

Law Reform Commission

REPORT 12 (1971) - SECOND REPORT OF THE LAW REFORM COMMISSION ON THE LIMITATION OF ACTIONS

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Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are-

The Honourable Mr Justice Reynolds, Chairman.

Mr R. D. Conacher, Deputy Chairman.

Mr C. R. Allen.

Professor D. G. Benjafield.

Mr D. Gressier.

Mr T. W. Waddell, Q.C.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. The Secretary of the Commission is Mr R. J. Watt. Letters should be addressed to him.

This is the twelfth report of the Commission on a reference from the Attorney-General. Its short citation is L.R.C. 12.

REPORT 12 (1971) - SECOND REPORT OF THE LAW REFORM COMMISSION ON THE LIMITATION OF ACTIONS

REPORT

Second Report on the Limitation of Actions

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

1. On the 27th October, 1967, we made to you our first report (L.R.C. 3) upon a reference which you made to us "To review the law relating to the limitation of actions, notice of action, and incidental matters".

2. We recommended a Bill in the terms of Appendix B to our report.

3. This recommendation was implemented by the Limitation Act, 1969, the Act was assented to on the 9th April, 1969, and was subsequently proclaimed to commence on the 1st January, 1971.

4. We have received helpful comments upon the Limitation Act, 1969. We record our indebtedness particularly to the Crown Solicitor. In the light of these comments we have reviewed the Limitation Act, 1969, and consider that problems may arise in four areas. These are-

(1) application of the transition provisions (s. 6) to causes of action for contribution between tortfeasors (s. 26)

(2) failure to plead extinction of right and title;

(3) adequacy of the provisions as to extinction of right and title (Part IV) ;

(4) recovery of possession of goods before expiration of the limitation period.

We shall deal seriatim with these problem areas.

Some other possible difficulties have been drawn to our notice and are receiving consideration; but they are not such that early intervention by the Legislature would be necessary.

Application of the Transition Provisions (s. 6) to Causes of Action for Contribution between Tortfeasors (s. 26)

5. A policy of the Limitation Act, 1969, is that in respect of causes of action which existed at the commencement of the Act, and which had not become statute-barred by the operation of any period of limitation which was applicable under the statutes in force before the commencement of the Act, the relevant limitation period should not be less than that applicable under those statutes (notwithstanding repeal of them by the Limitation Act, 1969). This policy was subject to the qualification that for the purpose of determining whether a cause of action was in existence at the commencement of the Limitation Act, 1969 (that is, whether it had "accrued before the commencement of the Act") the provisions of the Limitation Act, 1969, which govern the date upon which, for the purposes of the Act, a cause of action accrues, are to be applied to any cause of action which is not the subject of a pending action. This qualification was considered to be desirable because the Limitation Act, 1969, settled doubts and corrected injustices which, under the old statutes, existed as to the date upon which some causes of action accrue.

6. It was intended that this policy, as so qualified, be implemented by section 6 of the Act (see para. 52 of Appendix C to our first report). The relevant substantive provision made by section 6 is that nothing in the Act-

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

(d) prevents the commencement and maintenance, of an action or arbitration within the time allowed by an enactment or an Imperial enactment repealed or amended by this Act on a cause of action which accrued before the commencement of this Act..."

7. Section 26 of the Limitation Act, 1969, also has reference to limitation periods under the law as it was before the commencement of the Act. This section deals with the limitation period for the commencement of an action under section 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1946, which provides that where damage is suffered by a person as the result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who would, if sued by the person who suffered that damage, also be liable in respect of that damage (see paras, 154-160 of Appendix C to our first report). Section 26 (1) of the Limitation Act, 1969, provides that such an action is not maintainable if brought after the first to expire of-

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

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

Section 26 (3) directly refers to the limitation law in force prior to the commencement of the Act. It provides-

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

It should be noted that section 26 (3) is not directed to any question as to the application of the limitation period allowed by the law in force prior to the commencement of the Act for the bringing of an action for contribution. It relates to the fixing of the commencing date of the four-year limitation period provided by section 26 (1) (b). Section 6 and section 26 (3) are directed to different purposes. Both provisions, however, refer to limitation periods under the law as it was before the commencement of the Act, and in order to avoid any risk of confusion between these provisions as to the purpose for which the law in force prior to the commencement of the Act is relevant, we provided in section 6 that the section was “subject to section 26”, This was an unnecessary precaution, It gives rise to the difficulty of construction which presently concerns us.

8. If the expression “subject to section 26” as it appears in section 6 is construed as meaning that section 6 does not apply in respect of an action to which section 26 applies, serious consequences could ensue. A person who immediately before the commencement of the Limitation Act, 1969, had a good cause of action for contribution, well within the then limitation period of six years, could find that, upon the commencement of the Act, his cause of action was statute-barred by section 26. Indeed, the shorter limitation period provided by section 26 could give a defence to a pending action which was not barred by the former six-year limitation period. Such consequences were not only unintended; they would be manifestly unjust.

9. We do not consider that section 6 should receive this unintended construction. The Act does not elsewhere use the words “subject to” as words of total exclusion. Where total exclusion as distinct from qualification is meant, the Act consistently expresses the exclusion directly (s. 7, s. 10 (3), s. 14 (2), s. 22 (1), s. 22 (6), s. 23, s. 24 (3), s. 27 (3), s. 37 (3), s. 46, s. 47 (2), s. 52 (3), s. 55 (4), s. 63 (3), s. 64 (3)). For example, in section 14, which provides a six-year period of limitation in respect of “a cause of action founded on tort” (s. 14 (1) (b)), it is not provided that section 14 is “subject to section 26”; it is directly provided that section 14 “does not apply to...a cause of action for contribution to which section 26 of this Act applies”(s. 14 (2) (b)). It is, moreover, a long-standing principle of the construction of an Act that “It would require words of no ordinary strength” in the Act to take away “a vested right” (Jackson v. Woolley (1858) 8 *El & Bl.* 784 at 787; 120 E.R. 292 at 293)- *a fortiori* where, at the commencement of the Act, there is an action instituted and awaiting trial to enforce that right.

10. Nevertheless, section 6 of the Act is susceptible of a construction which would produce, if a relevant factual situation occurs, the manifest injustices to which we have referred in para. 8 of this report. Further, almost a year and eight months elapsed between the date of assent to the Act (9th April, 1969) and the date when it was proclaimed to, commence (1st January, 1971). This lengthy period may invoke a principle of construction which countervails the principle which we have referred to in para. 9. This principle is that where the coming into operation of a Limitation Act is postponed, it may be indicative of an intention that the limitation period will operate, upon the commencement of the Act, to deprive a person of a vested right which otherwise he would have-the reasoning being that the period of postponement affords to the person concerned opportunity to enforce the right before the Act commences (see Craies on Statute Law, 6th edn (1963), at 392-393). We do not consider

that this countervailing principle of construction should be applied. An Act is to be construed as at the date of enactment and there is nothing in the words of the Limitation Act, 1969, to indicate that such a lengthy postponement of its commencement was contemplated by the Legislature. However, the lapse of time between assent to the Act and the commencement of the Act may not be without influence upon a court dealing with the relevant question of construction.

11. We are not aware that any situation in fact exists in which a vested right would be lost in consequence of section 6 being construed contrary to the intended effect of it. Indeed, it may be thought unlikely that any such situation exists. It is rarely that a claim for contribution is not dealt with by third-party proceedings in the principal action. In the relatively few cases in which advantage is not taken of the third-party procedure, and a separate action for contribution is brought by the tortfeasor after he has suffered judgment against him (or has had his liability otherwise established), it would be exceptional for him to delay, beyond the limitation period provided by section 26, the commencement of that action. Nevertheless, such a case may exist; and if section 6 is construed contrary to the intended effect of it, manifest injustice would result. We consider that the Limitation Act, 1969, should be amended to preclude this possibility; and that this receive the early attention of the Legislature.

12. We have considered what form the amendment should take. There are many questions still unresolved by judicial decision as to the construction of section 5 of the Law Reform (Miscellaneous Provisions) Act, 1946. We refer to some of them in paras. 155 and 157 of Appendix C to our first report. These unresolved questions make it difficult satisfactorily to relate section 26 of the Limitation Act, 1969, to a section which deals generally with minimum limitation periods in respect of causes of action which accrued before the commencement of the Act. We consider that it is preferable to incorporate in section 26 specific provisions as to the limitation period applicable to causes of action for contribution which accrued before the commencement of the Act and to exclude section 26 from the operation of section 6.

Failure to Plead Extinction of Right and Title

13. Generally as to statutes of limitation it has long been settled law that unless the defendant appropriately raises the defence that the cause of action is statute-barred, an action on that cause of action is not defeated by the statutory bar. Where the defence is raised in a court of pleadings such as the Supreme Court, by the pleadings, or, in a court where the rules of pleading do not apply, otherwise in accordance with the procedure of the court (for example, in a District Court, by giving notice of special defence-District Courts Act, 1912, s. 75), the defendant succeeds upon the defence unless the plaintiff establishes that the action is within time (*Hurst v. Parker* (1817) 1 Barn. & Ald. 92; 106 E.R. 34; *Wilby v. Henman* (1834) 2 Cr. & M. 658; 149 E.R. 924; *Beale v. Nind* (1821) 4 Barn. & Ald. 568; 106 E.R. 1044; *Cohen v. Cohen* (1929) 42 C.L.R. 91 at 97; *Australian Iron & Steel Ltd. v. Hoogland* (1962) 108 C.L.R. 471 at 488). If, however, the defendant does not so raise the defence, the plaintiff's claim is not defeated by the statutory bar even if, upon the facts which are proved at the trial, it appears that the defendant could successfully have relied upon the bar. In *Lee v. Rogers* (1 Lev. 110; 83 E.R. 322), decided in 1663, the plaintiff sued for a debt in respect of which the limitation period was, by the Limitation Act, 1623, six years. The report states:

“But by the Court, judgment was given for the plaintiff; for...tho' the cause of action appears to be 20 years before the action brought, yet the plaintiff shall recover, if the defendant does not plead the statute, which was made for the ease of those who would take advantage thereof, but the Court will not give the defendant advantage thereof if he will not plead it.”

In our first report we did not indicate any intention that these well-settled principles be affected; nor was that intended. If a defendant wishes to waive the benefit of the statute, he should be at liberty to do so.

14. However, a consequence of the extinction provisions contained in Part IV of the Limitation Act, 1969, may be that these principles do not apply to waiver of the benefit of the statutory extinction of right or title. If this be so the principles would lose all utility. If the right or title is extinguished, irrespective of the wishes of the parties, it is of no avail that the defendant may waive the statutory bar to remedy-for there remains no right or title in respect of which remedy can be given.

15. Some reference to history is necessary. In 1833 an innovation was effected in the general law of limitation of actions. Section 34 of the Imperial Real Property Limitation Act 1833 (3 & 4 Wm. IV c. 27) provided:

“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 avowson for the recovery whereof such rent, distress, action or suit respectively might have been made or brought within such period shall be extinguished.”

This section is the progenitor of the extinction sections of the Limitation Act, 1969, which make it a general rule that, on the expiration of the limitation period for a cause of action, the right and title to debt, damages or other money, or the right and title to property, which the cause of action would enforce is extinguished. Judicial decisions as to the effect of section 34 of the Imperial Real Property Limitation Act 1833 give rise to concern as to the effect of the extinction sections of the Limitation Act, 1969, upon the fundamental principles of limitation law to which we have referred (para. 13).

16. The significance, in respect of pleading, of the Imperial Real Property Limitation Act 1833 was considered by the Court of Exchequer in *De Beauvoir v. Owen* ((1850) 5 Ex. 166; 155 E.R. 72). The Court held that it was not necessary for the defendant to plead that the plaintiff's title was statute-barred. It was sufficient simply to deny generally the plaintiff's alleged right and title. In delivering the judgment of the Court Patteson J. said:

“The last payment was made on the 25th of January, 1825, for rent due on the 11th of October, 1824. The distress, in respect of which this action is brought, was made on the 13th of May, 1845. If the twenty years mentioned in the 2nd and 3rd sections [the general limitation period] had then expired, the right and title of the plaintiff....to the rent had become extinguished by sect. 34...The question was therefore properly raised on the issue of non tenuit [general denial of right and title], without pleading the lapse of twenty years specially, notwithstanding the saving for disabilities in sect. 16 [infancy, lunacy etc.]. The necessity to plead a Statute of Limitations applies to cases where the remedy only is taken away, and in which the defence is by way of confession and avoidance; not where the right and title to the thing is extinguished and gone, and the defence is by denial of that right.” ((1850) 5 Ex. at 176, 177; 155 E.R. at 77.)

17. It is not, however, certain that rules of court requiring that a defendant specifically plead the statutory extinction of the plaintiff's right and title would be effective to enable the defendant, by failing so to plead, to waive the extinction. We do not consider that past judicial decisions resolve this question. Dicta in judicial decisions and statements in standard treatises upon the effect in litigation of statutory extinction of right and title must be considered in the context of the rules of pleading and procedure in force at the time of their publication.

18. The danger inherent in failing to consider judicial and other statements in the light of the court procedure then in force is illustrated by the following statement in Darby and Bosanquet, *Statutes of Limitation*, 2nd edn (1893), at 299:

“In actions for the recovery of possession of land, which is the name now used for actions which were formerly called actions in ejectment, the plaintiff must recover by the strength of his own title and not by the weakness of that of the defendant, and must both allege by his pleading, and prove, not merely a right of property but a possessory title unbarred by the Statute of Limitations [The Imperial Real Property Limitation Act 1833]; if he does not both allege and prove this, he must fail, even though he may prove that the defendant has no title to the land.”

The principal case relied upon by Darby and Bosanquet in support of this statement is the decision of the House of Lords in *Dawkins v. Lord Penrhyn* ((1878) 4 App. Cas. 51).

19. In *Dawkins v. Lord Penrhyn* (supra) the plaintiff, in his bill (that is the formal statement of his claim), alleged facts which, if true, showed that before commencement of the proceedings, his right and title had become extinguished by the Imperial Real Property Limitation Act of 1833. The court procedure enabled the defendant by demurring to the bill to raise for determination the question of law of whether, on the facts alleged by the plaintiff, he was entitled to recover. This the defendant did. He demurred on one specific ground of alleged defect in the plaintiff's title “and on other grounds sufficient in law to sustain this demurrer” (id. 54). In support of the demurrer he relied, *inter alia*, upon the statutory extinction of the right and title; and he succeeded on this ground. The plaintiff objected to the defendant relying upon the statutory extinction. He argued that this ground should have been stated specifically in the demurrer. This argument failed. But it failed because of the rules of procedure then in force. As the Lord Chancellor, Earl Cairns L.C., said-

“In that state of things a demurrer was put in, a demurrer which, so far as regards the expression of the ground, mentioned another ground of demurrer; but the law has always been, and the law continues to be, that in addition to a specified ground of demurrer you may, at the Bar, allege any other ground of demurrer which appears upon the face of the Bill.” (At 58).

It is in this context that dicta in that case must be considered—for example the following passage in the Lord Chancellor's speech—

“With regard also to the Statute of Limitations as to personal actions, the cause of action may remain even although six years have passed. It cannot be predicated that the Defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events do not do so; therefore you must wait to hear from the Defendant whether he desires to avail himself of the defence of the Statute of Limitations or not. But with regard to real property it is a question of title. The Plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations [the Imperial Real Property Limitation Act 1833] with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished . . . Therefore, *if upon the face of the bill the Plaintiff states that the period allowed by statute has expired*, he states in law that his title is extinguished..... It is therefore clearly a case in which a demurrer . . . is applicable as a mode of defence...” (at 58-59: emphasis supplied).

Lord Penzance said—

“The Statute of Limitations as applied to debts is a statute that does not put an end to the debt, it merely prevents the remedies; and it may be taken advantage of, or not taken advantage of, according to the volition of the Defendant. But the Statute of Limitation [the Imperial Real Property Limitation Act 1833] applying to real property as has been pointed out, does more than that; it goes to the root of the Plaintiff's claim...If the result of the statute is, that, upon the face of the claim as stated, the title is no longer in the Plaintiff, surely that is a matter which can be raised by demurrer.” (At 64).

20. *Dawkins v. Lord Penrhyn* (supra) did not decide that a defendant who does not wish to take advantage, in litigation, of the statutory extinction is unable to waive the advantage of the extinction. Despite the generality of the dicta contained in the case, the decision turned upon the rules of pleading and procedure then in force. Examination of other cases dealing with the statutory extinction effected by the Imperial Real Property Limitation Act 1833 shows either that rules as to pleading and procedure were fundamental to the decision, or at least, that these rules were of such importance that any pronouncement as to substantive law was so “secreted in the interstices of procedure” (Maine, *Early Law and Custom*, new edn (1891), at 389) as not to be capable of clear separation.

21. The absence of direct authority as to what course a court should take where a defendant does not wish to take advantage of the statutory extinction of right and title is not surprising. Until 1962 the English rules of court (Rules of the Supreme Court 0. 21 r. 21) permitted a defendant in possession of land simply to plead that he was in possession of the land sought to be recovered; and this put the plaintiff to proof of all the elements necessary to establish his claim to possession—and the plaintiff had to recover on the strength of his own right and title. The obvious advantages of the plea of possession ensured that the plea was generally used. But where the plea was used it raised, as an issue for the court's determination, statutory extinction of the plaintiff's right and title (*De Bevoir v. Owen*, supra. See para. 16).

22. The present English rule (Rules of the Supreme Court 0. 18 r. 8) provides—

“8.(1) A party must in any pleading subsequent to a statement of claim plead specially any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality—

- (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to paragraph (1), a defendant to an action for the recovery of land must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant is not sufficient.”

Paragraph (2) of this rule replaced the earlier rule (O. 21 r. 21) which permitted the general issue to be raised by a plea of possession. The English Supreme Court Practice accepts that it follows that in actions for recovery of land the Statute of Limitations, with the consequential extinction of right and title, must be specifically pleaded (The Supreme Court Practice (1970) at 255).

23. The rules contained in the Fourth Schedule to the Supreme Court Act, 1970, together with any amendments or additions made by the Rule Committee established by that Act, will commence in the relatively near future. The announced intention of the Government is that they will commence on 1st January, 1972. These rules adopt the substance of the present English rule O. 18 r. 8 (see *Part 15* rules 13 and 15).

24. What, however, would be the position if in the course of the trial it emerges that the right or title has been extinguished by the Limitation Act, 1969 even though the defendant has not pleaded the extinction as required by the rules of Court? Would the Court refuse to grant a plaintiff the relief to which otherwise he would be entitled? We do not think so. Litigation in New South Wales and in other places where the English system has been inherited is conducted under the adversary system. It is for the parties to the litigation to choose the issues on which the forensic battle will be decided-and rules as to pleadings and procedure select and define these issues. The court is not required to exercise an inquisitorial function (see the remarks of Diplock L.J. in *Thoday v. Thoday* [1964] P. 181 at 196-197). There are, of course, limits to this freedom of choice. These limits are set by statute or the inherent jurisdiction of courts to prevent abuse of the court process. Thus if a transaction is made illegal by statute, a court must give effect to the statute, despite the pleadings, if the facts proved necessarily disclose the illegality. “[I]llegality, once brought to the attention of the court, overrides all questions of pleading.” (*Belvoir Finance Co. Ltd v. Harold G. Cole & Co. Ltd* [1969] 1 W.L.R. 1877 per Donaldson J. at 1881.) No question of illegality arises in the present case. Nor does any question arise as to abuse of process of the court-such as the parties, by their pleadings, seeking to have the court determine rights upon avowedly fictitious facts (*Adams v. Naylor* [1946] A.C. 543; *Royster v. Cavey* [1947] K.B. 204). A question does arise, however, as to whether the provisions of the Limitation Act, 1969, as to extinction of right and title, are such that waiver of the benefit of them, by pleadings or otherwise, would be contrary to public policy as evinced by the statute. If waiver would be contrary to public policy, it would be the duty of the court to give effect to the statute-notwithstanding the wishes of the parties.

25. As to public policy:

“Speaking generally, public policy may be said to be policy in the observance of which the welfare of the community is involved (*Wilkinson v. Osborne* (1915) 21 C.L.R. 89 at p. 97). Whenever a statute creates new rights, public policy in a broad sense is always involved, because the legislature must be assumed to have thought it desirable in the public interest that the rights be brought into existence. But it does not necessarily follow that an agreement to release or abandon rights so conferred should be regarded as opposed to public policy in general or even to the policy of the particular Act. As was pointed out in *Admiralty Commissioners v. Valverda (Owners)* ([1938] A.C., at p. 185), ‘the problem must be solved on a consideration of the scope and policy of the particular statute.’” (*Lieberman v. Morris* (1944) 69 C.L.R. 69 per Rich J. at 84.)

These remarks are applicable, *mutatis mutandis*, to waiver by pleading of the benefit of a statutory extinction of right and title. The question is whether the provisions of the particular Act evince such a public policy as “to show with reasonable certainty that the legislature intended to prevent” waiver by an individual of the benefit of them (*Lieberman v. Morris*, supra, per Latham C.J. at 82).

26. We consider it evident that the policy underlying the provisions of the Limitation Act, 1969, as to extinction of right and title is elimination of the uncertainty which flows from the fact that, in the absence of such provisions, the expiration of a statutory limitation period would leave untouched the legal right and title even though it bars legal remedy for that right and title. The policy is that if the remedy is barred by statute, the relevant right and title ought to be extinguished. Is it inconsistent with this policy that an individual who would derive benefit from this extinction be at liberty to waive the benefit? We do not think so. It is well settled that an individual is at liberty to waive the advantage of the bar to the legal remedy. He may do so in litigation by not raising, by pleadings or otherwise in accordance with the procedure of the court, the statutory bar to legal redress. Indeed, there may be

an enforceable contract not to plead or otherwise rely upon the statutory bar-and the practical effect of such a contract is the same as a waiver by the promisor of the benefit of the bar (see generally Franks, Limitation of Actions (1959), at 19-20). We consider that the statutory scheme is that extinction of right and title is to be a corollary of the bar to remedy. It would be difficult to infer that the legislative intent was that although a defendant may waive the benefit of the bar to remedy which arises upon expiration of the relevant limitation period, he cannot waive the benefit of the statutory extinction of the plaintiff's right and title.

27. There is, however, room for contrary argument. It could be asserted that a policy of the Limitation Act, 1969, to be inferred from its provisions, ' is that in the public interest, and not merely in the interest of individuals, there should be security of possessory titles against stale claims; and, accordingly, that it would be contrary to public policy for the statutory extinction to be capable of waiver. Such an argument would have some cogency if the extinction provisions were limited to title to land or chattels. But they are not so limited. They extend, for example, to the right to obtain damages for tort (s. 63) ; and the argument is not tenable in respect of such a right. The uniformity of the language of the extinction provisions does not allow, in our view, a construction which would not permit waiver of extinction of right and title to land or goods.

28. Moreover, even if it would be contrary to the legislative intent for the statutory extinction to be capable of being waived, it would be a very rare case in which, unless an issue as to extinction were raised, all the facts necessary to require a court to apply the statute would appear from the evidence. The relevant statutory period may be extended, for example, by a period of disability, arising from illness or otherwise (s. 52: s. 11 (3)); and it would be unlikely that the evidence would exclude the possibility that the period was so extended. A court will not refuse relief, where no issue is raised as to contravention of public policy, unless it is satisfied that all necessary facts are before it (*Rawlings v. General Trading Co.* [1921] 1 K.B. 635; *North Western Salt Co. v. Electrolytic Alkali Co.* [1913] 3 K.B. 422, on appeal [1914] A.C. 461; *Lipton v. Powell* [1921] 2 K.B. 51).

29. Nevertheless we do not consider it prudent to leave room for doubt; and dicta in the cases upon the Imperial Real Property Limitation Act 1833 and the possibility that it may be held that waiver of the advantage of the statutory extinction would be contrary to public policy, do leave room for doubt. Amendments to rules of court would not suffice to remove these doubts as to curial proceedings. The statutory extinction, is, moreover, relevant to non-curial proceedings-for example, arbitration pursuant to an arbitration agreement.

30. We recommend that the Limitation Act, 1969, be amended to the effect that where in curial or arbitral proceedings a question as to the statutory extinguishment arises, a party to the proceeding shall not have the benefit of the extinction unless he pleads or otherwise specifically relies upon the extinction.

31. It may be desirable to deal more specifically, in the rules of the Supreme Court, as to the pleading of the statutory extinction. This is a matter within the province of the Rule Committee constituted under the Supreme Court Act, 1970. In respect of District Courts, however, it is doubtful whether section 75 of the District Courts Act, 1912, extends to requiring notice to be given of intention to rely upon the statutory extinction as distinct from the statutory bar to the remedy. We recommend that the section be amended so as to make it clear that the giving of notice is required in respect of the extinction.

Adequacy of the Provisions as to Extinction of Right and Title

32. Section 34 of the Imperial Real Property Limitation Act 1833 provided, as to land, that at the determination of the limitation period for recovery of possession, the title of the person who had the right to recover "shall be extinguished" (see *para.* 15). But, unless injustice were to result, some qualification of the ambit of the extinction was necessary. This qualification was "construed" into the Act, in 1962, by the House of Lords in *St. Marylebone Property Co. Ltd v. Fairweather* ([1963] A.C. 510). In that case the title of a lessee became "extinguished" by twelve years adverse possession of part of the land demised. But, as against whom was the lessee's title extinguished? Lord Radcliffe (with whom Lord Guest concurred) posed the problem this way-

"On one view...the right or title extinguished is coterminous with the right of action the barring of which is the occasion of the extinguishment. This would mean that, when a squatter dispossesses a lessee for the statutory period, it is the lessee's right and title as against the squatter that is finally destroyed *but not his right or title as against persons who are not or do not take through the adverse possessor*. On the other view..... the lessee's right and title to the premises becomes extinguished *for all purposes and in all relations*,

so that, as between himself and the lessor, for instance, he has thereafter no estate or interest in the land demised" (at 538: emphasis supplied).

The House of Lords adopted the first of these competing views. Adoption of the second of these views would have led to absurd consequences (see per Lord Radcliffe at 538-540; per Lord Denning at 545). For example-

"If the lessee's estate or title is destroyed for all purposes, there disappears with it any privity of estate between him and the landlord. If privity of estate is gone so are gone the covenants on the part of the lessee which depend on such privity: If the current lessee is an assignee of the lease, as he is likely to be if the term in question is a long term of years, the landlord will find himself deprived by the act of the legislature of the right to enforce in respect of the squatter's portion of the land a set of covenants of value to him -and he will have been so deprived without compensation or any necessary notice that the event that brings it about has in fact taken place. The squatter himself, on the other hand, is entitled to remain in possession against the landlord without personal liability for rent or covenant. It seems a strange statutory scheme" (per Lord Radcliffe at 539).

33. We agree that the extinction should be qualified as stated by the House of Lords. But this qualification should not depend upon a judicial gloss upon the unequivocal word "extinguished". Accordingly the Limitation Act, 1969, provides, where appropriate, that the right and title is extinguished "as against the person against whom the cause of action formerly lay and as against his successors" (s. 63 (1) ; s. 64 (1) ; g. 65 (1)).

34. The question has been raised whether this statutory qualification to extinction of right and title does not impair security of possessory titles to goods and to land. We do not think that it does.

35. The question as to goods may be posed by contrasting two supposed cases. Suppose that goods of A are converted by B and then sold by B to C who, in turn, sells them to D who takes delivery. In that case, upon the expiration of the six year period within which A could sue B in conversion, D's title is secure as against A. D is a "successor" of B and, by section 65 (1), A's title has become extinguished as against B "and his successors". But suppose, on the other hand, goods of A are converted by B, then further converted by C who then sells them to D who takes delivery. In this case is D's title, upon the expiration of the six year period within which A could sue B in conversion, secure as against A?-for D is not a "successor" of B. It is. This follows from section 21 of the Act which provides that where there are successive acts of conversion, an action in P 66835-2 Conversion against any of the converters is barred at the expiration of a period of six years running from the date of the first of the conversions. Therefore at the expiration of six years from the date of the conversion by B, an action in conversion by A against D is statute-barred also-because D was guilty of conversion of A's goods. Hence A's title is extinguished as against D and his successors (s. 65 (1)).

36. As to titles to land, the position is similar. Time commences to run when adverse possession is taken of the land (s. 28; s. 38 (1)). If B takes adverse possession of A's land but is, in turn, wrongfully dispossessed by C who sells to D, then the title of D is secure as against A upon the expiration of the limitation period (12 years-s. 27 (2)) for A bringing proceedings for recovery against B. This is not because D is a "successor" of B but because by section 38 (2) of the Act, the cause of action to recover the land from D accrues when B took adverse possession. This cause of action becomes statute-barred upon the expiration of twelve years from that date (unless during that time it ceases to be in adverse possessions. 38 (3) and A's title is, as against D and his successors, extinguished (s. 65 (1)).

Recovery of Possession of Goods before Expiration of the Limitation Period

37. Section 65 (1) of the Act, when read with Schedule Four to which it refers, provides that on the expiration of the limitation period for bringing an action on a cause of action for conversion or detention of goods, the title of the person having the cause of action is extinguished as against the person against whom the cause of action formerly lay and as against his successors.

38. Where, before the expiration of a limitation period, a cause of action ceases to exist, the limitation period ceases to have any effect. For example, a cause of action to recover possession of land ceases to exist upon the person having that cause of action recovering the land. But a cause of action in conversion or detinue does not cease to exist upon recovery of the goods. Where the goods have been restored to the owner after the conversion, the owner may nevertheless bring an action in conversion to recover damages-although the

damages are reduced by the value of the goods at the time when the owner got them back (*Solloway v. McLaughlin* [1938] A.C. 247, P.C., at 257-259; *Penfolds Wines Pty Ltd v. Elliott* (1946) 74 C.L.R. 204, per Williams J. at 243). Likewise, although in an action of detinue return to the owner of the goods is an answer to the claim for the return of the goods or payment of their value, it is no answer to a claim or for damages for the wrongful detention (*Williams v. Archer* (1847) 5 C.B. 318; 136 E.R. 899; *Strand Electric & Engineering Co. Ltd v. Brisford Entertainments Ltd.* [1952] 2 Q.B. 246).

39. It therefore follows that if section 65 (1) is read literally, without regard to the obvious purpose of it, the result would be that if A's goods are wrongfully withheld from him by B, so that a cause of action for conversion or detention of the goods accrued to A, A's title to the goods would, upon the expiration of six years from the accrual of the cause of action, be extinguished as against B and his successors-even though B has, in the meantime, restored the goods to A.

40. We do not consider it likely that a court would so construe section 65 (1). But we consider that it would be prudent to remove the verbal difficulty.

41. We recommend that section 65 be amended so as to provide that the section does not apply where the cause of action is for conversion or detention of goods and, before the expiration of the limitation period, the person having that cause of action recovers possession of the goods (cf. Limitation Act, 1939 (U.K.), s. 3 (2)).

Draft Bill and Notes Thereon

42. Appendix A to this report sets forth our recommendations in the form of a draft Bill. Notes upon the draft Bill appear as Appendix B.

7th June, 1971.

R. G. REYNOLDS,

Chairman.

COLIN R. ALLEN,

Commissioner.

REPORT 12 (1971) - SECOND REPORT OF THE LAW REFORM COMMISSION ON THE LIMITATION OF ACTIONS

Appendix A

No. 1971
A BILL

To clarify and amend the law relating to the limitation of actions; and for this purpose to amend the Limitation Act, 1969, and the District Courts Act, 1912.

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

Short title and commencement.	1. (1) This Act may be cited as the "Limitation (Amendment) Act, 1971". (2) This Act shall be deemed to have commenced on the first day of January, 1971.
Amendment of Act No. 31, 1969.	2. The Limitation Act, 1969, is amended-
Sec. 3 (Division.)	(a) by omitting from section three "68" and by inserting in lieu thereof "68A."
Sec. 6 (Transition.)	(b) by omitting section six and by inserting in lieu thereof the following new section:-
Transition.	6. (1) Subject to Division 3 of Part III of this Act, nothing in this Act-
cf. 2 & 3 Geo. 6, c. 21, s. 33(b).	(a) affects an action brought or arbitration commenced before the commencement of this Act;
cf. 2 & 3 Geo. 6, c. 12, s. 33(a).	(b) enables an action or arbitration to be commenced or maintained which is barred immediately before the commencement of this Act by an enactment or an Imperial enactment repealed or amended by this Act;
	(c) affects the extinction of the title of a person to land under section 34 of the Imperial Act shortly entitled the Real , Property Limitation Act, 1833, as adopted , and applied by the Act passed in the eighth year of the reign of King William the Fourth, number three, where the period limited by that Imperial Act, as so adopted and applied, to that person for making an entry or distress or bringing any action or suit to recover the land has commenced to run before the commencement of this Act; or
	(d) prevents the commencement and maintenance of an action or arbitration within the time allowed by an enactment or an Imperial enactment repealed or amended by this Act on a cause of action which accrued before the commencement of this Act, but this paragraph has effect subject to paragraphs (b) and (c) of this section.
	(2) This section does not apply to a cause of action for contribution to which section 26 of this Act applies.
Sec. 26 (Contribution)	(c) by omitting from subsection one of section twenty-six "An action" and by inserting

between tort-feasors)

in lieu thereof "Subject to subsections (5) and (6) of this section an action"

(d) by inserting next after subsection four of section twenty-six the following new subsections:-

(5) Nothing in -this Act prevents the maintenance of an action commenced, before the commencement of this Act, on a cause of action for contribution under subsection (1) of section 5 of the Law Reform (Miscellaneous Provisions) Act, 1946, where the action is not barred immediately before the commencement of this Act by the Imperial Act shortly entitled the Limitation Act, 1623.

(6) Where a cause of action for contribution under subsection (1) of section 5 of the Law Reform (Miscellaneous Provisions) Act, 1946, has accrued before the commencement of this Act and is not, immediately before the commencement of this Act, barred by the Limitation Act, 1623, nothing in this Act prevents the commencement and maintenance of an action on that cause of action within the time allowed by the Limitation Act, 1623.

Sec.65 (Property.)

(e) by inserting next after subsection two of. section sixty-five the following new subsection:-

(3) This section does not apply where the cause of action is for conversion or detention of goods and, before the expiration of the limitation period fixed by or under this Act for the cause of action, the person having the cause of action recovers possession of the goods.

(f) by inserting next after section sixty-eight the following new section :-

Allegation of extinction.

68A. (1) Where in proceedings in a judicial tribunal a question arises as to extinction under this Division of a right or title, a party to the proceedings shall not have the benefit of the extinction unless he pleads or otherwise specifically claims in the proceedings -that the right or title has been so extinguished.

(2) In this section "judicial tribunal" means a court or other person authorised by law or by agreement to determine the question so as to bind the party concerned.

3. The District Courts Act, 1912, is amended-

Sec. 75.(Notice of equitable and special defence.)

(a) by omitting from paragraph (c) of subsection one of section seventy-five "and to claim, and" and by inserting in lieu thereof "or to claim, or";

(b) by omitting from the same paragraph "Statute of Limitations" and by inserting in lieu thereof "Statute of Limitations (whether or not effecting extinction of any right or title)".

Appendix B

NOTES ON LIMITATION (AMENDMENT) BILL

Section 1

1. The purpose of the amendments to the Limitation Act, 1969, is to clarify the effect of provisions of that Act, so as to ensure that the effect of them accords with the intent of the legislation. The amendments are retrospective to the commencement of that Act. The Limitation Act, 1969, was proclaimed to commence on the first day of January, 1971 (*Government Gazette* No. 106 of 21st August, 1970).

Section 2 (a)

2. No comment is necessary.

Section 2 (b)

3. Section 2 (b) substitutes a new section 6 for section 6 as enacted by the Limitation Act, 1969. The substantial difference between those sections is that -the substituted section omits the provision that the section is subject to section 26 and directly provides that the section does not apply to a cause of action for contribution to which section 26 applies (see paras. 8, 11 and 12 of this report).

Sections 2 (c), 2 (d)

4. Paragraphs (c) and (d) of section 2 amend section 26 of the Limitation Act, 1969, by incorporating in that section specific provisions in respect of contribution actions under section 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1946, where, immediately before the commencement of the Act, the cause of action was not already statute-barred. The effect of these amendments is that a person who has, at the commencement of the Limitation Act, 1969, a cause of action for contribution under section 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1946, cannot be prejudiced, in suing upon the cause of action, by the coming into operation of the Limitation Act, 1969.

5. Section 26 of the Limitation Act, 1969, as originally enacted or as amended if our proposal is implemented, does not, except for its own purposes, alter the date of accrual of a cause of action for contribution. This requires explanation. On the present state of judicial decisions it is uncertain whether contribution under section 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1946, is recoverable only by a tortfeasor whose liability has been ascertained by judgment in an action against him (see paras. 155 and 157 of Appendix C to our first report). The question whether a tortfeasor whose liability has been established by arbitral award, or who has agreed to make payment in settlement of the claim against him, can recover contribution under that section, is not finally resolved (*Brambles Constructions Pty Ltd v. Heimers* (1966) 114 C.L.R. 213; *George Wimpey & Co. Ltd v. British Overseas Airways Corporation* [1955] A.C. 169; *Bitumen and Oil Refineries (Australia) Ltd v. Commissioner for Government Transport* (1955 (92) C.L.R. 200 at 211). Section 26 (2) of the Limitation Act, 1969, provides (inter alia) that the cause of action accrues, for the purposes of the two year limitation period provided by section 26 (1) (a), on the date of the making of such an arbitral award or, as the case may be, such a settlement agreement. This, however, does not alter the accrual date for other purposes. Resolution of the question whether a tortfeasor, whose liability has been established by arbitral award or who has agreed to make payment in settlement, can recover contribution, under section 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1946, falls outside the reference to us. Accordingly section 26 (4) of the Limitation Act, 1969, provides that nothing in the section affects the construction of section 5 of the Law Reform (Miscellaneous Provisions) Act, 1946. If the courts finally resolve the question by deciding that on the proper construction of that section, an arbitral award or settlement agreement can found a cause of action for contribution, the date of accrual of the cause of action will, for the purposes of section 26, be as provided by section 26 (2) of the Limitation Act, 1969. It is unlikely that, on that construction, the courts would arrive at an accrual date which differs from that provided by section 26 (2) of the Limitation Act, 1969. Section 26 (2), however, leaves no room for doubt as to what is, on that

construction, the accrual date for the purposes of the section. The court may, on the other hand, finally determine that an arbitral award or settlement agreement cannot found a cause of action for contribution under section 5 (1) of the Act of 1946. In that event the references in section 26 (2) to arbitral award and settlement agreement are otiose. Section 26 (2) does not create any new cause of action; and it is expressly provided by section 26 (4) that nothing in section 26 affects the construction of section 5 of the Law Reform(Miscellaneous Provisions) Act, 1946.

Section 2 (e)

7. See paras. 37-41 of this report.

Section 2 (f)

8. Section 2 (f) inserts a new section, section 68A, in the Limitation Act, 1969. As to this section see paras. 13-30 of this report.

9. Section 68A (1) provides that a party to judicial proceedings must, if he is to have the benefit of the extinction, plead or otherwise specifically rely upon it. In most courts, the rules of pleading or procedure of the court will require that the extinction be pleaded or at least that notice of intention to rely upon the extinction be given. Where rules of pleading or procedure do not require a party to take such a course, the party will not have the benefit of the extinction unless he specifically claims, in the proceedings, that the relevant right or title has been extinguished. He may choose not to do so.

10. Section 68A (2) gives an extended meaning to "judicial proceedings". This is necessary because it is not always clear in law whether a tribunal is a court; and also because it is desirable to extend the operation of section 68A (1) to proceedings before such a person as an arbitrator who is not a court, but who is empowered, pursuant to the arbitration agreement, to determine the relevant question by his award.

11. The consequences of a party to judicial proceedings not specifically relying upon the extinction may extend to persons other than the parties. Judgment in court proceedings, or an award in arbitral proceedings (*Fidelitas Shipping v. VIO Exportchleb Co. Ltd* [1965] 2 All E.R. 4), and any estoppel arising from the proceedings (*Jackson v. Goldsmith* (1950) 8t C.L.R. 446: *Mraz v. The Queen* [No. 2] (1956) 96 C.L.R. 62: *Somodai v. Australian Iron and Steel Ltd.*[1961] S.R. 305) bind not only the parties but their "privies". But successors in title are not necessarily "privies" for this purpose.

"In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to show (apart from his taking with a notice of a pending action) that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment, or at least to the commencement of the proceedings, and that the judgment was one affecting the property to which title is derived. Purchasers of land are not estopped by proceedings commenced after the purchase; and a judgment obtained against the mortgagor of land after completion of the mortgage, setting aside his purchase of the land on the ground of fraud, is not even evidence against the mortgagee who was not a party to the action." (Halsbury's Laws of England, 3rd edn. (1956), Vol. 15 at 198).

12. A case tried in a foreign court may be so connected with New South Wales that, applying the common law principles of the conflict of laws, the court would determine the rights of the parties in accordance with the substantive law of New South Wales (*lex causae*). The question could then arise whether the foreign court would apply section 68A. This would depend upon whether section 68A is construed as creating a substantive qualification of the extinction of right and title--even though it refers to matters of procedure. If it is a substantive qualification, the qualification would be applied by the foreign court--because (he qualification is part of the substantive law of New South Wales (*lex causae*). If it is not a substantive qualification but is merely a provision as to procedure, the foreign court would not apply section 68A. It would apply its own rule's of procedure. The law is in so confused a state as to the principles for determining whether a provision is substantive or merely procedural that the question cannot be answered with confidence (see generally Dicey and Morris, *The Conflict of Laws*, 8th edn. (1967), at 1089-1109: Nygh, *Conflict of Laws in Australia* (1968), at 239-257: *Pedersen v. Young* (1964) 110 C.L.R. 162). However, if a person having a cause of action chooses to sue in a foreign court, it is he who raises the question. The question does not arise if he sues in a court of New South Wales.

Section 3

13. Section 75 of the District Courts Act, 1912, provides (inter alia) that-

“(1) No defendant in a District Court shall-

(c) be allowed to set up by way of defence, and to claim, and have the benefit of...

(iv) any Statute of Limitations...

unless notice of such defence, as directed by the rules of court, is given to the registrar.”

Some doubt as to whether this provision is adequate to require notice to be given of statutory extinguishment of right or title arises from dicta in cases concerning the Imperial Real Property Limitation Act 1833 which suggests that the extinction is not a matter of “defence” as the plaintiff has the onus of proving a title which has not been extinguished. Section 3 would amend section 75 of the District Courts Act, 1912, so as to remove any doubt as to the necessity of giving the notice.