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PART PAYMENT
LIMITATION OF ACTIONS
JOINT DEBTORS

1. The Problem

In most jurisdictions where there is a limitation period on the bringing of an action for the recovery of a debt there is a provision that a promise to pay, an acknowledgement of the debt, or a part payment of the debt by the debtor subsequent to the creating of the cause of action will start the time running anew from the time of the promise, acknowledgement, or part payment. In Alberta such a provision is contained in The Limitation of Actions Act, R.S.A. 1970, c. 209, s. 9. In the situation where the cause of action is for the recovering of a debt owed jointly by two or more persons, the Alberta Act provides in s. 10 that the promise, acknowledgement, or part payment by one will not affect the running of the statute as far as the other joint debtors are concerned. It may be useful to set out the exact terms of s. 10.

> Where there are two or more
>
> (a) joint debtors, joint contractors, joint obligators or joint covenantors, 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 acknowledgement or promise made and signed, or by reason of a payment or interest made by any other or others of them.

Mr. W. A. McGillivray, in a letter to the Attorney-General of Alberta which has been referred to the Institute for comment, points out what he considers to be an injustice arising out of this provision. He describes the situation where the injustice would exist as follows:

> Three people can agree to pay a sum of money over, say, a ten-year period, by, let us say, annual payments. Six annual payments are made by one cheque, issued by one of the joint debtors. The creditor thinks that the matter of payment is a matter of internal arrangement. The cheque, indeed, may be that of a Trust Company or it may be a Bank Draft. The creditor does not know at whose instance it is being issued. All he knows, and indeed, is concerned about, is that he has his money. If, however, it appears that shortly after the original Agreement the parties agreed that one of them would assume the obligations, having, let us say, bought the other two out, according to section 10 the payment made by him would not interrupt the Statute as against the other two, and the creditor who thought he had recourse against three throughout, would find that after six years of meticulous payments, he had only a claim against the one man, who might then be insolvent. This is unfair. The creditor is not put on his guard, and it is ridiculous to suggest that he sue all three before the expiration of six years when the Agreement is in perfectly good standing. It is also silly to suggest that he ask for acknowledgements from everybody when the agreement is in good standing.

Mr. McGillivray suggests that, in order to correct this situation, the Limitation of Actions Act should be amended in respect of s. 10. He suggests that the provision of the English Act of 1939 would do justice in

the situation and submits that it should form the basis of the amendment. The provision to which he refers is in the following words:

> 24.(5) An acknowledgement of any debt or other liquidated pecuniary claim shall bind the acknowledger and his successors but not any other person: . . .
>
> (6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:
>
> Provided that a payment made after the expiration of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making this payment and his successors. . . .

The question, therefore, is whether or not Mr. McGillivray's suggestion should be acted upon. Should the part payment of one joint debtor start the limitation period running again for all joint debtors? Should the policy of the Legislature be to favour the creditor or the non-payment joint debtors?

The purpose of this report is to assist in the determination of these questions.

2. The Background

(a) The Development of the English Rule

It may be useful to begin by tracing the history of the rule governing part payments of joint debtors and their affect on limitation periods.

In English common law, the rule seems quite clearly to have been that the part payment or acknowledgement of a debt by one joint debtor had the effect of tolling the statute of limitations for the others. The leading case is often cited as being *Whitcomb* v. *Whiting* (1781) 2 Doug. 652; 99 E.R. 413. In that case the plaintiff was suing on the joint and several note of the defendant and three others. One of these others had made payment of part of the principal within the six-year limitation period. Lord Mansfield dealt with the issue of what effect this part payment should have in the following way:

> Payment by one, is payment for all, the one acting virtually as agent for the rest; and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

The courts generally recognized the strength of the dictum in later cases. Nevertheless some later decisions display a reluctance to accept it. For example, in *Atkins* v. *Tregold* (1823) 2 B. & C. 23; 107 E.R. 291, the court refused to extend the rule in *Whitcomb* v. *Whiting* to render liable the executors of a joint debtor whose death preceded the acknowledgement of the debt by another joint debtor. The cases are clearly distinguishable on the basis that joint obligations do not pass to executors. However, Bayley J. took time to indicate a disapproval of the *Whitcomb* rule and to question its authority. He said at page 29: "That is certainly a strong case and it may be questionable whether it does not go beyond proper legal limits."

The greater number of judges preferred to follow *Whitcomb* v. *Whiting* without question. In *Perham* v. *Ragnal* (1824) 2 Bing. 306; 130 E.R. the court follows *Whitcomb* out of a great respect for and confidence in the words of Lord Mansfield and out of a fear for the consequences, with respect to creating uncertainty in the law, of not following such a strong decision. In *Channell* v. *Taylor* (1839) 5 M. & W. 494, 151 E.R. 211, *Whitcomb* is extended in that it is held that it made no difference to the rule that the payment was made after the statute had run. Again in *Burleigh* v. *Stott* (1818) 8 B. & C. 36; 108 E.R. 956 the rule of *Whitcomb* v. *Whiting* is applied. Lord Tentuden C.J. said: ". . . a part payment by one of the joint promisors would refer to the nature of the note, and operate as an admission by all the joint promisors that the note was unsatisfied and therefore as a promise by all to pay the residue."

It is evident in all of these cases that the courts viewed the Statute of Limitations as creating a rebuttable presumption that after the specific period had lapsed, the debt must have been paid. The effect of the acknowledgement or part payment was to rebut the presumption. Where the debt was a joint one, it would be logically inconsistent to hold that the presumption could be rebutted as to one debtor but not as to another. If the obligation was proved to be joint, and if by the acknowledgement it was proved to be subsisting, it must be subsisting in its joint form.

The rule established at common law was changed in the 19th century by two statutory provisions. In 1829 by the Statute of Frauds Amendment Act, 9 Geo. IV, c. 14, s. 1, often referred to as Lord Tenterden's Act, the position was

changed with respect to the acknowledgement by one joint debtor of a simple contract debt. Such acknowledgements no longer would have any effect on the running of the limitation period in favour of the other joint debtors. The rule of *Whitcomb* v. *Whiting* continued to apply with respect to part payments and the law with respect to specialty debts remained untouched.

The Mercantile Law Amendment Act (1856) 19 & 20 Vict., c. 97, s. 14, changed the common law rule with respect to part payments. A part payment of a simple contract or a specialty debt by one joint debtor would no longer bind the others.

The effect of these statutes left the curious position that only the acknowledgement of a speciality debt by one joint debtor could affect the other joint debtors. This is shown by *Read* v. *Price* [1909] 2 K.B. 724. There were also exceptions to the rule established by the 1856 Act, see for example *Re Lacey* [1907] 1 Ch. 330 where the Real Property Limitation Act of 1833 is held to establish an exception. These exceptions are not, however, of sufficient significance to be explored in detail.

The position remained substantially unchanged until the 1939 Limitations of Actions Act, quoted earlier. The provisions of this Act were based on the recommendations of the Law Revision Committee (Wright Committee) contained in their Fifth Interim Report, 1936 (Command Paper, Cmd. 5334).

In that report, the committee reviewed the English law as described above and concluded that:

> The position under the present [1936] law appears to be, broadly speaking, that the acknowledgement or part payment does bind the co-debtors and successors, except where there is an express statutory saving in their favour.
>
> (Page 27).

Such statutory savings as contained in the 1828 Act and the 1856 Act are noted. The committee concludes that the proper principle is the one in force prior to the 1856 Act, for simple contract debts.

> . . . [A]cknowledgements should only bind the persons making the acknowledgement and persons claiming through them, whereas part payments should bind co-debtors. The ground of the distinction is that a part payment operates for the benefit of all persons who are liable, and it would seem fair that if they take the benefit they should take it with its accompanying disadvantages
>
> (Page 28).

It was recognized, however, that a part payment made after the expiration of the limitation period should not bind co-debtors because it could ". . . be of no particular advantage to persons in whose favour the statute has already run." (page 28).

The formal recommendation of the committee was in these words:

> We recommend therefore that s. 14 of the Mercantile Law Amendment Act, 1856, should be repealed, and that a general provision should be enacted to the effect that acknowledgements should bind the persons making them and their successors in title and that part

> payments should in addition bind co-debtors and contractors; but that no acknowledgement or part payment made after the statute has run should bind any person other than the person who made it, or his personal representatives (page 29).

This recommendation was acted upon by the British Parliament. The 1939 Limitation of Actions Act, s. 25(5) and (6) which were quoted earlier. The enactment had the effect of making the consequences of an acknowledgement the same for specialties as it had for simple contract debts since the Act of 1828. With respect to part payments, the enactment re-instated the rule in *Whitcomb* v. *Whiting* for part payments made before the statute had run, and left the law unchanged with regard to part payments made after expiration of the limitation period.

Glanville Williams in his book *Joint Obligations* (1949) shows approval for this arrangement. He interprets the provision of s. 25(6) as applying to the 'several' part of a joint and several obligation as well as to the 'joint' part to which it clearly applies. He says at page 153:

> The result achieved by this interpretation is a just one, for a creditor who has received a part payment from one of joint and several debtors is thrown off his guard with respect to the running of the Limitation Act.

This 'throwing of the debtor off his guard' is exactly the problem that Mr. McGillivray contemplates arising under the Alberta provision and in his letter to the Attorney General, Mr. McGillivray notes this approval of Glanville Williams for the English solution.

(b) The Recent Debate

The Law Reform Commissions of two Commonwealth jurisdictions have recently studied the issue under discussion. The first was the Law Reform Commission of New South Wales who reported on Limitations of Actions in 1967. The Commission recommended that a "confirmation" (the term they suggested be used to combine acknowledgements and part payments) ". . . have effect only between the parties to it acting either directly or by their agents" (paragraph 257, page 129). The reasoning of the Wright Committee, that part payments before the expiration of the period of limitation should bind all the joint debtors because they all benefit, was discussed, but the Commission did not find this reasoning persuasive.

> If A and B are jointly liable for a thousand dollars and the limitation period is about to expire in favour of both of them, it is incongruous that A should be in a position without the authority of B, and by paying one dollar or some other trifling sum, to postpone, as against B, the expiration of the limitation period until six years after the date of payment. Such a state of law, apart from its incongruity, appears to us to be apt to encourage underhand transactions between a creditor and one of his debtors (paragraph 259, p. 130).

On that basis, the Commission recommended that a provision such as that found in the English Statute not be used in New South Wales, and suggested a provision which in effect is the same as that in force in Alberta as preferable.

The second study of this issue was conducted by the Ontario Law Reform Commission whose *Report on Limitation of Actions* was published in 1969. In that report the existing Ontario legislation is described. It appears to be substantially the same as the present Alberta provision. The report then reviews the English reforms, the New South Wales proposals and the Uniform Act provision, which is also substantially the same as the Alberta provision, and concludes:

> The Commission believes that part payments should be treated in the same way as other acknowledgements. It agrees with the New South Wales Commission that the grounds put forward by the Wright Committee for its recommendation that a part payment by one co-debtor should bind another co-debtor are not convincing (page 123).

The recommendation of the Commission was that:

> No changes should be made in the Ontario rule that an acknowledgement (including a part payment) by one co-debtor does not bind another co-debtor.

It is apparent, then, that the two most recent studies of the issue involved in Mr. McGillivray's proposal have arrived at the same conclusion; that such a provision as that proposed is undesirable.

(c) The American Position

The American jurisdictions generally inherited the rule in *Whitcomb* v. *Whiting* and applied in the same way as did the English courts. However the rule did not go uncriticized. Mr. Justice Story in *Bell* v.

Morrison (1828) 1 Peters 351 spoke for the majority of the Supreme Court of the United States when after quoting Lord Mansfield's words he said:

> This is the whole reasoning reported in the case, and is certainly not very satisfactory. . . .
>
> When the statute has run against a debt, the reasonable presumption is, that it is no longer a subsisting debt; and therefore there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But if this were not so, still there is a great different between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all; the one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable, and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when such acknowledgement was made (page 368).
>
> [Quoted in Arnold, *The Statute of Limitations In the Law of Suretyship*, (1922) 17 Illinois Law Review 1 at page 4, footnote B.]

Another American decision *Van Veuren* v. *Parmelee* (1849) 2 N.Y. 523 (N.Y.C.A.) contains a very strong critical analysis of the *Whitcomb* rule. Because it is a re-enactment of that rule that Mr. McGillivray is in effect proposing, it may be of value to quote from the decision of Bronson J. at length:

> Nothing but the great name of Lord Mansfield could have given currency to this reasoning. It is plain enough that "payment by one, is payment for all" so far as relates to the satisfaction of the debt: but that fact neither shows, nor has it any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due; and like any other admission, it can only affect the party who makes it, unless he has authority to speak for others, as well as himself. A joint debtor has no such authority. It cannot be justly inferred from the relation which he sustains to the other joint debtors; and though he may conclude himself by an admission, he cannot conclude them. His lordship, after saying, that "payment by one, is payment for all," adds--"the one acting virtually , as agent for rest." If the meaning be, that there is such an agency as will make the payment by one enure to the benefit of all the joint debtors, the reasoning is well enough; but it proves nothing on the point in controvery. If the meaning be, that one joint debtor is the agent of the others for the purpose of making admissions to bind them, that was assuming the very point to be proved; and the assumption had neither authority nor argument to support it. There is nothing in the relation of joint debtors from which such an agency can be inferred. A joint obligation is the only tie which unites them together; and from the nature of the case, payment of the debt is the only thing which one has authority to do for all. I am persuaded that such a decision would not have been made, had it not been for the strong disposition which prevailed at that time to get round the statute of limitation (page 527).

On the basis of this reasoning the New York Court of Appeals overruled the many cases that had followed *Whitcomb* v. *Whiting* in that jurisdiction. However other American jurisdictions continue to apply the rule in

Whitcomb v. *Whiting*. (Eight of these jurisdictions are listed in *Partial Payment by One Joint Debtor Tolling Statute of Limitations as to All*, (1919-1920) 6 Virginia Law Review 586.) One explanation is that these jurisdictions have such a strong allegiance to the doctrine of *stare decisis* that they fail to take into account that the rule was formulated at a time when the statute of Limitations was not favoured by the courts.

> The leading case [*Whitcomb v. Whiting*] was decided, at a time when the statute of limitations was looked upon with disfavor by the courts, and when any acknowledgement, even the slightest, of the existence of a debt, was sufficient to deprive the party of the benefit of the statute, although the acknowledgement was made under circumstances showing that the debtor did not intend to recognize or admit an existing intention or liability to pay [*Shoemaker* v. *Benedict* (1854) 11 N.Y. 176 per Allen J. at 177.]

Some of the American jurisdictions have adhered to the rule in *Whitcomb* v. *Whiting* for reasons more substantial than that a change would be embarrassing. For example, the principle that joint debtors have such a community of interest between them that the presumption arises that one of them would not make an acknowledgement or part payment adverse to the interests of all, has been applied by some courts to achieve the same result.

3. Reconciliation and Recommendation

With the above background, it may be useful now, to discuss some of the considerations which may be taken into account when determining whether or not Mr. McGillivray's suggestion merits action.

(a) Consistency of Suggested Rule with Legal Principles

Firstly, it may be useful to determine whether or not a rule such as the one suggested by Mr. McGillivray would be consistent with existing legal principles. It may be profitable to approach this question by discussing principles associated with the nature of the Statute of Limitations, the nature of part payment, and the nature of joint obligations.

(i) The nature of the Statute of Limitations

It was noted earlier (page 7) that the courts in the time when the rule in *Whitcomb* v. *Whiting* was in force viewed the Statute of Limitations as creating a rebuttable presumption that, when the period had expired, the debt had been paid. The effect of the acknowledgement or part payment was to rebut the presumption. On this interpretation, the acknowledgement of a joint debt would logically rebut the presumption of payment for all joint debtors.

The tendency in later cases has been to not interpret the statute so narrowly. The intention of the Legislature is more frequently interpreted as having been to enact a statute of "repose" (see *Tolson* v. *Kaye* (1822) 3 Brod. & Bing. 217 at 222; 129 E.R. 1267). Best C.J. in *Court* v. *Cross* (1825) 3 Bing. 329 discussed the legislative policy at page 332:

> It has been supposed that the Legislature only meant to protect persons who had paid their debts, but from length of time had destroyed the proof of payment. From the title of the Act to the last section every word of it shows that it was not passed on this narrow ground. It is, as I have often heard it called by great

> judges, an Act of peace. Long dormant claims have often more of cruelty then of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The Legislature thought that if a demand was not attempted to be enforced within six years, some good excuse for non-payment might be presumed and took away the legal power of recovering it.

The comment of Lord Atkinson in *Board of Trade* v. *Cazzer Twine & Co. Ltd.* [1927] A.C. 610, at page 628 is also relevant:

> The whole purpose of the Limitation Act is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for a number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use.
>
> [See Peston and Newsom, *Limitation of Actions*, 3rd edition, (1953) at 227.]

The death of the presumption of payment interpretation of the Limitations Act has resulted in the extinction of one logical basis for the rule suggested by Mr. McGillivray. The idea that one joint debtor should be able to extend the limitation period for the others can be considered repugnant to the "statute of repose" interpretation. The Legislature's general intention throughout the Act is that after a specific period has passed, the remedy of a creditor should be laid to rest. A provision whereby that period could be altered by a person other than the debtor would be inconsistent with that general intention.

(ii) The Nature of Acknowledgement and Part Payment

The original English Statute of Limitations 21 Jac. I, c. 16, contained no provision with respect to the effect of an acknowledgement or part payment on the running of the limitation period. It was the courts that first established the rule that the acknowledgement or part payment should cause the statutory period to recommence. The actual mechanics of the rule were that the acknowledgement operated as a new promise to pay supported by the consideration of the old debt. Wigham V.-C. in the case of *Phillips* v. *Phillips* (1844) 3 Ha. 281 described these mechanics at page 300.

> The legal effect of the acknowledgement of a debt carried by the 21 Jac. I, c. 16, s. 3, is that of a promise to pay the old debt; and for this purpose, the old debt is a consideration in law; and the old debt may be said to be revived; but it is revived only as the consideration for the new promise. . . .

This quotation only refers to an acknowledgement after the statute has become a bar, but it is submitted that the same mechanics would apply to acknowledgements made before the expiration of the limitation period. Support for this submission is to be found in a decision of the Supreme Court of Illinois, *Kallenback* v. *Dickinson* (1881) 100 Sl. 427 where it was said at page 435:

> The point is made in argument that payment before the bar is complete and payment afterwards, rest upon different principles. . . . In either case, if the running of the statute is arrested, it is because of the new promise, express or implied; and it is that new promise, i.e., contract, resting upon the consideration of the old debt, in

> either case, where the statute is pleaded, that is replied to take the case out of the statute. The elements of contract must exist in either case.

Presumably, the legal principles that form the basis of the rule that acknowledgement tolls the statute, have not been affected by the fact that the rule became the subject of legislative enactment (Alberta Act, s. 9).

It is basic to the law of contract that one person cannot impose contractual obligations on another without authority sufficient to constitute an agency relationship. If it is correct that an acknowledgement functions on the principle of a new contract, it would be inconsistent for one joint debtor to bind another to a new contract unless some element of an agency relationship can be ascribed to the joint debtor relationship. The question of whether such an agency exists was discussed above (page 11) in the quotation from the New York Court of Appeals in *Van Keuron* v. *Parmellee*. It is submitted that the reasoning used there is most convincing and that the conclusion that no agency exists should be accepted.

It is recognized that Mr. McGillivray's suggestion is not that the acknowledgement of one joint debtor should bind the others but rather that a part payment of one joint debtor should have this effect. The basis of the distinction put forward by the Wright Committee, it will be recalled, was that all joint debtors benefit by the part payment of one of them whereas none derives any particular benefir from an acknowledgement. Part payment has always been regarded as a form of acknowledgement. Indeed, it was considered a very strong form of acknowledgement in the time when the Statute of

Limitations was interpretted as creating a presumption of payment as discussed above. What stronger evidence could there be to rebut or delay the presumption that a debtor had paid than the fact that he continues to make payment of part of the debt? An indication of the evidenciary strength of part payments is seen in the fact that the first legislative enactment dealing with acknowledgements and part payments, Lord Tenterden's Act of 1829, provided that the acknowledgement of one joint debtor would not bind the others, but part payments by one joint debtor would bind the others.

Does it follow from the proposition that a part payment is a strong form of acknowledgement that it operates in the same way as any other acknowledgement with regard to its effect on the limitation period, i.e., as a new promise? A part payment seems perhaps, to go more toward performance of an existing contract rather than creation of a new one. The issue was discussed in the American case *Shoemaker* v. *Benedict* (1854) 11 N.Y. 176 by Allen J. at page 184:

> . . . [P]artial payments are only available as facts from which an admission of the existence of the entire debt and a present liability to pay may be inferred. As a fact, by itself, a payment only proves the existence of the debt, to the amount paid, but from that fact courts and juries have inferred a promise to pay the residue. In some cases, it is said to be an unequivocal admission of the existence of the debt; and in the case of the payment of money, as interest, it would be such an admission in respect to the principal sum. Again, it is said to be a more reliable circumstance than a naked promise, and the reason assigned is that it is a deliberate act, less liable to misconstruction and misstatement than a verbal acknowledgement. So

> be it. It is, nevertheless, only reliable as evidence of a promise, or from which a promise may be implied. Any other evidence which establishes such a promise would be equally efficacious, and most assuredly, a deliberate written acknowledgement of the existence of a debt and promise to pay, is of as high a character as evidence of a partial payment, to defeat the Statute of Limitations. In either case, the question is, as to the weight to be given to evidence, and if a new promise is satisfactorily proved in either method, the debt is renewed; and without a promise, express or implied, it is not renewed.

This reasoning, supporting the conclusion that the rules with respect to the effect of acknowledgements and part payments should be the same, is more persuasive, it is submitted, than that put forward by the Wright Committee to support the conclusion that the rules should be different. If it is accepted that part payment operates in relation to its effect on the running of the limitation period in the same manner as an acknowledgement, i.e., as a new contract, then it continues to be relevant to inquire how, given the basic rules of contract law, one joint debtor can impose contractual obligations on the others.

(iii) Nature of Joint Obligations

The next question for discussion is whether or not there is some characteristic of the joint debtor relationship which permits one joint debtor to increase the obligations of the others.

Throughout his book on Joint Obligations, Glanville Williams emphasizes the singleness of the joint promise. The consequences that flow from this feature are many. They

include the general rules that performance by one is performance by all, that the discharge of one is the discharge of all, and that each joint debtor has a right to the contribution of the others. It is apparent that one joint debtor can affect the obligations of the others but it is not suggested anywhere that the obligations can be increased beyond what they were when the original joint obligation was entered. To allow one joint debtor to increase the length of time during which the obligations of the others will exist seems inconsistent.

The earlier discussion of the possibility of an agency relationship existing as part of the joint-debtor will be recalled. The earlier submission that the conclusion of the New York Court of Appeals that no such agency exists (page 16 above) should be accepted is repeated.

(iv) Conclusion

It is concluded that the rule suggested by Mr. McGillivray would be inconsistent with at least three established legal principals:

(1) that the Limitation of Actions Act is a statute of repose;

(2) that part payments operate as evidence of a new contract in respect of their effect on the running of the limitation period and one person cannot ordinarily impose contractual obligations on another without his knowledge or authority;

(3) that there is no characteristic of the joint-debtor relationship from which an authority for one to bind the others can be implied.

It is submitted that these inconsistencies should make a rule such as that suggested by Mr. McGillivray undesirable.

(b) Public Policy Considerations

Though it may produce undesirable inconsistencies in the law, the suggested rule may be desirable nevertheless on the basis of public policy considerations.

It was a situation of injustice arising out of the existing rule that prompted Mr. McGillivray's suggestion. He hoped that the suggested rule would provide the creditor with security against finding his remedy against most of the joint debtors statute barred in circumstances which ordinarily would not give rise to any suspicions that his remedy was in danger.

While the injustice of the situation described by Mr. McGillivray is admitted, it must also be recognized that the suggested rule gives rise to a potential injustice against the joint debtors. It is not difficult to imagine a situation where the period has almost run on a joint debt and the creditor, rather than instituting proceedings to collect his debt, coerces one joint debtor, to pay some trifling sum as a part payment and extend the period against all the joint debtors. Perhaps a defense that might have been available to the joint debtors had they been sued in

the original period, might be impossible to build near the end of the extended period due to the loss of evidence. The non-paying joint debtors would not even know, possibly, that any liability was hanging over them so that the likelihood that evidence in their favour could be destroyed would be great.

On a public policy basis, it appears that both possible rules contain potential injustice. It is not possible to determine which situation is likely to arise more frequently. Neither is there any means of determining which injustice is greater; if degrees of injustice exist. However, if it is assumed that the two situations of injustice rank equally in undesirability, then it is submitted that nothing is to be gained by changing the rule.

In summary, it is submitted that a rule whereby one joint debtor could start the limitation period running anew as against the others by a part payment of the debt should not be enacted in preference to the existing rule, since such a rule would be incompatible with existing legal principles and does not provide a system any more free of injustice than the existing system.

4. Acknowledgements and Part Payments in Other Parts of the Act

If a provision like that suggested by Mr. McGillivray were accepted, it would be necessary to consider its implications to the rules regarding acknowledgements and part payments as they exist in other sections of the Alberta Limitations of Actions Act than the ones discussed above.

To assist such an inquiry the following tables have been included. The first is taken from J. F. Josling, *Periods of Limitation*, 3rd edition, 1969, at pages 111 and 112. It is a table of acknowledgements and part payments under the English Act of 1939. Column (5) "Effect on persons other than the maker or recipient" is of particular relevance to the inquiry now being discussed.

The second table is an adaption of the first to the Alberta Act. Again, column 5 is the most relevant one.

TABLE 1

TABLE OF ACKNOWLEDGEMENTS AND PART PAYMENTS UNDER ENGLISH LIMITATIONS ACT, 1939
(from J. F. Josling, Periods of Limitation, 3rd edition, 1969, Oyez Publications, pages 111 and 112)

Action (1)	Nature of Acknowledgment or payment (2)	By (3)	Effect on period (4)	Effects on persons other than the maker or recipient (5)	When to be made (6)
1. To recover land or an advowson [23(1)]	Acknowledgment of title of person to whom the right of action has accrued	The person in possession of the land or benefice	The right is to be deemed to have accrued on and not before the date of the acknowledgment or payment [s. 23(1)]	Binds all other persons in possession during the ensuing period of limitation [s. 25(1) & (2)]	Acknowledgment or payment made after the expiration of the limitation period is ineffective, for the right will have become extinguished (see p. 5, and cf. *Nicholson* v. *England* [1926] 2 K.B. 93).
2. To foreclose in respect of any real or personal property [s. 23(1)]	Acknowledgment of title of person to whome the right has accrued Any payment of principal or interest in respect of the mortgage debt	The person in possession of the property, or the person liable for the mortgage debt			
3. To redeem land of which the mortgagee is, by virtue of the mortgage, in possession [s. 23(3)]	Acknowledgement of title of mortgagor or his equity of redemption Receipt of any sum in respect of principal or interest	The mortgagee in possession as in column (1)	The action may be brought within twelve years from the date of the payment or acknowledgment [s. 23(3)]	If given by one of two or more such mortgagees, it does not bind any other mortgagee or his successors but only the maker and his successors; but all mortgagors benefit from an acknowledgment to one [s. 25(3) & (4)]	

TABLE 1 (Continued)

Action (1)	Nature of Acknowledgment or payment (2)	By (3)	Effect on period (4)	Effects on persons other than the maker or recipient (5)	When to be made (6)
4. For debt or other liquidated pecuniary claim [s. 23(4)]	Acknowledgement of claim	The person liable or accountable therefor	The right is to be deemed to have accrued on and not before the date of the acknowledgment or the last payment, but payment of a part of the rent or interest due at any time is not to extend the period for claiming the remainder of the rent or interest then due [s. 23(4)]	Binds the acknowledgor and his successors, but not any other person [s. 25(5)]	As the substantive right is not extinguished an acknowledgment or payment may be effectually made even after the period has expired, but then will bind only the maker and his personal representatives [s. 25(5) & (6)]
	Any payment in respect thereof, including a payment of interest on a principal debt			Binds all persons liable in respect thereof [s. 25(6)]	
5. Claim to the personal estate of a deceased person or to any share or interest therein [s. 23(4)]	Acknowledgment of claim			If made by one of several personal representatives, binds the deceased's estate [s. 25(7)]	
	Any payment in respect thereof, including a payment of interest on a principal debt				

TABLE 2

TABLE OF ACKNOWLEDGEMENTS AND PART PAYMENTS UNDER ALBERTA'S LIMITATION OF ACTIONS ACT, R.S.A. 1970, c. 209

Action (1)	Nature of Acknowledgment or payment (2)	By (3)	Effect on period (4)	Effects on persons other than the maker or recipient (5)	When to be made (6)
. Recovery of land [s. 32]	Acknowledgement in writing of title of person entitled to land [s. 32]	Person in possession of land or in receipt of profits thereof or agent [s. 32]	Right deemed to have first accrued at and not before time of acknowledgement [s. 32]	[No provision comparable to English s. 25(1) & (2)]	Before his right to take proceedings has become barred under the Act [s. 32]
. To foreclose in respect of any real or personal property [s. 35]	Payment of part of principal or interest in respect of mortgage debt [s. 35(1)] Receipt of acknowledgement of title or right to redeem [s. 35(2)]	Person bound or entitled to make payment of principal or interest (mortgagor) [s. 35]	Right to take proceedings deemed to have first accrued at and not before time of payment or acknowledgement [s. 35]	[No provision comparable to English s. 25(1) & (2)] If a mortgagor can be considered a 'debtor, contractor, obligator or covenantor' then s. 10 applies to the effect that if there are two or more mortgagors the actions of one cannot affect the running of the statute in favour of the other.	Before expiry of 10 years from accrual of the right to take proceedings for foreclosure or sale [s. 35]

Table 2 (Continued)

Action (1)	Nature of Acknowledgement or payment (2)	By (3)	Effect on period (4)	Effects on persons other than the maker or recipient (5)	When to be made (6)
3. Redemption of mortgage where (1) mortgagee is in possession; (2) mortgagee is in receipt of profits of land mortgaged [s. 33]	Acknowledgement in writing of morgagor's title or right to redeem [s. 33(2)]	Mortgagee, or person claiming through him or agent of either [s. 33(2)]	Period of limitation recommences from time of acknowledgement [s. 33(2)]	If given to one of two or more mortgagors benefits all [s. 33(3)] If given by one of two or more mortgagees effectual only against that mortgagee and persons claiming through him [s. 33(4)]	Before expiry of the original 10 year period prescribed by s. 33 (1) [s. 33(2)]
4. Actions on agreements for sale [ss. 36 & 37]	Payment of part of the purchase money to person entitled to receive it [ss. 36(2)(a) & 37(2)(a)]	Person bound or entitled to pay [ss. 36(2)(a) & 37(2)(a)]	Right to take proceedings deemed to have first accrued at time of last payment or acknowledgements [ss. 36 &37]	Since the vendor and vendee can be considered 'contractors' or 'obligators' s. 10 will apply to effect that actions of one persons jointly bound to pay or sell cannot affect the other	Before expiry of 10 years from accrual of right to take proceedings [ss. 36 & 37]
	Acknowledgement of right of purchaser to land or to make payment [s. 36(2)(b)]	Vendor or person claiming through him [s. 36(2)(b)]			
	Acknowledgement of right of vendor to land or to receive payment [s. 37(2)(b)]	Purchaser or person claiming through him [s. 36(2)(b)]			

ABLE 2 (Continued)

Actions (1)	Nature of Acknowledgment or payment (2)	By (3)	Effect on period (4)	Effects on persons other than the maker or recipient (5)	When to be made (6)
Action for sale or recovery of goods [s. 39]	Payment of part of price or interest thereon to person entitled to receive it [s. 39(2)(a)] Acknowledgement of right of seller or person claiming through him to goods or to receive purchase money [s. 39(2)(b)]	Buyer or person bound or entitled to make payment [s. 39]	Right to take proceedings deemed to have accrued at time of payment or acknowledgement [s. 39]	Since the vendor and vendee can be considered 'contractors' or 'obligators' s. 10 will apply to effect that actions of one of two two or more persons jointly bound to pay or sell cannot affect the other.	Before expiry of 6 years from accrual of right to take proceedings [s. 39]
Action to Recover a debt [s. 9]	Promise (conditional or unconditional) to pay debt Acknowledgement of debt in writing Part payment on account of principal or interest	Debtor or agent	Action may be brought within 6 years of promise, acknowledgement or part payment	Binds debtor giving promise, acknowledgement, or part payment but no joint debtor [s. 10]	Anytime notwithstanding that the action would be barred under the provisions of the Act [s. 9(1)]

APPENDIX A

William A. MacGillivray, Q.C.
1500 Guinness House
Calgary 2, Alberta

8th September, 1972.

The Honourable C. M. Leitch, Q.C.,
Attorney-General of Alberta,
Legislative Building,
EDMONTON, Alberta.

Dear Mr. Leitch:- RE: The Limitation of Actions Act. -- Section 10.

Section 10 of this Act, in my view, is a most unfair piece of legislation, and should be amended, in line with the English Limitation Act (1939).

This Section reads as follows:-

"10. Where there are two or more

(a) joint debtors, joint contractors, joint obligators or joint covenantors; 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 principal or interest made, by any other or others of them".

From the plain wording of this Section, one can have this situation.

Three people can agree to pay a sum of money over, say, a ten-year period, by, let us say, annual payments. Six annual payments are made by one

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cheque, issued by one of the joint debtors. The creditor thinks that the matter of payment is a matter of internal arrangement. The cheque, indeed, may be that of a Trust Company or it may be a Bank Draft. The creditor does not know at whose instance it is being issued. All he knows, and indeed, is concerned about, is that he has his money. If, however, it appears that shortly after the original Agreement the parties agreed that one of them would assume the obligations, having, let us say, bought the other two out, according to Section 10 the payments made by him would not interrupt the Statute as against the other two, and the creditor who thought he had recourse against three throughout, would find that after six years of meticulous payments, he had only a claim against the one man, who might then be insolvent. This is unfair. The creditor is not put on his guard, and it is ridiculous to suggest that he sue all three before the expiration of six years when the Agreement is in perfectly good standing. It is also silly to suggest that he ask for acknowledgements from everybody when the Agreement is in good standing.

The English Act (1939) provides that an acknowledgement or part payment of a debt or other liquidated pecuniary claim made by one joint debtor does not take the case out of The Limitation of Actions Act as regards the others unless:-

(1) it is made with their authority as agent for them; or

(2) a part payment (not an acknowledgement) is made before the expiration of the limitation period.

Glanville Williams in his little book on joint obligations says this at Page 153:-

> "The result achieved by this interpretation is a just one, for a creditor who has received a part payment from one of joint and several debtors is thrown off his guard with respect to the running of the Limitation Act".

It is perhaps understandable that if a claim against joint debtors has become statute-barred, then one of those debtors cannot open up the claim by making a payment after the Statute has inter-

vened; where, however, payments have been made before the limitation period so that the creditor is lulled into thinking that he is maintaining his claim against all the parties who undertook an obligation, it does seem most unfair that he could find himself in the position of being without recourse against perhaps the most solvent of those persons with whom he contracted.

Again, I submit that the English Act of 1939 reasonably covers the situation, and that our Act should be amended accordingly.

Yours respectfully,

WAM/vr.

W. A. McGillivray.