are agreed by the vendor and purchaser to be governed by the master agreement. Many large stores have such arrangements. The result of such an arrangement is that payments may not be attributed to a particular conditional sale or to a particular item. These problems arise in the case of other transactions and are not peculiar to conditional sales. The intention of the parties is what governs any individual case; Petryk v. Petryk (1966) 56 D.L.R. (2d.) 621.

Section 38 is a definition section, the purpose of which is to fill out the meanings of the technical terms employed in s.39(1). The terms "buyer" and "seller" are defined so as to refer to the parties to a conditional sale. The principal definition is of a "conditional sale" which is defined so as to include any contract in which possession of goods is to pass but title is not to pass until the fulfilment of some condition. It also includes contracts of hire where the hirer has the option of becoming owner on compliance with the terms of the contract. A definition of "goods" is also supplied and, like all the other definitions in

this Part, the particular meaning here supplied is to be confined in its operation to this Part of the Act. Section 38 states;

> "(c) "goods"
> (i) means all chattels personal other than things in action or money, and
> (ii) includes emblements, industrial growing crops and things attached to or forming part of the land, that are agreed to be severed before sale, or under the contract of sale."

These are perfectly acceptable statutory definitions. They are extended in meaning slightly, viz. the extension of a conditional sale to cover a hire-purchase contract [on assimilation which can now no longer be made in England since the passage of the Imperial Hire Purchase Acts of 1964 and 1965 created a clear distinction between hire-purchases, conditional sales and credit sales]. However, in the context of other Alberta statutory provisions this is perfectly acceptable.

Section 39(2) is a subsection in the common form the purpose of which is to extend the limitation period in the case of a part-payment or acknowledgment.

> "When at any time before the expiry of six years from the accrual of the right to take proceedings mentioned in subsection (1)
> (a) a person who is bound or entitled to make payment of the price or his agent in that behalf pays a part of the price or interest thereon to a person entitled to receive the same, or his agent in that behalf, or
> (b) an acknowledgment of the right of the seller or person claiming through him to the goods, or to receive payment of the purchase money, is given to the seller or person claiming through him or the agent in that behalf or either of them, in writing, and signed by the buyer or the person claiming through him or the agent in that behalf of either of them,
>
> then the right to take proceedings shall be deemed to have first accrued at, and not before, the time at which the payment or last of the payments, if more than one, was made or the time at which the acknowledgment or last of the acknowledgments, if more than one, was given."

With respect to the part-payment Dickson J. said in Petryk v. Petryk (1966) 56 D.L.R. (2d.) 621 that the intention of the parties

with respect to the sums was what ultimately mattered. Some part-payments, furthermore, could not be attributed to a sum in dispute (at p. 623);

> "In order for a part payment to take a case out of the Statute of Limitations it must have been made on account of an amount greater than the part payment."

Thus, when payments were made from time to time on the whole of a running account the whole account and every item on it could be kept alive; Scott v. Allen (1912) 5 D.L.R. 767. However, the onus of establishing part payment is always on the plaintiff; Ball v. Parker (1877) 1 O.A.R. 593, Josling Periods of Limitation (1969; 3rd. ed.) at p. 108. The rules established as to who is a duly constituted agent for making a part payment were established in Manufacturers Life Ins. Co. v. Hodges (supra.). These rules have generally been followed since, often as a matter of common sense, with respect to the other sections of the Act which allow a part payment to postpone the running of the limitation period. Thus in Buenneke v. Buenneke (1966) 56 D.L.R. (2d.) 365 a payment made by the wife of the maker of a demand note, at the request of the payee, did not constitute a part payment where the payment had not been ratified by the maker. The judgment of the Saskatchewan Court of Appeal was to the effect that the relationship of principal and agent could be created retrospectively by ratification. Similarly applying the general law of agency to acknowledgments and part payments is Smarzik v. Bogdalik (1959) 29 W.W.R. 481.

There seems to be nothing in this Part which particularly needs to be altered.

TRUSTS AND TRUSTEES

Part VII of the Act is devoted to the subject of Trusts and Trustees. This corresponds to Part II of the Ontario current Limitation of Actions Act, 1960, R.S.O. c. 214, which enacts substantially the same provisions. Most other jurisdictions make some special provisions for actions against trustees and these usually appear as separate and distinct parts of the relevant statutes; see Part II, Division 5 of the New South Wales Bill and the title "Actions in respect of trust property or the personal estate of deceased persons" in the English Limitation of Actions Act, 1939.

As a preliminary matter it may be mentioned that the use of the expression "cestui que trust" is somewhat archaic. The word "beneficiary" would appear to be more modern and it may be noted that this word is in fact used in s. 41 of the Act. Even the explanatory side-note of s. 40 uses the word "beneficiary". Nevertheless, the expression "cestui que trust" is to be found in s. 40 and in s. 42. Thus, it is more modern to employ the word "beneficiary" in place of "cestui que trust". It would eliminate use of the two forms within Part VII of the Act. Besides, very few people know the correct plural form; see Sweet Cestui que Use: Cestui que Trust (1910) 26 L.Q.R. 196.

Section 40 of the Limitation of Actions Act is the principal section in this Part. It does not provide that a longer period than that ordinarily accorded shall be limited to an action by a beneficiary against a trustee, it simply provides that no period at all shall be limited;

> "Subject to the other provisions of this Part no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act."

It may be noted that this section overrides any limitation period to be found in any other part of the Act with respect to an action by a beneficiary against a trustee, but that this section is itself subject to any provision within this Part with which it may conflict. It is certain that the purpose of the next succeeding section (s. 41) is to cut down the situations in which there is no limitation period. The purpose of s. 41(2) is to limit the situations in which there is no limitation period to actions for recovery of trust assets and actions concealed by fraud. This is probably a perfectly proper limitation for these are the two most obvious cases in which a beneficiary may be prejudiced by the conduct of the trustee. In view of all this, it is rather surprising to find a statutory provision couched in substantially the same terms as s. 40 but not subject to any exceptions at all. Section 34(2) of the Judicature Act, 1955, R.S.A. c. 164 has not been

amended and reads;

> "No claim of a cestui que trust against his trustee for any property held on an express trust or in respect of a breach of the trust shall be held to be barred by a statute of Limitations."

At best, this section is repetitious, at worst it may substantially increase the effect of the provision. Furthermore, it is to be found in an odd place for a limitation provision. Therefore, it is recommended that this section of the Judicature Act should be repealed. Section 34(2) confers a wider immunity than that to be found in the Limitation of Actions Act itself. This is certainly contrary to the modern trend. The repeal of s. 34(2) is a necessary step to be completed before an examination of the question of whether the immunity of trustees should be further cut down. [This is so despite the fact that the section has been part of the Alberta Judicature Act since 1919 c. 3 s. 37(1) and was also to be found in s. 25(2) of the English Judicature Act, 1873.]

The examination next to be undertaken is that of whether there should be a time limit imposed on all actions by beneficiaries against their trustees, including actions for the recovery of trust property and those concealed by fraud. It is possible to look at the imposition of a limitation period as the conferring of a benefit upon a trustee. However, there is always a corresponding detriment to a beneficiary to be considered. [Where a trustee has acted honestly and reasonably he may be relieved wholly or partially from liability under s. 31 Trustee Act, 1955 R.S.A. c. 346. This may be held to extend to cases in which a long time has elapsed since the occurrence of the breach of trust.]

The English law is that no period of limitation prescribed by the Limitation Act, 1939, is to apply to a beneficiary under a trust in the cases of recovery of trust property or fraud to which the trustee was privy; s. 19(1) Limitation Act, 1939. This is similar to what the law of Alberta was intended to be. However, the English provision covers constructive trustees and other trustees than express trustees; Trustee Act (Imp.) 1925, s. 68 (17) and the 1939 Act, s. 31(1). Before 1940 in England only an express trustee was precluded from pleading the statute. This position corresponded closely to the modern Alberta position. A fairly liberal interpretation of who was an express trustee was always accorded under the English provision. To this extent the New South Wales Commissioners thought that not even a fraudulent trustee should be forever outside the law of limitation of actions (Report (1967) at p. 125). They felt that in certain circumstances this unlimited period within which an action might be brought if fraud was involved (which now appears both in the English and Alberta law) could be very prejudicial to a trustee or to his estate. To compensate in part for the harshness this position might involve vis-a-vis beneficiaries the New South Wales Commissioners

recommended that a long limitation period should be accorded (twelve years) and that the time should not begin until the beneficiary might with due diligence have discovered the facts and his own rights. These proposals are embodied in s. 47 of the New South Wales Draft Bill. This proposal thus sets a time limit for actions involving the fraud of the trustee, conversion of the trust property, actions for recovery of the trust property and actions to recover money on account of a wrongful distribution of trust property. The Ontario Commissioners considered Trusts at pp. 53-61 of their Report. They were dealing with an older statute than that of Alberta. (The Ontario statute has several internal inconsistencies from which the Alberta Act is free.) The Ontario Commissioners thought that a beneficiary should not be required to be reasonably diligent in ensuring that the trustee acts properly because the nature of a trust pre-supposes confidence in the trustee. However, they recommended the imposition of a ten year limitation period running from discovery of the cause of action. This proposed limitation period would cover actions by a beneficiary for conversion, for wrongful distribution and recovery of the trust property as well as for fraud. (Incidentally, they recommended that a ten year limitation period should also be applied to actions against the personal representatives of a deceased person for a share of the estate, whether under a will or on intestacy. However, that type of action in Alberta is well covered by s. 14 although a six year period is allotted and not the ten year period recommended by the Ontario Law Reform Commission.)

Thus, it may be seen that a beneficiary is extremely vulnerable to breaches of trust and fraud by his trustee. Also, the fact that a trustee is a trustee will indicate that someone has had confidence in him, even if it was not the particular beneficiary. These reasons combine to make a case for not requiring fast action from a beneficiary from whom the fact of a breach of trust may be concealed, fraudulently or otherwise, for a very long time. On the other hand, it may not be unfair to allow to a trustee a statutory limitation period. He has a very heavy burden to discharge and has some intricate rules with which to comply. Not only are the rules at times quite intricate but a trustee may be responsible for other persons, such as co-trustees. [For an example of technical rules which had to be adhered to by a trustee who was not protected by any limitation period see the decision of Danckwerts J. in re Howlett [1949] 1 Ch. 767.] The modern trend of attempting to compromise between these aims is understandable. The compromise is to allow a long limitation period to the aggrieved beneficiary. Furthermore, since concealment is possible in so many cases the starting point of the running of time should be a fair one. It would be invidious for time to run while the potential plaintiff is unaware and cannot be aware. [The fewer situations like Cartledge v. Jopling [1963] A.C. 758 that the law creates, the better.] If such a solution is to be adopted time may be started according to one of two formulas. Time may begin to run when either;

(a) the plaintiff knew of the act complained of, or

(b) the plaintiff knew of the act complained of, or ought to have known of the act complained of.

Neither solution is entirely satisfactory. The former starting point for the running of time was adopted by the Ontario Commissioners. It is subject to the difficulty that when a plaintiff first became aware of something is not easily amenable to proof. This is very much a matter of inference from the facts and to make it a workable starting point for the running of time the matter would have to be governed by some fairly strong presumptions. The Ontario Commissioners circumvented the problem by the procedural device of recommending that the burden of proof of the relevant knowledge should rest on the trustee. The latter solution (of taking the time at which the potential plaintiff knew or ought to have known of the act complained of) was adopted by the New South Wales Commissioners. It is subject to the difficulty that actual knowledge will only be demonstrated in exceedingly rare cases since there is no presumption, procedural or otherwise, for determining when knowledge is obtained. This means that recourse will have to be had to when "knowledge ought to have been obtained." This means, in turn that the court will have the burden of deciding on the facts of each case when the limitation period shall commence. This is a burden that has been placed on the English courts by virtue of ss. 1 and 2 of the Limitation Act, 1963, 11 & 12 Eliz. 2 c. 47. It has proved to be a very difficult burden to discharge.

One must, of course, make the assumption that the courts will reach a conscientious and fair conclusion on each case according to the facts. However, it is not certain that cases decided on the basis of the recommendation of the New South Wales Commissioners would be expunged of their elements of caprice. Either decisions on that basis would be somewhat capricious or else fairly hard rules would emerge either in common law or statutory form. Thus, it is suggested that to import a section like that of the New South Wales recommendation would cause some difficulty because it would be a difficult section for the courts to administer. The Ontario recommendation would be preferable but would seem to have the disadvantage of presenting an invidious spectacle in that knowledge would have to be proved by circumstantial evidence. However, the sting of this criticism is drawn by the fact that the contention of knowledge would only be made where there was some evidence available to the trustee. This means that only in the cases where there was some proof of knowledge available would the limitation period be relied upon. Furthermore, it would be left to the trustee to keep alive the evidence of the commencement of the running of time. [In other causes of action evidence of the accrual of the cause of action is also evidence of the start of the running of time.] This would mean that the trustee would need to keep on hand evidence of knowledge of the beneficiary for an indefinite period in order that he might be protected. It is suggested that there is not much protection for the trustee in that case. One of the original reasons for the introduction of limitation periods was that they would prevent unjust claims being brought (see Preston and Newsom Limitation of Actions (1953; 3rd. ed.) at p. 2). In order to prevent unjust claims being brought limitation

periods should have something of an automatic effect. If a defendant is to be bound to keep proof of knowledge alive he, and those in the same position as him, will not be very well protected since with the passage of time the proof will become less readily available. (In all fairness, it must be mentioned that proof supporting the plaintiff's claim will tend to disappear at the same time as proof of the knowledge.)

In view of all of the foregoing it may be stated that it is a laudable ambition to give the trustee a limited measure of protection by the imposition of a limitation period that is fair in its length. It is suggested that ten years would be a reasonable length of time. That was the period accepted by the Ontario Commissioners. However, it is clearly useless to ascribe a limitation period without setting a point from which it should run. It is submitted that all the proposed starting points suffer from some defect. If these defects could be remedied in a way that was fair to both trustee and beneficiary the starting point would be acceptable. If such a cure of those defects could be achieved the imposition of a fair limitation period would be a progressive and equitable measure. In the light of this it is not recommended that a change should be introduced to radically alter s. 40 of the Act.

Although it would be desirable to impose a reasonable limitation period upon actions against all trustees as soon as a fair starting point for the limitation period can be worked out that this would solve many problems some would still remain. One quandary is as to whether constructive, express and implied trustees, as well as personal representatives should all be treated in the same way. In the present state of Alberta law claims by beneficiaries against express trustees are set apart and are subject to no limitation period. At present, actions against other than express trustees are subject to a limitation period. However, the definition of an express trustee has been somewhat extended. It would seem, on first impression, to be preferable to treat all types of trustee in the same manner for the purposes of limitation periods since the basic institution of trusteeship is the same in all cases. This is so even though in some cases, such as the imposition of a constructive trusteeship, the point of creating a man a trustee is merely remedial in that he is then subjected retroactively to certain duties. The Ontario Commissioners recommended that executors and administrators should be treated as trustees for the purposes of the applicable limitation periods. Since Part II and s. 41 of the Alberta Act deal competently with actions against personal representatives discharging their duty in the ordinary way it is not recommended that they should be treated as trustees for all purposes. There are, however, two situations in which the personal representative may be a trustee;

> (a) where an express trust is imposed on the personal representative; Alexander v. Royal Trust Co. [1949] 1 W.W.R. 867. Such a trust may also be a secret or semi-secret trust; Blackwell v. Blackwell [1929] A.C. 318.

(b) where the personal representative has converted himself into a trustee; Phillippo v. Munnings (1837) 2 My. & C. 309 and Dix v. Burford (1854) 19 Beav. 409.

These are well established and need no modification of the statutory provisions in order that one falling within these categories would be a person contemplated by s. 40 so as not to have the protection of any limitation period. Thus, only those personal representatives who are in fact trustees should be treated as such. This same distinction is preserved in ss. 19 and 20 of the English Limitation Act, 1939. Otherwise, it would appear to be useful to treat all trustees (express, implied and constructive) in the same way if an acceptable limitation period could be found to apply to them all. This would have the incidental benefit of avoiding the definitional disputes that may now be encountered as to who is an "express trustee."

The express trust may be created with ease. It is really any situation in which the equitable obligation is imposed upon a person to deal with trust property for the benefit of certain others. [See Underhill's Law of Trusts and Trustees (11th. ed.) p. 3 and Mowbray Lewin on Trusts (1964; 16th. 3d.) p. 3]. It is part of the substantive institution of the trust that it covers obligations arising in so many different ways. This makes the creation of a trust an easy task. For the purposes of s. 40 we shall be mainly concerned with express trusts (although it may be hoped that if a satisfactory formulation of a limitation period could be achieved that period could be extended in its scope to cover other sorts of trustees - but not generally executors and administrators). The ease with which an express trust could be created was demonstrated in Alexander v. Royal Trust Co. [1949] 1 W.W.R. 867 (See p. 871 n.). In that case there was an unequivocal imposition of a trust to pay debts upon the trustees. However, a mere enumeration of a debt in a schedule to a creditor's trust deed was insufficient to constitute an acknowledgment in Cockshutt Plow Co. Ltd. v. Young [1917] 1 W.W.R. 1441. A fortiori it did not itself constitute a trust.

Thus, the present position of express trustees, according to s. 40 of the Alberta Act, is that time will not run in respect of a claim against them for a breach of trust or for the recovery of trust property. A statement of the reason for the existence of this provision is to be found in Taylor v. Davies (1920) 51 D.L.R. 75 (Viscount Cave delivering the judgment of the Judicial Committee of the Privy Council at p. 84);

> "The possession of an express trustee was treated by the courts as the possession of his cestuis que trustent and accordingly time did not run in his favour against them. This disability applied, not only to a trustee named as such in the instrument of trust, but to a person who, though not so named, had assumed the position of a trustee for others or had taken possession or control of property on their behalf, such (for instance) as the persons enumerated in the judgment of Bowen, L.J. in

> Soar v. Ashwell [1893] 2 Q.B. 390 ..... These persons though not originally trustees had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named. It followed that their possession also was treated as the possession of the persons for whom they acted, and they, like express trustees, were disabled from taking advantage of the time bar. But the position in this respect of a constructive trustee in the usual sense of the words - that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a Court of Equity - was widely different, and it had long been settled that time ran in his favour from the moment of his so taking possession..."

These comments were made in relation to the then current Ontario limitation provision which was similar to s. 40 of the present Alberta statute. It demonstrates that the expression "express trustee" is to be generously construed and that it includes many, but not all, constructive trustees. Thus, in Soar v. Ashwell [1893] 2 Q.B. 390 a solicitor to trustees was himself regarded as an express trustee because he stood in a fiduciary relationship to those who were express trustees. In that case Bowen L.J. expressed the fact that the term "express trustees" had been extended to include;

(1) persons who assume the position of trustee,
(2) strangers who participate in the fraud of a trustee,
(3) persons who knowingly receive trust property and deal with it inconsistently with the trust, and
(4) certain other miscellaneous persons.

Where a city had held money over a period of time it was held to be an express trustee within a former Ontario provision; Gordon v. Ottawa [1953] 4 D.L.R. 542. See also Gillis v. Sewell [1942] 4 D.L.R. 582 and Wulff v. Lundy [1940] 2 D.L.R. 126 at p. 132 et seq. These rules seem to have been clearly established, though there was some hesitation in earlier times to accept that any constructive trustees could be held to be "express trustees". [See Petre v. Petre (1852) 1 Drew. 371 and other authorities cited by Waters in The Constructive Trust (1964) at p. 107.]

The Wright Committee Report (1936) in England recommended that the distinction between express and constructive trusts should be abolished. This recommendation is all the more appealing since some constructive trusts have been comprehended by the term "express trusts" and others have been judicially excluded. The question may be raised as to whether there is any justification for retaining the distinction between express and constructive trustees in Alberta.

[There is, in fact, no distinction between express and constructive trustees in England now.] The Ontario Report (1969) at p. 60 recommended that the distinction between express and constructive trusts should be abolished. So, too, did the New South Wales Commissioners.

It would seem sensible to abolish the distinction between express and other trustees. After all, the same basic duties and obligations are imposed on a trustee irrespective of how he is appointed. At the present time, however, it would be a cruel kindness to place all trustees in the same position. Either solution would be unsatisfactory. Thus assimilation of express and other trustees will have to wait until a convenient limitation period is found and a fair starting period for it to be decided upon.

There are, in addition, equitable limitation periods which are relevant to consideration of actions by beneficiaries against their trustees. Such equitable limitation periods are preserved by s. 4 of the Act;

> "Nothing in this Act interferes with a rule of equity that refuses relief, on the ground of acquiescence or otherwise, to a person whose right to bring an action is not barred by virtue of this Act."

This is very similar to the corresponding English provision (s.29 of the 1939 Act) which reads;

> "Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise."

The equitable limitation periods, thus preserved in both jurisdictions, may apply to limit recovery against a trustee even where no time limit was specified in the Act; O'Dell v. Hastie (1968) 67 D.L.R. (2d.)366. In re Jarvis, Edge v. Jarvis [1958] 1 W.L.R. 518. This applies to equitable rules not expressly supplanted by a particular statutory provision. Thus, in Alberta despite the strong words of s. 4 it has not been suggested that the redemption of a mortgage could be exercised other than in compliance with s.33(1) of the Limitation of Actions Act. There is now statutory regulation of several claims which were formerly equitable and not statutory. Among these claims are; those to recover trust property or in respect of any breach of trust, those for the personal estate of a deceased person, those to redeem mortgaged property and those to foreclose on mortgaged property.

This equitable rules relating to limitation of actions may be categorized as (a) direct applications of the Act, (b) applications of the Act by analogy and (c) claims outside the Act. The first would be exemplified by ss. 40 and 41 whereas s. 4 would

be concerned particularly to preserve the latter two categories. Where the equitable remedy sought corresponds to a remedy available at law the statutory provision may be applied by analogy; Mellersh v. Brown (1890) 45 Ch. D. 225; Smith v. Clay (1767) 3 Bro. C.C. 640n. Certain claims in equity attract the application of the statute by analogy although there is no real analogy. Thus direct applications and applications by analogy of the Act may be disposed of since they are fairly clear. Independent applications of equitable rules are also preserved by s. 4 of the Act and this means in particular, the doctrines of laches and acquiescence. They consist of bodies of rules developed independently of the legal rules and applicable to equitable claims. The rules of laches and acquiescence are quite separate and are founded on different rationales (see Brunyate Limitation of Actions in Equity (1932) pp. 190-2). Since trusts are the creature of equity many claims concerning trustees or trust property will be subject to both the rules of laches and those of acquiescence.

Laches refers to any delay considered by equity to be excessive. Courts of equitable jurisdiction may refuse an equitable relief or remedy if they consider that the claimant has delayed unduly in bringing his claim. Recourse may be had to this rule where a Limitations Act does not provide a limitation period for an equitable claim and the statute may not be applied by analogy; Weld v. Petre [1929] 1 Ch. 33. Normally, where there is a statutory period ascribed to an action the objection of simple laches does not apply until the expiration of the time allowed by the statute: Gutheil v. Rural Municipality of Caledonia No. 99 (1965) 48 D.L.R. (2d.) 628. In that case Sirois J. said at p. 634;

> "Where a defendant has suffered no substantial alteration in his position by virtue of plaintiff's delay, the defence of acquiescence or laches is to no avail. Taylor v. Wallbridge (1879) 2 S.C.R. 616 at pp. 689-90"...

The equitable defence of laches can only be opposed to an equitable claim; A.G. of Nova Scotia v. City of Halifax (1969) 2 D.L.R. (3d.) 576, and authorities therein cited at p. 586.

Acquiescence was explained by Lord Wensleydale in Archbold v. Scully (1861) 9 H.L.C. 360, at p. 383;

> "But acquiescence is a different thing; it means more than laches. If a party, who could object lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact, of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be any equitable bar."

The rule has its counterpart in law in the principle that an agreement to a postponement of performance waives the right to treat the non-performance as a breach; Trott v. Mott [1942] 4 D.L.R. 150. It has too, some of the elements recognizable in the various forms of estoppel.

Most statutes of limitation reserve to these equitable rules a sphere of operation. Since equitable relief and remedies are so often discretionary it would seem reasonable that undue delay should form part of the information on which the court does exercise that discretion.

Section 41 of the Limitation of Actions Act purports to affect, as well as express trustees, constructive and implied trustees and also executors and administrators. (See p. 54 of the Ontario Law Reform Commission's Report on Limitation of Actions (1969) for a summary of the various classifications of non-express trustees). Since s. 41 is wide in its scope in that it includes various types of trustees other than express trustees it may have the incidental implication that s. 40 is to be confined narrowly in its scope so as to include only express trustees strictly so-called. However, that has not really been the effect since certain constructive trustees have always been treated as being within the terms of s. 40 and its counterparts in other jurisdictions. The clear intention of s. 41 is that there shall be a time limit for the protection of other than express trustees in the circumstances outlined in s. 40. Subsection (2) of this section in fairly clear words limits the scope of s.40. Subsection (3) preserves the right of a beneficiary whose interest is postponed and this too is necessary. [Indeed, it seems much more felicitously worded than s. 49 of the Draft Bill proposed by the New South Wales Commissioners.] However, subsection (1) does not appear to be very clearly worded for it does not clearly distinguish between constructive and implied trustees;

> (1) In this section, "trustee" includes an executor and administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
>
> (2) In an action against a trustee or a person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use,
>
> (a) rights and privileges conferred by this Act shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in the action if the trustee

or person claiming through him had not been a trustee or person claiming through a trustee, and

(b) if the action is brought to recover money or other property and is one to which no limitation provision of this Act applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to the action in the like manner and to the same extent as if the claim had been against him in an action for money had and received.

(3) Notwithstanding subsection (2) the limitation provisions in this Act do not begin to run against a beneficiary unless and until the interest of the beneficiary becomes an interest in possession.

It is intended to cover a constructive trustee but not one who is not subject to a limitation period within the preceding section. S. 41:(2) only supplies limitation periods for the actions specified therein. In O'Dell v. Hastie (1968) 67 D.L.R. (2d.) 366 at p. 370 MacDonald J. said of a Saskatchewan provision that is exactly like that of Alberta in all material respects;

> "As I understand s. 43(2) where the trust property is in the possession of the trustee then an action to recover it is not barred by the Act..."

That was a case of a vendor of land being held to be a constructive trustee. It is often possible to impose a constructive trusteeship of the sort that would be included in s. 40 as an "express trustee" and the imposition of the constructive trust as a remedial measure will often have the effect under the present law of removing any limitation period; Smarzik v. Bogdalik (1959) 29 W.W.R. 481. In some circumstances it is quite clear that there will be a constructive trust in the sense that the general law imposes a trust. For example, the director of a company will be such ex officio; Lloyd v. Canada Permanent Trust Co. (1966) 54 W.W.R. 543. Sometimes, however, the constructive trust looks much more like a remedy than a substantive institution; see Waters The Constructive Trust (1964) at pp. 9 et seq.

The remaining two subsections of s. 41 read as follows;

> (4) The limitation provisions in this Act run against a married woman entitled in possession for her separate use, whether with or without restraint on anticipation.
>
> (5) No beneficiary as against whom there would be a good defence by virtue of this section derives any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this section had been pleaded.

It is suggested that subsections (4) and (5) are self explanatory. Subsection (4) is socially antique. No doubt, it will eventually be removed as obsolete. At present, it may still serve some vestigial purpose. Subsection (5) is probably a good cautionary provision although the cases must be rare in which it is necessary to invoke it. The discretionary barriers of laches and acquiescence must surely have a similar effect in many cases.

The object of s. 41 is to furnish limitation periods for all those situations which are not exempted from the imposition of limitation periods by s. 40. Where the corresponding English provision lays down a flat period of six years (s. 19(2) of the 1939 Act) the Alberta section allows whatever periods might be applicable if there were no trust in existence. However, it is recognised by s. 41(2)(b) that a six year period will be appropriate where the claim is for money or other property. It is generally a good idea to keep strictly limited the situations in which there is to be no limitation period at all.

The main concern of s. 41 is to provide a limitation period for trustees. However, problems do sometimes arise in connection with the possession of beneficiaries against one another and against their trustee. [See Goodman Adverse Possession by a Cestui que Trust (1965) 29 Conveyancer (N.S.) 356; Sweet Adverse Possession by a Cestui que Trust (1914) 30 L.Q.R. 158 and Darby and Bosanquet Statutes of Limitation (1893; 2nd. ed.) at p. 444 et seq.] The question of whether a beneficiary can possess trust property adversely to the interests of his trustee or of another beneficiary is what is here at stake. There has been much discussion of whether the adverse possession of trust or other property must be backed by a feeling of hostility or at least by an utter incompatibility of interests on the part of the possessor or, alternatively, how far adverse possession is a legal construct. [See an unpublished thesis by Goodman Adverse Possession of Land in the Law of Limitation of Actions (1967) and the First Report of the Real Property Commissioners (1830).] The orthodox view is that if one beneficiary is in possession of a trust estate, or in receipt of the rents and profits, his possession is not adverse to the legal right of the trustees, and the passage of time will not preclude the claim of the trustees or another beneficiary enforceable through them; Knight v. Bowyer (1858) 2 De G.& J. 421; 44 E.R. 1053. Goodman (op. cit. supra) claims that in at least four circumstances the possession of a beneficiary is capable of being adverse to the trustee and to other possible beneficiaries. These situations are as follows;

> **(a)** the beneficiary under a bare trust. This will be the case with the vendor of land who holds the legal estate on a bare trust for the purchaser; Bridges v. Mees [1957] Ch. 475.
>
> **(b)** The beneficiary who has his beneficial status thrust upon him only after he has taken possession of the property adversely.

(c) The beneficial co-owner who succeeds for the appropriate period in ousting his fellow co-owners from possession of the property.

(d) The infant entitled to an absolute interest in a trust, the property of which he is not entitled to own outright. Re Michael Daily [1944] 1 N.I. 1 at p. 6.

Clearly, this Part of the Alberta Limitation of Actions Act is not concerned with claims against a beneficiary as with those against the trustee. However, it would be as well to think about the problem of limitation of claims against a beneficiary since the unity of interest of the trustee and beneficiary probably ought to be reciprocal. If some thought is to be devoted to the problem of giving trustees some respite by way of limitation from their mistakes or misdeeds the beneficiary ought, in a general way, to be given the same protection. Some attention might be given to this problem.

Section 42 supplies the commencement of the limitation period for those cases where one is applicable and which might otherwise be doubtful as to the starting of the running of time;

> Where any property is vested in a trustee on an express trust the right of the cestui que trust or of a person claiming through him to bring an action against the trustee, or a person claiming through the trustee, to recover the property shall be deemed to have first accrued, and not before, at the time at which the property was conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against the purchaser and a person claiming through him.

This section is designed to bestow a limitation period on the purchaser of misappropriated or otherwise traceable trust property. The limitation period will be the normal period but it will start to run when possession is taken of the property. If the purchaser of the property is not a bona fide purchaser or is not innocent but colludes with the express trustee he may make himself a trustee de son tort. It seems that this might deprive him of the benefit of the protection of s. 42 and make him amenable to an action by the beneficiary in perpetuity; s. 40, Soar v. Ashwell [1893] 2 Q.B. 390. The section is in harmony with the rest of the Part, as presently constituted, and it would seem desirable to retain it.

GENERAL

Part VIII of the Limitation of Actions Act, 1955, R.S.A. c. 177 is entitled "General" and it is. This Part comprises a miscellany of matters some of which have a limited application and some of which refer to almost all of the other Parts. There are some sections which, it is felt, more properly belong to the General section than to the substantive Parts in which they are now found. Examples are the ubiquitous sections relating to acknowledgment and part performance. Their theme is the same and the interpretation of it is uniform but most of those sections differ from each other in some minor way. One might also like to see some general provisions attempting to clarify the position of the Crown and other governmental agencies. Actions by and against the Crown and other government agencies are now subject to an enormous number of archaic and unexpected statutory provisions.

Section 43 expresses in the language that is common to many of these Acts that a formal entry will not be regarded as a possession of land so as either to be adverse or to keep the right of an owner alive;

> "No person shall be deemed to have been in possession of land within the meaning of this Act merely by reason of having made an entry thereon."

Section 39 of the New South Wales Draft Bill expresses the meaning of this and the next succeeding subsection in a somewhat clearer way. It expresses the same provision as is contained in s. 43 of the Alberta Act and s. 13 of the English Act. The orthodox language that has been employed in the Alberta Act has worked well to remove fictions and artificial claims. A formal entry, referable to a subsisting title, will not be sufficient to found a claim to possession.

This subsection, and s. 43 (2) are useful and necessary, but it may be questioned whether their proper place is in the general Part or that relating to land. The difficulty envisaged is that their application might be slightly wider than the scope of 'actions to recover land'. Possession of land is important throughout several other Parts of the Act and it therefore might be wise to retain s. 43 in the General Part.

Section 43(2) reads;

> "No continual or other claim upon or near any land preserves any right of making an entry or distress or bringing an action."

This excludes formal conduct which was used to preserve rights until the R.P.L.A. 1833. It is still useful.

Section 43(3) reads;

> "The receipt of the rent payable by a tenant at will, tenant from year to year or other lessee shall, as against such lessee or a person claiming under him, but subject to the lease, be deemed to be receipt of the profits of the land for the purposes of this Act."

It may sometimes be difficult to distinguish part-payments or acknowledgments from receipt of rent. In some cases, therefore, receipt of an amount already fixed by lease or agreement is taken to be receipt of the profits of the land. The effect of this is to make the recipient to all intents and purposes possessor of the land. At least, he will be in an equivalent position thereto. The tenant may be said to be a custodian for his possession is physical but precarious. [This is an attempt to draw a distinction akin to that the Romans drew between possidere and tenere.] The section should be retained.

The next question that arises in the General Part is that of extinguishment of title. The present Alberta position is that the right to recover land, the right to recover a rent charge and the right to recover money charged on land are all extinguished with the remedy. (The recommendations made with respect to Part III of the Act will necessarily entail a modification of this provision which is to be found in s. 44 of the Act.) The modern controversy is as to whether more, or all, rights should be extinguished with the remedy. The present Alberta s. 44 covers all actions to do with rights in land and with respect to the enforcement of mortgages;

> "At the determination of the period limited by this Act to any person for taking proceedings to recover any land, rent charge or money charged on land the right and title of such person to the land, or rent charge or the recovery of the money out of the land is extinguished."

The effect of this section is fairly clearly to extinguish the title of anyone claiming an interest mentioned that has not been exercised within the appropriate limitation period. The section is descended from s. 34 of the Imperial Real Property Limitation Act, 1833, 3 & 4 Wm. IV c. 27 which was the first such provision to exist in the Commonwealth. The effect of the section extends also to the rights of mortgagors; Re Zurbyk and Orloff (1959) 28 W.W.R. 584, Eastern Trust Co. v. Mc Aleer [1931] 1 D.L.R. 509 and Puhacz v. Wyrzykowski (1967) 59 W.W.R. 180.

By now the differences between simply barring the remedy and extinguishing the right are relatively well known. Whereas the former simply prevents a person from invoking the assistance of the court to regain possession of the property involved thelatter also withdraws from him his title. While barring

the remedy is still a matter of procedure extinguishment is a substantive measure. Before extinguishment with respect to land was introduced in 1833 it was still open to a person barred to get back into possession and thus be able subsequently to enforce his remedy for subsequent invasions of the right that he had now protected with possession. On the other hand, it did seem odd to let a bare legal right outstand. Allowing the bare ownership to outstand was a hindrance in conveyancing. The bare ownership unsupported by possession was a distracting, if insubstantial, right to a prospective purchaser. Two theories sprang up as a result of the enactment of s. 34 R.P.L.A. 1833; these were the "Parliamentary conveyance" theory and the "one true owner" theory. These theories were with respect to the ownership of land as was s. 34 and as is s. 44 of the modern Alberta. However, they will be of some relevance where any extension of the extinguishment provisions is under contemplation. A note on these two theories is included as Appendix B.

England, by s.3(2) of the Limitation Act, 1939, extended the extinguishment provision to chattels;

> "Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expires and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished."

At that time the Wright Committee (Law Revision Committee, Fifth Interim Report, 1936, Cmd. 5334 at p. 32) recommended against a general extinguishment. Subsequently, both the Ontario and the New South Wales Commissioners have recommended an extension of extinguishment. All reports referred to nine or ten instances in which the continuing existence of the right after the remedy was barred had some significance. These are briefly mentioned below;

1. The creditor has the option of applying money to a statute-barred debt where money is paid by a debtor on account of debts, some of which are barred and some of which are not. (But see s. 7 of the Limitation of Actions Act of Alberta.)
2. An executor need not pay to a specific or residuary legatee any money representing a statute-barred debt.
3. An executor may, however, pay a statute-barred debt, even if it is owed to himself. The Ontario Commission thought there was no good reason why a statute-barred creditor should benefit at the expense of the beneficiaries.
4. Certain liens and charges might be enforced though the debt secured by them might be statute barred.
5. A trustee may pay statute-barred costs and statute-barred debts.

6. A statute-barred debt owed to a testator by a person who becomes executor of his will has been treated as an asset of the estate.

7. Where an action in conversion is statute-barred against one person the action may be brought by the owner against a second person who has converted the personalty. See ss. 3(1) and (2) Limitation Act (Imp.), 1939.

8. The Canadian Bankruptcy Act, 1952, R.S.C. c. 14 is not clear as to whether a statute barred creditor may present a bankruptcy petition. Of course, this is not a matter entirely within Provincial control. The statute-barred creditor should not benefit at the expense of the other creditors, at least.

9. A debt incurred as the result of a tort may be claimed as part of the damages flowing from the tort though the tort is statute-barred. Under the Alberta Act the claim in tort is likely to be barred first, but such a claim against a doctor or other practitioner may endure.

10. Limitation provisions dealing only with remedies are characterized for the purposes of conflict of laws as procedural, but those dealing with the right may be characterized as substantive. (See Falconbridge The Disorder of the Statutes of Limitation (1943) 21 Can. B. Rev. 669 and 786.) Thus, more may be achieved by having them characterized as substantive.

In the Report of the Law Reform Commission of New South Wales (1967), at p. 136, the general recommendation was made that extinguishment of the right should attend the effluxion of time for the cause of action. The Commissioners believed that such a move would greatly improve the law. In Schedule Four of the New South Wales Draft Bill enumerated the rights and titles that would be extinguished, as was allowed for in ss. 63-68 of the Draft Bill. The Ontario Commissioners made a blanket recommendation that there should be an extinguishment of right in all causes of action where the time for bringing action has lapsed.

The real question is whether the non-extinguishment of rights has caused any substantial hardship. The effect of extinction of the title of a former owner of land has been demonstrated to be generally beneficial since 1833. Such a title founded on possession (and, in Alberta followed by a declaratory judgment and registration) can be sold to a purchaser; Re Atkinson and Horsell's Contract [1912] 2 Ch. 1. One of the oddities of the law of Alberta is that until declaratory judgment and registration the former owner may still sell the land to a third party; Cp. Boyczuk v. Perry [1948] 1 W.W.R. 495 and Eastwood v. Ashton [1915] A.C. 900. The point is that in Alberta s. 44, extinguishing the right and title to land in certain circumstances does not have the effect it purports to have. [But see s. 25 of the Limitation of Actions Act.]

Thus, extinction of the title appears to work well with respect to land. This is so as a general rule, despite the difficulty about the effect of the Alberta provision. The effect of not having a general extinctive provision is to confuse all concerned about the rights of a statute barred claimant. Thus an executor has the right to pay a statute-barred debt; In re Yates (1902) 4 O.L.R. 580, Budgett v. Budgett [1895] 1 Ch. 202. However, he need not do so. Thus in the latter case at p. 215, Kekewich J. stated;

> "...if they have paid these costs, it seems to me that they are entitled to be indemnified against them out of the trust estate."...
> "An executor may pay a statute-barred debt."

[See also authorities relied on as supporting this proposition.] The proposition holds good even where a payment is made to the trustee or executor himself. It was held in Re Alice Kerr (1911) 2 O.W.N. 1342 that the Statute of Limitations only applied as between the debtor and the creditor directly. Where a trust was impressed on funds to pay the creditors of another person, all such creditors were to be paid rateably. Middleton J. said;

> "The creditors of the husband are none the less his creditors because their claims are statute barred."

The result might well have been different had the rights of the creditors been extinguished. [See also the effect of s. 7 Limitation Act on a problem like this.]

It sould seem to be advantageous, in most cases, for extinguishment of the right to be coincidental with the barring of the remedy. However, it should be ensured that this is what happens. Extinguishment should follow the barring of the remedy in all cases and allowance should be made for extension, postponement, interruption and suspension of the limitation period, wherever applicable. Sections 63-68 of the New South Wales Draft Bill are instructive as to the practical accomplishment of this task. Extinction of rights might lead to a defendant pleading merely "no right and title in the plaintiff" instead of expressly relying on the Limitation of Actions Act.

Section 45 assimilates the law relating to administrators to that which applies to executors. A notional interval occurs, according to the common law, between the death and the grant of letters of administration. This is not so in the case of an executor. The reason is that whereas executors derive their authority from the will an administrator derives his authority from the grant of letters of administration. Section 45 reads;

> "For the purposes of Parts II, III, IV and V an administrator claiming the estate or interest of a deceased person of whose property he has been appointed administrator shall be deemed to claim as if there had been no interval of time between

> the death of the deceased person and the grant of letters of administration."

The purpose of this section, of course, is to overthrow the old common law in this respect and to treat executors and administrators on the same basis. There ought, really, to be no difference between executors and administrators in this respect.

The usual basic provision as to disabilities is contained in s. 46;

> (1)"If, at the time at which the right to take any proceedings referred to in Parts II, III, IV or V first accrued to a person, he was under disability, then the right to take such proceedings shall be deemed to accrue at the time when such person first ceases to be under disability or dies, whichever happens first."

Since disabilities are matters relating to the person, if they are to exist at all and to have the effect of postponing the running of time, then such a provision as this must be included.

It is usual not to permit cumulative disability periods. Section 46(2) so provides;

> "No such person or a person claiming through him may take proceedings at any time after the cessation of the disability or after the death of such person, as the case may be, within, and not after, the time limited by this or any other Act for the taking of such proceedings, but if such person died without ceasing to be under disability no further time to take proceedings shall be allowed by reason of the disability of another person."

The import of this section is also to prohibit those under a disability from bringing action during the existence of the disability. It is, however, cast in very obscure language and at one point seems contradictory. It is badly in need of clarification in clear and precise language.

An outside limit of thirty years is also provided by s. 46(3);

> "Notwithstanding anything in this section no proceedings may be taken by a person who was under disability at the time the right to take proceedings first accrued to him or by a person claiming through him except within thirty years next after that time."

It is generally beneficial for actions finally to be effectively barred. This period probably corresponds with the outside limit of reliable oral evidence.

Section 47 of the Limitation of Actions Act permits the plaintiff to opt for the limitation period provided by this Act or to bring the action within two years after the defendant returns to the Province. This option is only available where the cause of action arises when the defendant is out of the Province and not where the defendant leaves shortly after the cause of action has accrued;

> "If a person is out of the Province at the time when there arises against him within the Province a cause of action . -
>
> (a) as to which the time for taking proceedings is limited by this Act, and
> (b) other than one of those mentioned in clauses (a) and (b) of subsection (1) of section 5.
>
> the person entitled to the action may bring it within two years after the return of the first mentioned person to the Province or within the time otherwise limited by this Act for bringing the action."

The option is not available in the case of actions brought for the recovery of a penalty or damages or other sum of money in the nature of a penalty imposed by a statute (ss. 5(1)(a) and (b)). Section 47 bestows an option rather than allowing a postponement or suspension of the limitation period. It might be thought that a greater hardship would be created where the defendant left the Province shortly after the cause of action had accrued. This is a situation in which a plaintiff is not granted any indulgence by this section. In this case the accrual of the cause of action is not only artificial as a starting-point for the running of time but it is not as convenient a starting-point as it usually is. Whereas the absence of the defendant from the Province is the important feature of this section that absence has to coincide with accrual of the cause of action for the section to operate. This seems artificial and unnecessarily harsh. A more just result might be achieved by a suspension of the limitation period during the absence of the defendant from the Province. However, this would be a departure from the traditional position. Nonetheless, if the aim of the section is to provide a measure of procedural justice it is deficient in that it does not strike at the root of the matter. Absence from the Province is the characteristic of this defendant that makes him difficult to sue, whether or not his absence happens to coincide with accrual of the cause of action is purely a matter of chance and should be treated as such. In addition, it may be questioned whether such a provision is necessary at all. With the spread of international agreements for the reciprocal enforcement of judgments the quasi-disability that s. 47 confers on a plaintiff may not be so necessary. This is a form of disability that ought to be eradicated in due course. The only real point of contention

is when it ought to be dispensed with. Since suit may be brought on the judgment this will effectively prolong the limitation period. Nevertheless, there is no remedy against the person who is absent from the Province (together with his assets) in a jurisdiction in which the enforcement of the judgment is impossible. For preservation of a claim against such a person the section should be retained but consideration should be given to its elimination at a later stage.

Section 48 provides a corollary;

> "(1) Where a person has a cause of action against joint debtors, joint contractors, joint obligors, or joint covenantors, that person is not, by reason only that one or more of them was at such time out of the Province, entitled to any further time within which to commence the action against such of them as were within the Province at the time the cause of action accrued.
>
> (2) A person who has such a cause of action is not barred from commencing an action, against a joint debtor, joint contractor, joint obligor or joint covenantor who was out of the Province at the time the cause of action accrued, after his return to the Province, by reason only that judgment has already been recovered against such of the joint debtors, joint contractors, joint obligors or joint covenantors as were at such time within the Province."

It seems eminently just that the rules should differ in this way with respect to joint defendants.

Section 49, and its precursors, have been in existence since the early days of the Province;

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

The aim of this section is to preserve the integrity of the records kept by the Registrar of Land Titles. It is generally a good idea if the register can be made to conform with the facts. Since this section has been in force for so long it has effectively precluded incorporeal hereditaments from being acquired by prescription. Thus, in most cases, express or implied grants are the origin of such incorporeal hereditaments. Like adverse possession, it is an incursion into the Torrens system. However, it is thought that this incursion is one that is less necessary. Moreover, a large incubus of antique law is thereby precluded from having any effect in Alberta. This law was always quite distinct from the law relating to adverse possession of the land itself. Tichborne v. Weir (1892)

67 L.T. 735; Aluminum Goods Ltd. v. Federal Machinery Ltd. (1970) 10 D.L.R.(2d) 405, Stall v. Yarosz (1964) 43 D.L.R. (2d) 255. In short, this is an excellent provision and ought to be retained intact. The Ontario Commissioners (Report (1969) p. 141 et seq.) recommended abolition of prescriptive acquisition of easements and profits-a-prendre. [The complexity of the transitional provisions that they recommended demonstrates how difficult the law is.]

This recommendation has no application to easements and ways of necessity. However, it should probably apply to easements of support.

The Act concludes with s. 50 (which has been commented on above). It is the section designed to secure uniformity of interpretatio

> "This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of those provinces that enact it."

The section does not seem to be particularly forceful, yet there is no harm in notifying those who are called upon to interpret it that the Act delivered in other jurisdictions will be relevant. The modern approach of attaching a note would not serve notice in as clear a way to those who read only the statute.

Appendix A

The History of the Legislation

Originally, the Common law, like the Roman law, had no time limits within which a complainant had to move to secure his rights, Megarry and Wade The Law of Real Property (1966, 3rd. ed.) at p. 996 and Cheshire Modern Law of Real Property (1967, 10th ed.) at p. 806. This absence of limitation periods is also still to be found in some relatively undeveloped legal systems. In certain native or customary law jurisdictions actions may be brought ad infinitum, e.g. South African and other African customary law systems. From early times, however, both the great secular systems of law in existence have adopted rules setting time limits within which actions might be brought, and outside which actions may not be brought. This will be the result whether the rule chosen by the system affords merely extinctive protection or allows acquisitive prescription. Whether a negative or a positive system is chosen the results will be positive in effect but the degree of protection afforded to the possessor will vary. Limitation periods with respect to actions concerning land have been found to be indispensible in Roman law, with its derivative Civil law regimes, and in the Common law jurisdictions.

Before there were any statutory provisions on the subject no rule of English law provided for the extinction of stale claims and obsolete titles. Without any such time period a person who had long been in undisputed possession may have been practically able to deal with land as its owner, this will become increasingly so as time passes and those who would be able to contest his title disappear, but there would always have been the legal possibility of another claiming a better title. Without the finality of a rule extinguishing claims to, and estates in, land there is a risk of such intervention and a corresponding diminution in value of the property.

Both title to land and possession thereof have always depended on some evidence of possession, see Megarry & Wade The Law of Real Property (1966, 3rd. ed.) at p. 997. The forms of action prevented a possessory action from prejudicing a question of title. Success in a possessory action thus would not preclude a subsequent proprietary action. The possessory actions were introduced to provide a swift remedy and so prevent breaches of the peace but soon came to be used extensively. One such distinctly possessory action was the assize of novel disseisin. Early proprietary actions are typified by the writ of right. Many subsequent variants of each of these actions sprang from them. Title to land therefore depended on the better right to possession or seisin. Thus it may be claimed that English law still protects both possession and the better right to possess. Whereas the Roman law system protected ownership and possession. See Nicholas An Introduction to Roman Law (1962) at p. 120, Hargreaves Terminology and Title in Ejectment (1940), 56 L.Q.R. 376 and Holdsworth Terminology and Title in Ejectment- A Reply (1940), 56 L.Q.R. 479. However, it should be noted that the losing party and his heirs in the trial of a writ of right would be forever barred from again putting their title in issue. As between two claimants ownership is bestowed on the one laying claim to the earlier, and therefore the better, seisin. The fact of possession became the best evidence of seisin.

It is said that limitation periods, when first introduced in England, varied in length. This variation in length has been attributed to changes in the exercise of judicial discretion as well as to a succession of royal ordinances. It is alternatively suggested by Simpson An Introduction to the History of the Land Law (1961) at p. 27 that short limitation periods were written into the writ from time to time. Royal ordinaces from time to time set limits to certain actions. These

ordinances might seize on either a fixed date or might specify an ascertainable date. In the reigh of Henry II there is evidence to suggest that the claimant in an assize of novel disseisin must depend on a seisin since the last passage of the king to Normandy, Glanvill Tractatus de legibus et consuetudinibus regni Anglie (1187-1189) (Hall ed. 1965) XIII 32-33 states the writ of novel disseisin to run as follows; "The king to the sheriff, greeting. N. has complained to me that R. unjustly and without a judgment has disseised him of his free tenement in such-and-such a vill since my last voyage to Normandy..." Pollock & Maitland History of English Law (1923, 2nd. ed.) II at p. 51 describes the fact that in Normandy the action had to depend upon a disseisin by the defendant since the last harvest. In an early agricultural community the gathering of the harvest would be an important event remembered by all. See Van Caenegem Selden Society v. 77 at p. 304. Thus the novelty of the disseisin was specified. Because of the frequency of such visits there may often have been a period of less than a year in which to bring the action, see Pollock & Maitland History of English Law (1923, 2nd ed.) II, at p. 51 n. 2. Henry II never mentioned King Stephen, his predecessor, and this fact tended to shorten all limitation periods. This fact would have the tendency of limiting the efficacy of the assize. It may also be noticed that this time-period may be regarded as a substantive rule, rather than procedural. Other actions claiming possession were similarly subjected to a limitation period. After the time of Henry II (1154-1189) it is generally thought that little attention was paid to the limitation period in a possessory action. Thus the same voyages were used as a measure and the limitation period was correspondingly increased. Later, the limiting date used was that of the coronation of Richard I (September 3rd, 1189). Later still, in and around 1236, the limiting date in use seems to have been that of Henry III's coronation (October 28th, 1216). See Pollock and Maitland History of English Law (1923, 2nd ed.) v. II. at p. 51. However, between 1235 and 1237, the Statute of Merton, (1236) 21 Hen. III c. VIII (4) is thought to have read: "Writs of Novel disseisin shall not pass the first voyage of our sovereign Lord the King, that is now, into Gascoine". It is alleged by some historians (see Pollack and Maitland op. cit. supra) that the reference was to a voyage to Brittany, and not Gascony. It is also probable that there was another ordinance respecting limitations in the following year, 1237; see Glanvill Tractatus de legibus et consuetudinibus regni Anglie (Hall ed. 1965) at p. 196, provided a period dating from the first voyage of the King to Gascony. This voyage appears to have taken place in 1230.

Limitation periods were also imposed upon proprietary actions. The dichotomy of actions into proprietary and possessory is a little facile. See the warning uttered by Simpson An Introduction to the History of the Land Law (1961) at p. 34. There were also numerous writs of a procedural or executive character. Both the writ of right and the praecipe in capite were essentially proprietary and lay to determine every element of a large issue. See examples of the writ of right in Van Caenegem Selden Society v. 77 p. 195 et seq. Before the Statute of Merton (1236) 21 Hen. III c. VIII reliance might be placed in any writ of right upon a seisin in any ancestor "from the time of" King Henry I. Since Henry I reigned from August 1st., 1100 until December 1st., 1135 the former date would seem to have been the operative limitation date for the writ of right. Recital of this fact is to be found in the Statute of Merton itself. The Statute of Merton, 1236, 21 Hen. III c. VIII states: "Touching Conveyance of Descent in a Writ of Right from any Ancestor from the time of King Henry the elder, the Year and Day, it is provided that from henceforth there be no mention made of so long time, but from the time of King Henry our Grandfather." It may be argued that the end of the reign of Henry I was the operative limitation date. In the same section of that Statute it was provided that from the year 1236 onwards the writ of right had to depend upon a seisin dating from the time of Henry II (December 19th.,

1154-July 6th, 1189), or later. This had the merit of being fairly certain and the provision of the same statute relating to writs of Mort d' ancestor, nativis and entry declared that in those actions a seisin might not be relied upon if it was earlier in time than the last return of King John from Ireland.

It would appear that the events selected for the purpose of setting a limitation to the action became more and more matters of public knowledge. As promulgation of the ordinances improved the chance of defeat by an unknown and arbitrarily fixed lapse of time diminished. While frequent revisions might cause hardship it would also cause annoyance if the periods set were alternately too long and too short, as must have been the result of founding the periods on an historical event. The succession of ordinances shows the difficulty of keeping the date realistic, and the fact that so many of the ordinances are only obliquely referred to indicates that the populace must have had some trouble ascertaining the limitation period applicable to each writ. The succession of Royal ordinances and Statutes culminated in the Statutum Westminster Primum (1275) 3 Edw. I c. 39, which set various limitation periods for the different Writs. It was provided by this Statute that the "Time of King Richard" should be the point furthest removed in time for a reliable seisin. The Statute states; "That in conveighing a Descent in a Writ of Right, none shall presume to declare of the Seisin of his Ancestor further, or beyond the Time of King Richard, Uncle to King Henry, Father to the King that now is." This provision is always taken to have supplied the date of the coronation of Richard I as the limitation period for seisin in the Writ of Right. Thus the claimant who could not show that his ancestor was seised at some time later than 3rd. September, 1189, could not recover by a writ of right. This date is still of some importance in the law of prescription of incorporeal hereditaments. See Reeves History of English Law (2nd ed., 1787) v. I at p. 215 with respect to customs. The Statute of Westminster I set out other limitation periods too. For the writ of Novel Disseisin Henry III's first voyage to Gascony in 1242 set the limit. It has been suggested, however, that for the writ of novel disseisin to lie the disseisin should have occurred since the last circuit of the justices in eyre. The space between the circuits is said to have been about seven years. It is not clear whether this test was super-imposed upon the time periods laid down in the statutes and ordinances. Neither is it clear from which era in time this limitation period is alleged to date. Bl. Comm. (1768) at p. 189 relies on Co. Litt. at p. 153 for this proposition. Support for this may be derived from the Statute "At what Time Writs shall be delivered for suits depending before Justices in Eyre", 1285, 13 Edw. I st. I c. 10, which was repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59 s. 2 and Schedule. Other writs, including that of Mort d'ancestor were limited to the time that had elapsed since the coronation of Henry III, October 28th, 1216. The Statute of Marlborough, 1267, had adopted the time limit imposed by the Statute of Merton, 1236, (the first voyage of Henry III to Brittany; (1230) for the length of seisin a lord had to prove before he could distrain for the customs and services of his tenant. The lord had to show such an older disseisin because his action was concerned more with entitlement than with the possession that was in issue in the action for novel disseisin. See Plucknett Legislation of Edward I (1962) at p. 63. Thus the limitation periods set by the Statute of Westminster I were all relatively long, but none was longer than that pertaining to the writ of right. This may have been the result of the fact that the emphasis of the writ of right was more on right and less on possession than in the other writs.

The Statute of Westminster I was the last enactment on the subject of limitation of actions for 265 years. The effect of this long delay was to reduce

the efficacy of a Statute that was quite permissive enough when enacted. Throughout the Middle Ages there was, therefore, no effective limitation and this allowed common law presumptions governing the ownership and possession of land to spring up. For a long time the forms of action dominated the recovery of land though the distinction between the different writs became less justifiable on the basis of the different limitation periods. The extra-judicial remedies that had been so important in former times were less widely used. Self-help was still countenanced to the extent that one who had been ejected could re-enter upon the land. This right was, however, cut down at common law to a limitation period of four days from the date of the ejectment. See Simpson Introduction to the History of the Land Law (1961) at p. 30. In earlier times a longer period was allowed to the disseised owner for self-help remedies. The times allowed in the reign of Henry III depended upon where the disseised owner was. Whereas a certain length of time would be allowed to one in the King's service in Gascony a greater length of time would be allowed to one travelling to the Holy Land. At the expiry of the appropriate period the owner lost his natural and civil possession and was then bound to recover the property in an action at law. See also Bracton De Legibus et Consuetudinibus Angliae f. 163. After that the disseised possessor lost his right of entry and was bound to bring either novel disseisin or a writ of right to recover the land.

The departure from the previous practice of setting ad hoc limitation dates came about in the reign of Henry VIII. The need for a statutory provision which did not require constant revision was satisfied by The Act of Limitation with Proviso, 1540, 32 Hen. VIII c. 2. The Preamble to this Act recited that jurors could not conscientiously arrive at a conclusion on any seisin that might be alleged to have been in existence so far in the past as to be "above the Remembrance of any living Man". The Preamble also bemoaned the fact that no repose was accorded to a long possession or seisin since the possibility of its being upset always existed. The enactment then proclaimed in section 1 that no Writ of Right should lie or claim be made to land except "within threescore Years next before the Teste of the same Writ..." This time limit may have been an approximation to the longest reasonable length of time over which some member of the community could allege that he remembered the state of affairs. The fact that the jurors were still to a large extent regarded as witnesses was recognized in the Preamble to the Act. By the second section of the Act a fifty year period before the trial of the action was laid down for actions which necessarily involved an allegation of seisin or possession in a party other than the plaintiff. Such actions expressly included the Assize of Mort d'Ancestor, Cosinage, Ayel and Writ of Entry upon disseisin. The third section of the Act allowed a limitation period of thirty years for actions depending upon an averment of previous possession or seisin of the claimant himself. Other limitation periods were laid down for certain types of writ, but it is noticeable that there is a trend towards describing or classifying the writs rather than referring to each by name. This trend is continued in subsequent statutes laying down limitation periods. Further general provisions are to be found in the Act, one being to the effect that a demandant who is unable to show a possession or seisin within the limitation period "shall from henceforth be utterly barred forever" (1540), 32 Hen. VIII c. 2, s. VI. This is a heavy reinforcement of the limitation period but it does not preclude extra-judicial recovery of the land. The remedy alone is barred, the right is left intact. The Statute also introduced an extension of the limitation period for those suffering from certain disabilities. The extension consisted of a six year period dating from the cessation of the disability. The disabilities are listed in s. VIII as, "within the Age of twenty-one Years, or covert Baron, or in Prison, or out of this Realm of England..."

Almost a century later the Statute of Limitations, 1623, 21 Jac. I c. XVI was enacted with a view to shortening some periods of limitation. By the Statute Writs of Entry were barred after the lapse of twenty years. Actions for trespass quare clausum fregit were confined to a limitation period of only six years. Section III of the Statute of Limitations, 1623, provided this time period for trespass and the actions on the case as well as for debt, trover and detinue. While six years seems suitable for these actions it seems inappropriately short for trespass quare clausum fregit. However, where the question of title was not in issue an offer of 'sufficient amends' was now allowed as a defence in the trial of the action, Section V of the Statute of Limitations, 1623. See also Basely v. Clarkson (1680), 3 Lev. 37; 83 E.R. 565. Also the Writs of Formedon in Descender, Formedon in Reverter and Formedon in Remainder were by the Statute allowed a period of twenty years only. Quite clearly, this Statute did not effect a thorough or comprehensive reform but was much more limited and thus allowed provisions of the previous Acts to remain viable. Thus, in 1768 when Sir William Blackstone wrote the first edition of his Commentaries he referred to the 1540 Act as "the present statute of limitations"; Bl. Comm. (1768) III, p. 189. Thus, the sixty-year and thirty-year periods laid down by the Act of Limitation with a Proviso of 1540 remained for the purposes for which they were originally intended.

The most important feature of the Statute of Limitations, 1623, was that it restricted the exercise of a right of entry to a period of twenty years from the accrual of the right. Wherever the demandant had a right of entry the twenty year period applied. For success in the action of ejectment the claimant must have had such a right of entry. See Simpson An Introduction to the History of the Land Law (1961) at p. 140. The right of entry was thus of a possessory character whereas the real actions were the claim of title to the property itself and were still bound by the 1540 limitation periods. Thus the 1540 Act dealt with the right of action, the 1623 Statute with right of entry but neither barred the title of an owner by lapse of time. The Statutes simply prevented the enforcement of title and did not remove the possibility of the existence of a dormant title. Thus an indirect restraint was imposed upon the action of ejectment. If the plaintiff had a right of action, but no right of entry, then the limitation periods set by the Act of 1540 applied.

A further enactment of the year 1623 was that entitled "An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever" (1623), 21 Jac. I c. 2. This Act by s. IV(2) thereof limited itself to binding the Crown only. The Act provided that the Crown should not be able to sue for the recovery of land or the profits therefrom unless the King or his predecessor had the right or title to the property within the period of sixty years before the Parliament in which the enactment was made. Both the beginning and the termination of this period was made ascertainable and fixed by the Act. The right or title of the Crown had to be demonstrated to have existed between 1563 and 1623 S. I of the same Act. It was designed to impose a type of limitation upon the Crown but the specification of both ends of the limitation periods was an unusual measure. Before 1540 the specification was always only of the beginning of the limitation period. The 1540 Act and subsequent enactments bestowed the benefit of a movable limitation period, and it is curious that this Act of 1623 did not confer the same benefit upon the Crown. The effect of describing such an immutable period would tend to make it increasingly more difficult for the Crown to recover land as time went on.

The Act for Limitation of Actions, and foravoiding of Suits in Law, 1623,

had by s. 1(4) allowed a limitation period of twenty years for making an entry into land, and this time was to be calculated from the accrual of the cause of action. At the termination of the period of twenty years the claimant and his successors were to be utterly precluded from entry. This provision remained in effect until 1705 when a further statute altered the position. This statute was entitled, "An Act for the Amendment of the Law, and the Better Advancement of Justice" (1705), 4 & 5 Ann. c. 16, which by s. 16 provided that a claim or entry would not be sufficient for the purposes of the 1623 statute unless within a year of the making of the claim or entry an action were brought to advance it. The effect of this was to super-impose the requirement of bringing action within this very short period with the object of vindicating the conduct of the claimant. The imposition of two different limitation periods for different parts of the same transaction is a rather onerous procedure.

The next enactment having a substantial effect on the law of limitation of actions was the Real Property Limitation Act, 1833, more properly known as; An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto, (1833), 3 & 4 Will. IV c. 27. The Act did more with respect to incidental provisions than with respect to the setting of time limits. However it did set one principal time-limit of interest. By s. 2 it was enacted that;

> "...no Person shall make an Entry or Distress or bring an Action to recover any Land or Rent but within Twenty Years next after the Time at which the Right to make such Entry or Distress or to bring such Action shall have first accrued to some Person through whom he claims; or if such Right shall not have accrued to any Person through whom he claims, then within Twenty Years next after the Time at which the Right to make such Entry or Distress or to bring such Action shall have first accrued to the Person making or bringing the same."

It is noteworthy that the section purported to deal with all actions for the 'recovery of land'. This was certainly more simple than the previous system which had specified different time periods for different writs. This would have allowed a claimant to choose between limitation periods and in some cases thus avoid defeat. Furthermore, the period of twenty years specified by s. 2 became the principal limitation period for actions concerning land. This came about as a result of the operation of s. 36 of the same Act which abolished the real and mixed actions. Writs of dower and the writ of right of advowson were abolished in 1852. Among the actions specifically abolished by s. 36 were the Writ of Right, the Writ of Assize of novel disseisin, the Writ of Mort d'ancestor and the Writs of Entry. These writs and, except for certain specified exceptions,".... no other Action real or mixed...." might be brought after 1834. By abolishing these actions the distinction between them was removed and the limitation period was standardised at a period of twenty years. After the abolition of real actions the most important action was that of ejectment. The rule was still that a claimant in ejectment must have a right of entry and so it was necessary, in the 1833 Act, to abolish the rules which took away a right of entry so that the action of ejectment might assume a larger importance. Therefore, some situations which, before 1833, might have converted a right of entry into a mere right of action were deprived of this effect by s. 39 of the Real Property Limitation Act, 1833. That section provided that after 1833, "no Descent cast, Discontinuance, or Warranty which may happen or be made ....shall toll or defeat any Right of Entry or Action for the Recovery of Land." Thus the action was almost always to be one

of ejectment and was to be brought within twenty years of the accrual of the cause of action.

A further innovation introduced by the Real Property Limitation Act, 1833, was that found in s. 34. That section extinguished the right of the claimant to the land at the expiry of the limitation period. Previously, if a claimant had been out of time his remedy only would be barred. This had meant that if he could somehow come into occupation of the property he could still have excluded all entrants. This had been because his bare title had been coupled with occupation. When a claimant realised he had been precluded by his delay from bringing an action he would surely cast around for any other method of recovering property. To judge from the recorded cases out-of-time claimants recovering their property by this method would seem to have been uncommon. A scramble for possession of the land would be attended by many undesirable features, the chief of which would be the encouragement of the use of force and feuding. On the other hand, it would tend to promote actual use of the land instead of allowing it to lie fallow. The feature of this system which prompted reform in s. 34 of the 1833 Act was the spectacle of an outstanding bare legal title to the land which could not become of any use unless a self-help remedy were employed by the bare legal owner. One who had occupied for the time period specified before the 1833 Act would acquire a possession incapable of being defeated by any except the bare legal owner, and only by him if he could gain possession. It would be a title good against all the world except the bare true owner, and only by him if he could gain possession. It would be a title good against all the world except the bare owner and even he would be precluded from bringing action. Allowing a bare ownership to outstand was a hindrance in conveyancing. The bare ownership was a distracting, though insubstantial, right to a prospective purchaser. The abolition of this right has been approved by subsequent re-enactments of s. 34 of the 1833 Act, s. 16 Limitation Act, 1939, 2 & 3 Geo. 6 c. 21, is the modern statutory provision for England.

This section gave rise to the situation in which the former owner whose limitation period had expired could not attack the possession of the possessor who had occupied the land throughout that period. That is not to say that the possessor's occupation could not be attacked by one who had a longer limitation period available to him or whose cause of action accrued at a later time. However, the possibility of such subsequent attack would be unlikely. This indefeasibility at the desire of the former owner was an innovation which was quickly likened to ownership. Thus, for some time after 1833 the theory was in vogue that the Act effected a "Parliamentary conveyance".

The Real Property Limitation Act, 1833, was the most important piece of legislation governing the matter of limitation of actions with respect to land. It was, however, modified by various statutes throughout the Victorian era and later. The first relevant clarification to follow the 1833 Act was that contained in the Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28). It provided that mortgagees would be able to avail themselves of the provisions of the 1833 Act and would be permitted a period of twenty years within which they might bring action to recover land provided that they were contemplated by the 1833 Act. The period was to run from the last payment or part-payment under the mortgage although more than twenty years might have elapsed since the loss of the right of entry. The Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59) repealed the statutory provision that had abolished real and mixed actions. The appropriate action was clearly by now simply one to recover land. This description

has survived in modern law and has acquired an aura of precision. Since the action of ejectment depended upon the existence of a right of entry it is also relevant to notice that by s. 14 of the Conveyancing Act, 1881, (44 & 45 Vict. c. 41) restrictions were placed on the exercise of a right of re-entry under a lease. This section was re-enacted in s. 146 of the Law of Property Act, 1925, 15 & 16 Geo. 5 c. 20. Section 212 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76 had reiterated that a tender of sufficient amends by a tenant before action would be sufficient to have an action discontinued. Sufficient amends would amount to the arrears of rent and costs. The legal entitlement of trustees, executors and administrators was recognized by s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), and it was enacted that they should be able to avail themselves of the protection of the limitation periods. This was not to prejudice the beneficiary, nor to be available to a trustee who was a party to any fraud.

With respect to the time periods allotted, there were two rather important Victorian statutes which altered the law in a lasting way. The first was the little-known Act to amend the law relating to Double Costs. . . Limitation of Actions etc., 1842 (5 & 6 Vict. c. 97), s. 5 of which reads: "And whereas divers Acts commonly called Public Local and Personal, or Local and Personal Acts, and and divers other Acts of a Local and Personal Nature, contain Clauses limiting the Time within which Actions may be brought for anything done in pursuance of the said Acts respectively: And whereas the Periods of such Limitations vary very much, and it is expedient that there should be One Period of Limitation only; be it therefore enacted, That from and after the passing of this Act the Period within which any Action may be brought for anything done under the Authority or in pursuance of any such Act or Acts shall be Two Years, or in case of continuing Damage, then within One Year after such Damage shall have ceased; and that so much of any Clause, Provision, or Enactment by which any other Time of Period of Limitation is appointed or enacted shall be and the same is hereby repealed." This provision is of considerable benefit in resolving the large number of limitation periods existing in Private Acts. The limits prescribed by such Acts were usually somewhat shorter than those found in the general law. It should be noticed that, at times, there has been an irrestible, and unresisted, urge on the part of legislators to spell out a limitation period for public and general statutes also. For example, of the 42 Statutes enacted in 1769, 9 Geo. 3, ten were provided with a limitation period or a short period within which notice of an impending claim had to be given to the defendant. A common limitation period was six months.

The second, and most important, statute enacted during the Victorian era was the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). By s. 1 the time limit on actions for recovery of land or rent was reduced to twelve years. The section used the form of words currently used in limitation statutes: "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or brining the same." The section also had the effect of equating the accrual of the cause of action with respect to most modern statutes. Occasionally, a statute may specify that the time should be computed by reference to a different event, but this is rare. An example would be s. 3 (s. 55) Limitation of Acts (Amendment) Act, 1966, (Alberta) S.A. c. 49. This allows an action to be brought against a medical practitioner within one year only of the termination of the contract of services. Where damage is the gist of an action one may discover

that the cause of action accrues on a continuing basis.

The subsequent sections provided for the accrual of causes of action to take place when an estate formerly vested an interest fell into possession. Several sections also dealt with disabilities which might postpone accrual of the cause of action. Section 9 of the Real Property Limitation Act, 1874, expressly preserved the Act of 1833 with the reduced limitation period.

The statutory changes of the twentieth century relating to the acquisition of land by possession are relatively minor, most of the difficulties having been worked out by the statutes and case law of the nineteenth century. The statutes designed to effect a general reform of the land law are of incidental relevance only to the development of the law of this original mode of gaining title to land. The Law of Property Act, 1925, 15 & 16 Geo. 5 c. 20. Section 12 provides that: "Nothing in this Part of this Act affects the operation of any statute, or of the general law for the limitation of actions or proceedings relating to land or with reference to the acquisition of easements or rights over or in respect of land," in s. 12 expressly preserves the law relating to limitation of actions and of prescription. Indirectly, however the scheme has affected possessory acquisition of title to land. Provisions relating to the merging of estates such as ss. 5, 88(3) and 89(3) of the Law of Property Act, 1925 and for curtailing the right of a landlord to re-enter, as s. 146 of the Act does, have an obvious effect upon the date of accrual of the cause of action. Furthermore, s. 153 of the Law of Property Act, 1925, allows for the enlargement of a long lease complying with certain restrictive conditions into a fee simple. One of the conditions precedent to such an enlargement is that to be found in s. 153(4) which provides that the rent must not have been paid for a continuous period of twenty years or more. The statutory period for the barring of a fee simple is twelve years, which is a shorter period than that required for enlargement. The enlargement provision will also apply in cases where the possession of a tenant is not 'adverse' (in the post-1833 sense) which still constitutes a requirement for adverse possession. Section 153 of the Law of Property Act, 1925, is used most often for the enlargement of mortgage terms where the mortgagor's right of redemption has been barred.

The Administration of Estates Act, 1925, 15 & 16 Geo. 5 c. 23, ss. 26(2) & (5), abolished by the Law Reform (Miscellaneous Provisions) Act, 1934, infra, allows actions in tort to be maintained by or against a personal representative within six months of the death of the deceased. This applies to any torts that may be committed as a result of the occupation of another's land. This principle is preserved in a limited form by s. 1(3) of the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5 c. 4) Section 1(3) was further modified by s. 4 of the Law Reform (Limitation of Actions) Act, 1954, 2 & 3 Eliz. 2 c. 36.

The Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), was essentially a codifying statute. The statute repealed, among others, part of the Limitation Act, 1625; The Crown Suits Act, 1769; The Real Property Limitation Act, 1833; The Real Property Limitation Act, 1837; The Limitation of Actions and Costs Act, 1842; The Limitation of Actions Act, 1843; The Crown Suits Act, 1861 and The Real Property Limitation Act, 1874. Although the 1939 Act effected certain reforms, with respect to the law relating to adverse possession it merely reiterated the same principles of law. Section 4 of the Act declares that an action by the Crown to recover land shall be brought within thirty years except in the case of foreshore when a period of sixty years shall be allowed. Spiritual and eleemosynary corporations sole must bring action to recover land within thirty years. The section then goes on to

state: s. 4(3) "No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person." The proviso to s. 4(3) declares that if the right of action accrued first to the Crown or a spiritual or eleemosynary corporation sole the period applicable to such an action may apply, or the twelve year period may apply. The shorter of the two periods will apply in any case. Sections 5 to 10 govern the accrual of a cause of action to recover land in some considerable detail. Section 10 states that there must be a person in whose favour the limitation period can run before the time will so run. It is also provided by the Act Section 13 that no right of action shall be preserved by a formal entry or a continual claim on or near the land in question. This is merely re-enactment, in modern language, of sections 10 and 11 of the Real Property Limitation Act, 1833. The right of the person whose action is statute-barred is extinguished by s. 16 of the Act.

After the Second World War it was specially enacted that the limitation periods should be suspended by those who had been detained in enemy territory. This was enacted by the Limitation (Enemies and War Prisoners) Act, 1945 (8 & 9 Geo. 6 c. 16). See the useful information on this substantially obsolete law in Preston & Newson Limitations of Actions (1953; 3rd. ed.) at p. 329 et seq. The Act also binds the Crown. This is now of limited importance.

The nationalization of the Coal Board by the Coal Industry Nationalization Act, 1946 (9 & 10 Geo. 6 c. 59), brought with it the provision in s. 49(3) that; "No right adverse to the title of the Board to any coal or mine of coal shall be capable of being acquired under the Limitation Act, 1939." This sub-section conclusively exempts the Board, not from an adverse possession of coal or coal-mines, but from losing their title to such a possessor at the termination of the limitation period.

Two further modern statutes affected the law relating to limitation of actions, but did not have particular reference to actions to recover land. The Law Reform (Limitation of Actions) Act, 1954, enacted certain amendments of diverse nature. Its principal aim was to remove certain odd limitation periods which were found in various Acts. To repeal the appropriate sections had the substantive advantage of unifying the limitation previously therein contained and it had the adjective advantage of removing such limitation periods from statutes which might not be thought likely to contain them in the first place.

The latest statute, the Limitation Act, 1963, 11 & 12 Eliz. 2 c. 47, amended the law of Scotland and Northern Ireland to conform with the law of England. Section 1 & 2 of the Act also allow extensions of the time-limit in certain cases. However, such extensions of the time-limit are only applicable to suits for personal injuries and leave of the court must be obtained before the time-limit will be extended. The Act has no applicability to actions for the recovery of land.

In Alberta the law of limitation of actions has had a somewhat different course. The general history of the introduction of the common law and legislation is set out in Coté The Introduction of English Law into Alberta (1964) 3 Alberta L. Rev. 262. Since there are no common law limitation periods the rules in relation to the adoption of statutes are the most relevant. This means that particular attention will have to be paid to statutes passed by the Dominion Parliament between 1867 and 1905 for the North-West Territories since Alberta was a part of the Territories until the latter date. After

1905 statutes passed by the Provincial Legislature become relevant. [It is not suggested that the common law of England and other jurisdictions may be ignored. Judicial decisions of other common law jurisdictions is particularly relevant in the interpretation of limitation provisions. Some doctrines, such as those of acknowledgment and part performance, were developed by the judges and later incorporated into the legislation.]

Before the 15th. July 1870 (a date which became of significance by the Dominion North West Territories Act) there were several English statutes in force. These statutes remained in force in England until the passage of the Real Property Limitation Act of 1874. That Act was received as part of the law of the North West Territories by the Second Legislative Assembly of the Territories, held at Regina for the space of a month in 1893. Ordinance number 28 of 1893 was an Ordinance respecting the Limitation of Actions relating to Real Property and it read as follows;

> "The provisions of the "Real Property Limitation Act 1874", being Chapter 57 of the Statutes of the Imperial Parliament, passed in the thirty-seventh and thirty-eighth years of Her Majesty's reign, are hereby declared to be in force, and to have been in force, in the Territories, since the passing thereof."

Thus the English Act of 1874 became retrospectively accepted as part of the law of what is now Alberta. The Provincial Legislative Assembly later incorporated this provision into an Act passed as law of the Province. Section 3 of an Act respecting Limitation of Actions in certain cases, 1922, R.S.A. c. 90 simply restates the former Ordinance. In addition that Act provided a six year limitation period for contracts not under seal. By s. 4 that Act also enacted that prescription could not confer a right to light, an easement, a right in gross or a profit-á-prendre. This provision dated from 1903 and is still part of the modern Alberta Limitation of Actions Act, 1955, R.S.A. c. 177 (s. 49). This section was not repealed by section 52 of the Limitation of Actions Act, 1935, S.A. c. 8, although the six year limitation period for contracts was replaced by a similar provision and R.P.L.A. (Imp.) 1874 was replaced in so far as it had operated in Alberta. The 1935 Limitation of Actions Act of Alberta was the Uniform Limitation of Actions Act approved by the conference of Commissioners on Uniformity of Legislation in Canada in 1931. Five other jurisdictions (including the Yukon and North West Territories) have also adopted the Uniform Act. The Limitation of Actions was amended in Alberta in 1966 with respect to certain tort actions. [For the most part those amendments are not dealt with by this Report although it may be necessary to refer to them from time to time.] Thus, for all actions with the exception of those founded on tort the limitation legislation has remained untouched since 1935 when it was first enacted in Alberta. This is not necessarily a defect, in fact, rather the reverse. However, there are some points on which the legislation now appears to need some attention.

The other statutory enactment which is referred to in the part of this report dealing with actions for the recovery of land in s. 73 of the Land Titles Act, 1955, R.S.A. c. 170 which requires the Registrar of Land Titles to cancel the certificate of a registered owner of land where three months has elapsed since receipt of a declaratory judgment declaring another to be entitled, in whole or in part, to the land. This is the section that clearly

subordinates the registration system to the doctrine of adverse possession of land. This statutory section has been in the Act since its introduction in 1921 as s. 50A. Sections can be found in earlier Acts relating to recognition of adverse possession on first registration but this does not involve any intrusion on the Torrens system (e.g. ss. 50-54 Territories Real Property Act, 1886, S.C. c. 26) (Aluminum Goods Ltd. v. Federal Machinery Ltd. (1970) 10 D.L.R. (3d.) 405). However, s. 73 has remained in its present form throughout the time it has been included in the Act.

Appendix B.

Extinguishment of the Right

When extinguishment of the right to land was effected at the determination of the limitation period two rather odd theories became current as to the ownership of land. Section 34 of the Real Property Limitation Act, 1833, 3 & 4 Wm. IV c. 27 had enacted;

> "And be it further enacted, That at the Determination of the Period limited by this Act to any Person for making an Entry or Distress, or bringing any Writ of Quare impedit or other Action or Suit, the Right and Title of such Person to the Land, Rent, or Advowson for the Recovery whereof such Entry, Distress, Action, or Suit respectively might have been made or brought within such Period, shall be extinguished."

Thus it will be seen that the words of the section are similar to those of s. 44 of the Alberta Limitation of Actions Act and to s. 16 of the English Limitation Act, 1939. The theories that were raised about the effect of this section in the nineteenth century were based on a measure of truth but were also misconceived in that they were illogical extensions of the idea behind the extinguishment section. England has subsequently enacted, in s. 3(2) of the Limitation Act, 1939, a corresponding provision for chattels and that subsection has not been subjected to the same misconceptions. Nevertheless, these theories should be considered when an extension of the extinguishment provision is being proposed. Such theories might be particularly applicable to the title to chattels.

Section 34 of the R.P.L.A. 1833 gave rise to the situation in which the former owner whose limitation period had expired could not attack the possession of the possessor who had occupied the land throughout that period. That is not to say that the possessor's occupation could not be attacked by one who had a longer limitation period available to him or whose cause of action accrued at a later time. However, the possibility of such subsequent attack would be unlikely. This indefeasibility at the desire of the former owner was an innovation which was quickly likened to ownership. Thus, for some time after 1833 two theories were in vogue, one that the Act effected a "Parliamentary conveyance", and the other that there was now only "one true owner" of land instead of competing ownerships.

The "Parliamentary Conveyance" Theory

The theory that Parliament had bestowed a new title upon the person in possession at the termination of the limitation period could not have met with the fleeting acceptance it did enjoy were it not for the introduction by s. 34 of the Real Property Limitation Act, 1833, of the rule that not only the remedy of the former owner, but his right too, was to be extinguished. This extinction of the title of the former owner prevented further action or entry by him. Thus, the former title could not be revived in Brassington v. Llewellyn (1858) 27 L.J. Ex. 297, Thus the doctrine that the former owner could be remitted to his former estate was abolished by the statute. Several early authorities supported variations of the theory that the statute either conferred a new title on the possessor or conveyed to him the estate of the former owner. One such case was Doe d. Jukes v. Sumner (1845) 14 M. & W. 39; 153 E.R. 380 where Parke B. made the blunt statement (with which the other Barons concurred), "The effect of the act is to make a parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed." The impression fostered by this statement is that whatever interest the former owner had in the property is passed, by operation of law, to the person in possession at the end of the period. This statement is fortified by the fact that the estate gained by the squatter is commensurate with that lost by the former owner, however it should be remembered that the reason for this is the fact that the cause of action only accrues when an estate vests in possession. Thus the loss of title, whether to a leasehold or a freehold estate, depends on the first date on which the title holder could have brought action to recover the property. Furthermore, restrictive covenants and other encumbrances which bound the old estate would still bind that of the adverse possessor at common law. These features might tend to make one think that it was the previous estate which was acquired by the adverse possessor but it might better be stated that the estate acquired by the adverse possessor was subject to the same restrictions and limitations as that previously held. The theory propounded by Parke B. would tend to suggest a transfer of the estate. That theory was supported by Lord St. Leonards in Incorporated Society v. Richards (1841), 1 Dru. & W. 258, at p. 289, when he stated; "There is a marked distinction between the old Statutes of Limitation and the present one. The former Statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right; but under the new Act, when the remedy is barred, the right and title of the real owner are extinguished, and are, in effect, transferred to the person whose possession is a bar. . . "

Two years later, in Scott v. Nixon (1843) 3 Dru. & W. 388, at p. 406, he reiterated this formulation when he said: "It was said in this case, that the Statute of Limitations only operated as a defence, but never could be held to confer a title, and I was asked, where, or in whom, was the legal title? I reply, that the Statute has executed a conveyance to the party, whose possession is a bar. The Statute makes the title, for by its operation it extinguished the right of the one party, and gives legal force and validity to the title of the other, the party in possession."

More recently the same view was taken with respect to an identical statutory

provision in Ontario. In Court v. Walsh (1882), 1 O.R. 167, at p. 170, Boyd C. Stated; . . . ."it is not merely a loss of the claim, but it is a divesting of the title or a transfer of title to somebody else."

In the case of expiry of the limitation period on a mortgage the statute has been stated to have effected a reconveyance or transfer to the mortgagor. [See Heath v. Pugh (1881), L.R. 6 Q.B.D. 345, at p. 364, per Lord Selborne L.C..]

One learned author, in the Statute of Limitations as a Conveyancer (1883) 3 Can. L.T. 521, examines the judicial pronouncements and classifies them as representing several different theories. Certainly the vagueness of the pronouncements is such that the classification ought to command a great deal of support. Justification may be found for claiming that the "parliamentary conveyance" theory was that; (i) the land itself was conveyed by the statutes, (ii) the title was transferred, (iii) the estate was transferred, (iv) the right, title, estate and interest was transferred or, (v) the statute merely lent legal force and validity to the title of the dispossessor. It is argued that if title had to be shown in a way which involved reliance upon the title of the dispossessed the effect would be a solecism insofar as reliance upon and denial of the dispossessed's title are inconsistent. However, this is not felt to be a conclusive argument since the same sort of approbation and reprobation is required where reliance is placed on the title of a vendor or where conveyance takes place under the authority of any statute. The purpose of showing the paper title of the dispossessed might simply be the illustration that the most likely objector is now disentitled. This is the assertion of a claim against the paper title and does not depend upon a statutory transfer. The statute is still basically extinctive in character and does not countenance acquisitive prescription. This point is well made by Strong J. in Gray v. Richford (1878), 2 S.C.R. 431, at 454. The idea that the statute is negative in operation runs counter to the theory of the statutory passage of anything. Since the land acquired by a squatter may be variable in quantity or quality the theory that the land itself is conveyed is unacceptable. The theory that the estate is passed by the statute is also objectionable because a dispossessor gains no estate until all other claimants have been barred. He has in the interim a right of possession only, and not a right of property. Again, the idea that the statute has effected the passage of anything is unsatisfactory. The theory that the Act merely supports the right of the dispossessor after the expiry of the limitation period is the one that commands most support. This is the theory that appeals to most authors.

The notion of the passage or transfer of anything being directed by s. 34 of the statute fell from favour because whatever was alleged to have been transferred could be shown not to have passed intact. Modern lawyers believe that the section merely strengthens the claim of a possessor by removing the possibility of claims by others. This view was accepted by Strong J. in an Ontario decision reported at (1878), 2 S.C.R. 431 Gray v. Richmond when he stated at 454, "The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any

> which our own law is conversant with, a law of extinctive, not one of acquisitive prescription - in other words, the Statute operates to bar the right of the owner out of possession, not to confer title on the trespasser or disseisor in possession. From first to last the Statute of 4 Wm. 4 says not one word as to the acquisition of title by length of possession, thought it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of James, which only barred the remedy by action, but its operation is by way of extinguishment of title only."

This view has been accepted by most authors too. See the Statute of Limitations as a Conveyancer (1883), 3 Can. L.T. 521 and (1865) II Jur. N.S. 15. The owner is taken to claim generally the entire property in the land unless he expressly qualifies his claim or the interest against which he possesses is for less than the fee simple. There is little justification for concluding that the statute transfers right, title, estate or the land itself to the person who happens to be in possession when the rightful title is extinguished.

THE "TRUE OWNER" THEORY

Also in the nineteenth century a notion became current which offended against the traditional conception of competing interests in land. This notion was that there was simply one true owner of land and to the existence of such a person was lent some support by s. 34 of the Real Property Limitation Act, 1833. The impression was fostered that this section had conferred the status of owner upon one who had possessed for the twenty year period. However, we should not easily be able to say that such a possessor has an indefeasible title at the expiry of the period. There may always be persons with unbarred claims outstanding against the land. The only way in which it may be ensured that there are no such claimants is to employ a Torrens system of registration of title to land, thereby rendering all unregistered claims void. This is the position in Alberta with the reservation that the register is subordinated to the fact of possession in some cases; s. 73 Land Titles Act, 1955, R.S.A. c. 170.

The traditional theory was that several persons might have competing interests in land but that the one with the best known title had a virtually unassailable position with respect to it. [See Lawson Introduction to the Law of Property (1958) at p. 40]. A title of some strength could be obtained simply by gaining possession of the land. Who had the better, or best, title would depend upon the antiquity of the possession on which each of the claimants relied. The rules of seisin applicable in the real actions had many similarities to the rules of possession though the latter were pertinent to the personal actions. Seisin lost its immediate importance as a result of the passage of the 1833 Act. It had before that date lost most of its practical importance; see Sweet Seisin (1896), 12 L.Q.R. 239. This traditional theory would not tolerate the existence of a "true owner"; merely the existence of claimants with varying degrees of security. This theory is supported by such cases as Doe d. Hughes v. Dyeball (1829), M. & M. 346; 173 E.R. 1184. See also Wiren The Plea of Ius Tertii in Ejectment. (1925), 41 L.Q.R. 139, at p. 141, Megarry and Wade The Law of Real Property (3rd. Ed., 1966) at p. 1002, Hargreaves Terminology and Title in Ejectment (1940), 56 L.Q.R. 376, contra Holdsworth Terminology and Title in Ejectment-A Reply (1940), 56 L.Q.R. 479. If the title claimed rests on possession such possession may be long enough to benefit from the statutory protection afforded by s. 34 of the Real Property Limitation Act, 1833. If the possession is shorter than that required for statutory protection the possession is usually said to be evidence of seisin in fee simple. This has been open to some dispute since the Act for there is some argument that possession itself is a good root of title. Indeed, there are situations in which a claimant of land may never have seisin but yet he may gain title. The example of the tenant at sufferance who claims adversely to the owner is suggested in Simpson Introduction to the History of the Land Law (1961) at p. 145. Though there is still some dissent, it is generally agreed that possession is evidence of seisin, which in turn is evidence as to title. Whether possession is evidence of seisin or not it is certainly the factor which is most important in determining title where there is no documentary evidence.

The theory of the relativity of the titles of various claimants runs

counter to the idea that land may have one true owner. The intention of the introduction of the Torrens system of registering an indefeasible title to land was to create a "true owner" of land. The English system established by the Land Registration Act, 1925, does not confer an unassailable status upon the registered owner. Since the Judicature Act, 1873, abolished the action for ejectment the courses open to a claimant of land are to bring an action for its recovery or an action claiming a declaration that the plaintiff owns the land in fee. This is intended to settle the matter only as between the parties represented in the action. The plaintiff who brought an action of ejectment, or one who brings any other suit for the recovery of land, must recover on the strength of his own title and may not rely entirely on the weakness of that of the defendant. There is, however, little authority on the question of whether the claimant or the defendant may show that a third person is better entitled. See Wiren The Plea of the Ius Tertii in Ejectment (1925) 41 L.Q.R. 139, at p. 148 et seq. A distinction could be drawn between the action of ejectment which depends upon the claimant's title (of which his possession may be evidence) and the action for trespass in which the claimant relies upon his own possession. See Cooper v. Crabtree (1882), 20 Ch. D. 589 and Ames The Disseisin of Chattels, (1889-90) 3 Harv. L. Rev. at 324n. Logically, such a demonstration of title would prevent either party to the action being able to show title to the property. And, therefore allowing the party not claiming to eject to succeed. The claimant in ejectment must show a right to enter. This could be defeated by showing a better right in the defendant or in some third person. Effectively, it appeared that the claimant must establish an absolute right of ownership. Therefore, when the real actions came to be abolished the conception of ownership that had been developed around the action of ejectment came to be recognised. A parallel development in the law of trover is outlined by Holdsworth in History of English Law VII (1925) at p. 426. It is there stated that the conception of an absolute jus in rem in property arose in ejectment, replevin and trover almost simultaneously. This development took place in 1833 and ejectment was left as the only suitable remedy for the recovery of land. The orthodox way for a claimant to show his own title was for him to give evidence of ownership it afforded. This is because any possession not shown to be tortious is evidence of a right. Where there are competing possessions for less than the statutory period the presumption of title is to be made in favour of the earlier because that is not statute-barred and is prima facie evidence of an older, and better right which, in turn assists the plaintiff to establish a case in ejectment. Whale v. Hitchcock (1876), 34 L.T. 137, Doe d. Harding v. Cooke (1831), 7 Bing. 346; 131 E.R. 134 and Doe d. Carter v. Barnard (1849), 13 Q.B. 945; 116 E.R. 1524. In the latter case Patteson J. stated, at p. 1527,

> ". . . such possession is prima facie evidence of title, and, no other interest appearing in proof, evidence of seisin in fee. Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was prima facie evidence of his seisin in fee; and, as he died in possession and left children, it was prima facie evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail; and, therefore, she has by her own shewing proved the title to be in another, of which the defendant is entitled to take advantage. On this ground

we think that the rule for a nonsuit must be made absolute."

The proposition is supported by such early authorities as Stokes v. Berry (1699), 2 Salk. 421; 91 E.R. 366. The presumption is not useful in trespass where the action depends upon and protects the occupation or possession of the plaintiff, and for which s. III of the Statute of Limitations, 1623, had provided a six year limitation period. Certain acts might be both trespassory and suitable for the action in ejectment, with its longer limitation period. The aim of these two actions differed in that ejectment was designed to secure removal of the offender and trespass was for reparation.

The other principal argument levelled against the recognition of ownership in English law proceeds on the basis of tenure. It is argued that since feudal tenure is still the foundation of our land law its modern influence is to deny the existence of any true or absolute owner. The argument acknowledges a residual right in the Crown.

The contrary argument is sometimes called the rule in Asher v. Whitlock (1865), L.R. 1 Q.B. 1. The rule is expressed to be that possession is good against all except the true owner. An argument may easily be made for cloaking actual possession with some protection, for the consequence of so protecting it will be to diminish violence and breaches of the peace. Not to protect possession would amount to encouraging attempts to oust the possessor. However, even if the doctrine that possession is good against all except the true owner is now accepted, it certainly was not always the case and there was no rash of attempts at ouster. If the doctrine were to receive the support of the authorities it would allow the ius tertii of some specific third person to be pleaded only in restricted circumstances. The doctrine was accepted to the extent that an unchallenged possession was recognized as affording a prima facie case for compensation in Perry v. Clissold. (By the Judicial Committee of the Privy Council at [1907] A.C. 73.) Although the support for Asher v. Whitlock was stated strongly by Lord Macnaghten the ratio decidendi is equally consistent with the existence of competing estates in land. However, Lord Macnaghten did state, at p. 79, that; "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner."

Other authority on the question is equivocal, but it does seem to be fairly clear that a possessory interest is capable of being devised or otherwise disposed of at common law; Clarke v. Clarke (1868), I.R. 2 C.L. 395, Leach v. Jay (1878) 9 Ch. D. 42, per James L.J. In any case, to emphasise possession and ownership is to detract from the place that the "better right to possession" has traditionally held. It might be noticed that wherever allusions to the "true owner" have occurred the phrase "one better entitled to possession" could have been substituted without violence to the meaning.

Since a considerable amount of the foregoing deals particularly with the common law relating to ownerships of land to the extent that this system has been supplanted by the Torrens system of registration of title the

foregoing discussion is not directly relevant. However, there is no such registration system for most chattels. There is considerable authority for considering title to chattels in a similar way to titles to land. To this extent the foregoing comments may be relevant to any proposed extension of extinguishment of title to chattels.

Limitation Periods (Part I)

1. No basic change in Part I as now amended ought to be embarked upon, save for those outlined below.

2. Where amendments are made, such as those embodied in the 1966 Act, the import of the amending legislation ought to be explained by it. An amending Act should not merely state the verbal changes effected.

3. The wording of s. 5 (i)(b) ought to be clarified so as to include damages which are in the nature of a penalty (but not exemplary damages) as well as the penalties and sums of money in the nature of penalties not included.

4. Damage inflicted by exposure to radiation ought to have a longer period accorded to it than is normal.

5. The position of Crown as regards limitation of actions ought to be clarified. A Part of the Act ought to be devoted to actions by and against the Crown and other governmental agencies.

6. Proliferation of limitation periods outside the Limitation of Actions Act ought to stop.

7. So far as possible, a minimum number of different limitation provisions ought to exist. The Act already has provision for periods of two, six and ten years and these ought to be adhered to.

8. An index should be appended to the Act classifying the actions according to their subject matter and showing the basic limitation periods.

Land (Part III)

1. Some resolution of the position of the adverse possessor ought to be effected along the lines of one of the alternative recommendations in the Report.

2. Section 28 ought to be amended so as to incorporate a more modern and realistic sum of money.

Mortgages of Real and Personal Property (Part IV)

1. It is recommended that this Part be left intact, subject to the following exceptions.

2. The language of s. 33(i) ought to be simplified. Furthermore, that chattels ought to be treated similarly to land throughout that subsection.

3. It is recommended that there should continue to be no limitation period imposed on actions where the mortgagor is in possession or receipt of the profits of the mortgaged property. This need not entail any alteration in the wording of the Act or any addition to it.

4. An upper limit should be set on the amount of arrears of interest that may be demanded of a mortgagor as the price of redemption. This might conveniently be effected by imposition of either the six year or ten year limitation period. The former limit would seem to be the more equitable and harmonious with the rest of the Act. Furthermore, it could be acheived by slight modification of s. 15(1) and s. 15(3) and the addition of a further subsection in Part IV so as to cover mortgages of personalty of realty.

5. Section 35(2) should be entirely re-worded.

Actions with respect to Charges on Land, Legacies, etc. (Part II)

1. This Part of the Act should be preserved but should be supplemented by a schedule of limitation periods which apparently apply to particular causes of action. Such a schedule ought to be prepared as a guide and might be appended to the Act but ought not to have any statutory force. In addition, it is recommended that the following defects in this Part should be remedied.

2. The title of this Part should not contain the expression "etc." but should list, as accurately as possible, the actions therein dealt with. It is proposed that the title should be amended to the following;

> "Actions with respect to charges on land, legacies and the personal estate or a share thereof of an intestate."

3. Section 15(1) and 15(3) ought to be amended so as to enable this Section to cover arrears on a mortgage. (See recommendation 4 with respect to Part IV of the Act.)

4. There should be further study of the matter of charges of mixed funds. There is no immediate or easy solution of this question which arises also with respect to Part V of the Act, which contemplates agreements for the sale of mixed funds.

5. There appears also to be a misprint in s. 14(2)(a), which should read "...or any interest thereon..."

Agreements for the Sale of Land (Part V)

1. The position of agreements for the sale of mixed funds should be clarified. (See recommendation 4 with respect to Part II of the Act.) An additional subsection could be added to each section of Part V stating that the section applies only insofar as the property included in the agreement is in fact land.

2. Otherwise, this Part should be left intact. However, it will be recognized that proposed changes in other Parts will affect Part V.

Conditional Sales of Goods (Part VI)

1. It is recommended that this Part should be retained as it is.

Trusts and Trustees (Part VII)

1. Use of the expression "cestui que trust" throughout the Part should be eliminated That expression should be replaced with "beneficiary."

2. Section 34(2) Judicature Act should be repealed.

3. That all actions by a beneficiary against a trustee should be subject to a ten year limitation period.

4. That a suitable starting point for the commencement of the ten year limitation period be formulated.

5. That all trustees, whether express, implied or constructive, should be subject to the same ten year limitation provision.

6. That no change in the Act should be made in accordance with recommendations 3, 4 and 5, above, until an acceptable solution to recommendation 4 is proposed.

7. That all the provisions of this Part not in conflict with the above recommendations should be retained.

General Part VIII

1. The sections in this Part ought to be retained subject to the modifications recommended below.

2. Section 44 (relating to expiry of the right at the end of the limitation period) ought to be extended so as to embrace all causes of action.

3. Section 46 (2) ought to be rephrased so as to render it intelligible.

4. Continuing consideration ought to be devoted to section 47 to determine whether it ought to be abolished.