15

SCOTTISH LAW COMMISSION

(SCOT. LAW COM. No. 15)

Reform of the Law Relating to Prescription and Limitation of Actions

Laid before Parliament
by the Secretary of State for Scotland
and the Lord Advocate
under section 3(2)
of the Law Commissions Act 1965

EDINBURGH
HER MAJESTY'S STATIONERY OFFICE
10*s.* 0*d.* [50p] NET

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Hon Lord Kilbrandon LL D, *Chairman*
Professor A E Anton MA LL B
Professor J M Halliday MA LL B
Mr A M Johnston QC BA LL B
Professor T B Smith QC DCL LL D

The Secretary of the Commission is Mr A G Brand MBE MA LL B. Its offices are at the Old College, University of Edinburgh, South Bridge, Edinburgh EH8 9BD.

SCOTTISH LAW COMMISSION

To: THE RIGHT HONOURABLE GORDON CAMPBELL MC MP
Her Majesty's Secretary of State for Scotland, and

THE RIGHT HONOURABLE NORMAN R WYLIE VRD QC MP
Her Majesty's Advocate

In accordance with the provisions of section 3(1)(*b*) of the Law Commissions Act 1965, we submitted on 16 September 1965 our First Programme for the examination of several branches of the law of Scotland with a view to reform. This Programme, which was approved on 21 October 1965, included a proposal for examination of Prescription and the Limitation of Actions.

We have the honour to submit our proposals for the reform of this branch of the law of Scotland.

C J D SHAW
Chairman

7 August 1970

Contents

SCOTTISH LAW COMMISSION

Prescription and Limitation of Actions

PART I

Introduction

1 Our First Programme of reform was approved on 21 October 1965. Paragraph 15 of that Programme contained the following statement, 'The various kinds of prescription of rights and obligations, some closely connected with the law of evidence and the law of obligations, and therefore requiring consideration in relation to these topics, are based upon very old statutes and the whole law of prescription, positive as well as negative, now stands in need of clarification, co-ordination and modernisation. As a cognate subject we propose to examine the law relating to the limitation of actions with special reference to the Law Reform (Limitation of Actions) Act 1954 and Part II of the Limitation Act 1963. It should be possible to have the examination of these topics completed independently, and long before the larger subjects of evidence and obligations have been finally dealt with.' This forecast has proved correct, although the work on the subject-matter of this Report has taken longer than anticipated.

2 On 5 November 1968 we issued our Memorandum No 9 on this subject. The Memorandum was circulated widely. Comments on and criticisms of the proposals in it were made by many organisations and individuals, listed in Appendix A. In some cases further consultations took place as a result of comments and criticisms received. We are grateful to all those who have assisted us by giving their views on the Memorandum. Some of the suggestions submitted to us are discussed more fully later in this Report.

3 In paragraph 5 of the Memorandum we invited views with regard to prescription in relation to title to corporeal moveables or incorporeal rights. It has been suggested that it would be useful to clarify the law on this subject, with particular reference to disposal of lost property and acquisition of stolen property. We have come to the conclusion that the acquisition of title to moveables and incorporeal rights merits a separate study, on which we are now engaged.

4 In paragraphs 6 and 7 of the Memorandum we referred briefly to prescription of crimes. We pointed out that there is no general prescription of crimes in the law of Scotland (*Sugden v HM Advocate* 1934 JC 103) and that the numerous statutory time-limits upon the bringing of criminal proceedings seem to be governed less by general legal principle than by the expediency of having a time-limit in relation to the particular offence. We received a comment which suggested the introduction of a statutory prescription of twenty years in respect of crimes, with the exception of crimes against the person. Since there was no widespread demand for such a prescription, we have not examined prescription of crimes further in connection with this Report.

5 A Committee of Experts set up by the Council of Europe is seeking to draft a set of Rules on 'extinctive prescription' in civil and commercial matters. In Scottish terms, 'extinctive prescription' comprises the long negative and septennial prescriptions and limitation of actions. Although the work of the Committee of Experts is not yet complete, we have found it helpful in discharging our duty under s. 3(1)(*f*) of the Law Commissions Act 1965 to obtain information as to the legal systems of other countries. Where we have thought it appropriate, we have drawn upon the proposals of the Committee of Experts, particularly with regard to our proposed new short negative prescription and to the rules for calculating prescriptive periods. We are grateful to the Faculty of Advocates and the Law Society of Scotland for their help in informal consultations on various matters which arose in connection with the work of the Committee of Experts.

6 The United Nations Commission on International Trade Law (UNCITRAL) has also concerned itself with the subject of time-limits and has set up a Working Group to study it. The Working Group has not yet progressed sufficiently to produce firm conclusions which would assist our consideration of the matter.

7 This Report sets out, in relation to each branch of its subject, our understanding of the present law, the result of our consultations and discussions and our recommendations as to what the law should be.

8 As we later indicate, the law of prescription and limitation of actions is largely statutory. Many of the statutes are old and are complicated by subsequent amendment or judicial interpretation. We suggested in paragraph 96 of the Memorandum that the whole of the law relating to prescription and limitation of actions should be brought together in a comprehensive statute. This suggestion seems to have found favour with those who commented on the Memorandum. The statute would deal with the positive prescription, the long negative prescription, a new short negative prescription and limitation of actions arising from personal injuries.

We recommend that the law of Scotland relating to prescription and limitation of personal injury actions, both common law and statutory, should be stated in one comprehensive statute.

PART II

Positive Prescription

9 Positive or acquisitive prescription or usucaption relates to the fortification by possession of the title to heritable property or rights. In the case of servitudes and rights of way, it operates either to create the right or to make good a defect in the grant of a right. Most legal systems have rules whereby possession of land for a period of years validates the possessor's title of ownership or creates some form of possessory title. In Scots law the rules of positive prescription do not protect a possessor of property without title but operate to perfect a title which is defective although *ex facie* valid.

EXISTING LAW

10 While there are traces of a common law doctrine of prescription in relation to servitudes and rights of way, and in relation to special subjects such as church benefices, for all practical purposes the law of positive prescription relating to heritage is wholly statutory, the principal statutes on which it is based being the Prescription Act 1617 (c. 12), the Conveyancing (Scotland) Act 1874 s. 34, the Conveyancing (Scotland) Act 1924 s. 16 and the Conveyancing and Feudal Reform (Scotland) Act 1970 s. 8.

Heritable Property

11 (1) The prescription applies to heritable property and heritable rights based on recorded titles, including rights to salmon fishings and minerals. For the prescription to operate there must be an *ex facie* valid irredeemable title duly recorded in the appropriate Register of Sasines followed by possession for the prescriptive period. The prescription does not apply in cases where the title in question is a forgery or has a patent intrinsic nullity such as a defect in the statutory solemnities of execution. It is no objection to the plea of prescription that the title proceeds from a party who himself had no title to the lands in question or no right to dispose of them, and a party may plead prescription even in the knowledge that he has been in possession on a defective title.

(2) The period of the prescription is generally now ten years (Conveyancing and Feudal Reform (Scotland) Act 1970 s. 8). The 1970 Act does not reduce the prescriptive period in relation to claims against the Crown to the ownership of salmon fishings or the foreshore, where the period remains twenty years. In the cases of both registered and unregistered leasehold titles, the period is still forty years.

(3) The prescription excludes all enquiry into the previous titles and rights to the lands, thereby protecting the holder of the prescriptive title against any person alleging a better title. It may determine the extent of an estate where there is an ambiguity or lack of specification in the title. It may merge a title of property (*dominium utile*) in the higher title of superiority (*dominium directum*) and thus effect consolidation. On the other hand,

prescription does not fortify a title to subjects which have been possessed for the prescriptive period when the title clearly excludes these subjects.

(4) The prescription may be interrupted judicially or extra-judicially. Extra-judicial interruption may be effected by demanding and obtaining or by effectually assuming possession of the subjects, or by notarial protest. Judicial interruption may be effected by citation, duly registered, by an action brought into court, or by the presenting of, or concurring in, a petition for sequestration, or the lodging of a claim in a sequestration or in a liquidation. The running of the prescription is not affected by the fact that the party against whom the prescription is pleaded is in pupillarity or minority or is under legal disability.

Servitudes and Rights of Way

12 (1) The positive prescription also applies to servitudes and to rights of way. Positive servitudes may, and negative servitudes must, be constituted by express grant, and prescription operates to perfect any defect in the grant. Positive servitudes may also be created by exercise of the right for the prescriptive period without any antecedent grant and rights of way are also created by use for the prescriptive period without written grant.

(2) The period of the prescription in the case of servitudes and rights of way is forty years.

(3) The effect of the prescription following upon a written grant of a servitude right is to exclude enquiry into the title of the granter. The terms of the grant determine the measure of the right but the extent of the possession during the prescriptive period may be decisive where there is any ambiguity of expression in the grant. In the case of positive servitudes created only by use for the prescriptive period and rights of way, possession during the prescriptive period constitutes the right and determines its extent.

(4) The prescription may be interrupted judicially or extra-judicially. Judicial interruption may be effected by citation duly registered or by an action brought into court. Extra-judicial interruption may be effected by preventing the exercise of the right, or by notarial protest. When a public right of way has been established, acquiescence in an effective interruption must continue for the prescriptive period in order to extinguish the right. In contrast to the situation of the law on positive prescription of heritable property, the pupillarity, minority or legal disability of the party against whom the prescription is pleaded are available as defences to the plea of prescription.

CRITICISMS AND SUGGESTIONS

Heritable Property

FOUNDATION OF PRESCRIPTIVE TITLE

13 (1) In paragraph 16 of the Memorandum we pointed out that it may seem strange that, on the one hand, a possessor in bad faith, holding on a title from a person who to his knowledge could not lawfully grant it, should have the benefit of the prescription, while, on the other hand, a possessor

in good faith, holding on a title which suffers from a patent but not serious error in execution, even of the kind which is remediable under the Conveyancing (Scotland) Act 1874 s. 39, should not have the benefit of the prescription. We also pointed out that, even when there is a decree of declarator of the expiry of the legal, a period of forty years' possession is required to found a prescriptive progress when the foundation writ is a recorded extract decree of adjudication for debt and that such a title cannot obtain the advantage of the shortening of the prescriptive period because it is technically redeemable. We asked for views on these subjects.

(2) As regards the benefit of prescription being available to a possessor in bad faith, views were expressed which were critical of the present law but the majority of those consulted were of opinion that bad faith should not affect the operation of the prescription. We recognise the principle that a person should not benefit from actings in bad faith. However, since the positive prescription is founded on the fact of possession, without regard to the possessor's state of mind, we consider that the necessity of having certainty of title after a reasonable period must prevail.

We recommend that no change in the law should be made.

(3) There was, however, a strong body of opinion which favoured some relaxation of the requirement that a title must be free of any defect in execution in order to be a valid foundation for positive prescription, and it was suggested that the benefit of the prescription should be extended to a deed containing an informality of execution which had been cured by a decree pronounced in pursuance of the Conveyancing (Scotland) Act 1874 s. 39.

We recommend that, where a deed contains an informality of execution and the appropriate court has pronounced a decree under the Conveyancing (Scotland) Act 1874 s. 39 declaring that the deed was subscribed by the grantor and the witnesses, the deed should be deemed to be, and always to have been, ex facie valid for the purposes of positive prescription.

(4) With regard to a recorded extract decree of adjudication for debt having the benefit of the shortening of the prescriptive period, some of those consulted favoured such an amendment of the law but others were of opinion that these decrees are so uncommon in practice that amending legislation was not required. We suggest that the principle that positive prescription should be based on a recorded title which is on the face of it irredeemable is important and there is no sufficient justification for making a change to deal with this comparatively rare case.

We recommend that no change in the law should be made.

Registration of New of Defective Deeds

14 The Titles to Land Consolidation (Scotland) Act 1868 s. 143 authorises the registration of new (or 're-registration') of any instrument, such as a notice of title, which contains an error or defect, and also authorises re-registration of any deed or conveyance where there is an error or defect

in the recording of it. The section does not authorise re-registration where the error or defect occurs in a deed or conveyance itself, but in practice such an error or defect is corrected in the deed and, where it is of sufficient importance, appropriately authenticated, and the deed is then recorded of new so that the record may conform to the deed as amended. One disadvantage of this practice is that, since the re-registration publishes the error in the deed or conveyance originally recorded, the benefit of positive prescription may only be avilable as from the date of re-registration. It was suggested to us that the scope of s. 143 should be widened to permit re-registration of a deed or conveyance and that the benefit of the positive prescription should be available as from the date of the original registration. We agree that where the error or defect was not such as to affect the measure of the grant, *eg* an error in execution or in the narrative or in an executory clause, the suggestion is acceptable and would be helpful. Where, however, the error or defect occurs in the dispositive clause and affects the extent of the grant, it would not be in accordance with principle to extend the benefit of the prescription to a grant prior to its registration.

We recommend that (1) the Titles to Land Consolidation (Scotland) Act 1868 should be amended to authorise re-registration of any deed or conveyance which contains an error or defect and (2) where any such deed or conveyance is registered after the amending legislation has taken effect and is subsequently re-registered, the period of positive prescription should commence on the date of the original registration, except where the error or defect relates to the extent of the grant made in the deed or conveyance in which case the period of positive prescription should commence only on the date of re-registration.

Notices of Title and Notarial Instruments as Foundation Writs

15 We propose one minor amendment with regard to the basis of title for positive prescription. The Committee on Conveyancing Legislation and Practice (the Halliday Committee) in its Report (Cmnd 3118—December 1966) recommended (in paragraph 67) that notices of title and notarial instruments should be accepted as a sufficient foundation for prescription without production of the warrants upon which they proceed. This proposal met with wide approval among those whom we consulted.

We recommend that notices of title and notarial instruments should found prescription without production of their warrants.

Period of Positive Prescription

FEUDAL PROPERTY

16 In paragraph 18(1) of the Memorandum we considered whether the period of the prescription for feudal property could safely and with advantage be shortened. We need not here rehearse the considerations expressed and the views received on this matter, since the Conveyancing and Feudal Reform (Scotland) Act 1970 s. 8 has now reduced the period to ten years (except in relation to claims against the Crown in respect of the ownership of the foreshore or salmon fishings). Section 54(2)(*a*) of the Conveyancing and Feudal Reform (Scotland) Act provides that s. 8 will come into operation

on 29 November 1970. The relevant provisions of that Act would, of course, have to be repealed and re-enacted in the comprehensive statute which we propose.

LEASES

17 (1) Under the existing law there is a distinction, as regards the period of positive prescription required, between a feudal title and a registered leasehold title. Although the matter is not beyond doubt we take the view that in the case of a registered leasehold title the period of positive prescription is still forty years. In the Memorandum we stated that there seemed to be no sufficient reason for the distinction between a feudal title and a registered leasehold title and we suggested, in accordance with the recommendation of the Halliday Committee (in paragraph 59 of its Report), that the period of the positive prescription should be reduced to ten years where the foundation writ is a registered leasehold title. That view was generally supported by those whom we consulted.

We recommend that in the case of a registered leasehold title the period of the positive prescription should be reduced to ten years.

(2) In paragraph 18(2) of the Memorandum we invited suggestions as to the period of positive prescription which would be appropriate to an unregistered lease. The replies received did not disclose any strong support for alteration of the existing law. Our own view is that the period of positive prescription appropriate to an unrecorded leasehold title should be longer than that for a title recorded in a public register. Nevertheless we consider that in modern times the period of forty years is unduly long and could without serious risk be shortened to twenty years.

We recommend that in the case of an unregistered lease the period of the positive prescription should be reduced to twenty years.

ALLODIAL PROPERTY

18 It was pointed out to us in consultation that consideration should also be given to the period of positive prescription applicable to allodial property, which at present is forty years. The number of allodial titles is comparatively small but we agree that they are of sufficient importance to merit consideration. In some cases allodial titles are recorded in the Register of Sasines, but many are not. In accordance with the distinction which we recognise between registered and unregistered leases as regards the period of positive prescription which is appropriate, we consider that in the case of titles to allodial property which have been recorded in the Register of Sasines the period of the positive prescription should be ten years and in the case of titles to allodial property which have not been so recorded the period should be twenty years. If this suggestion encourages registration of such titles, we should regard that as a beneficial result.

We recommend that in the case of a title to allodial property which has been recorded in the Register of Sasines the period of positive prescription should be reduced to ten years and that where such a title has not been so recorded the period should be reduced to twenty years.

19 The Halliday Committee considered (in paragraph 61 of its Report) the period of positive prescription required for the constitution or proof of existence of servitudes and rights of way, which at present is forty years, and recommend the reduction of the period from forty years to twenty years. In paragraph 19 of the Memorandum we expressed the view that since a positive servitude or right of way may be created by possession for the prescriptive period alone, the period necessary should be longer than that required to fortify a title based on a recorded grant. Making due allowance for this distinction, we considered that the existing period of forty years was unnecessarily long and that the provision of evidence necessary to establish the right over so long a period presented practical problems. If a positive servitude or right of way had been exercised without interruption for twenty years, we thought it reasonable for the law to protect the possessor or the public against belated interference. Even when the person against whose interests the servitude was used was a pupil or minor or was subject to legal disability, his property would normally be administered on his behalf and with reasonable vigilance the exercise of the servitude should have been challenged within twenty years. Moreover, the period of nonage now extends only for a maximum period of eighteen years. For these reasons we agreed with the recommendation of the Halliday Committee that the period of positive prescription applicable to these rights should be reduced to twenty years, and we added the suggestion that in the computation of the period no allowance should be made for the years of pupillarity or minority or the legal disability of the person against whom the prescription was used. The consultation which followed on the Memorandum revealed a large measure of agreement with these views.

We recommend that the period of positive prescription applicable to servitudes and rights of way should be reduced to twenty years, which should not be extended on account of the pupillarity, minority or legal disability of the person against whom the prescription is used.

Interruption

20 As part of a comprehensive review of the law of prescription we have examined the existing methods, both extra-judicial and judicial, of interrupting positive prescription. We suggest some simplification and modernisation of the law with regard to both. Extra-judicial interruption may be effected either by adverse possession (natural interruption) or by notarial protest (civil interruption). The latter method involves the preparation of an Instrument of Interruption which, in order to be effective against singular successors, requires registration in the Register of Sasines. It is now little used in practice, and we doubt if its continuance is defensible in principle. We consider it wrong to permit a person who claims a right in heritable property to place upon the Register of Sasines without judicial authority an instrument which may affect the marketability of the title of the reputed owner possessing on a habile title duly recorded. If physical possession is not conceded, then a dispute as to the rights of parties should be determined by judicial process.

We recommend that interruption of positive prescription by notarial protest should no longer be competent.

21 Judicial interruption may be effected by an action brought into court or, in appropriate circumstances, by the presenting of, or concurring in, a petition for sequestration, or the lodging of a claim in a sequestration or liquidation. We suggest that, since claims in respect of heritable property are now sometimes determined by arbitration, the making of a claim in a competent arbitration process should also have the effect of interruption. It would be necessary to define what constitutes the making of a claim in an arbitration process and we suggest that the definition should be based on the provisions of the Limitation Act 1939 s. 27. A temporary interruption of prescription may also be effected by citation in an action challenging the right but a citation, unless it becomes a process, must be renewed every seven years and, in order to be effective against singular successors, must be recorded in the Register of Sasines. We doubt whether this method of interruption should be permitted in future. If a person propones a claim adverse to that of the reputed owner, or the person having a servitude right or right of way, and wishes to make his challenge by way of judicial process, he should be prepared to submit the issue to the decision of the court or arbiter and should not be permitted to interrupt prescription by commencing a judicial process without pursuing it to a conclusion.

We recommend that interruption of positive prescription should be effected by the making of a claim in an arbitration process but that positive prescription should not be interrupted by citation in an action which does not become a process.

Amending Legislation

22 We suggest that our proposals for amendment of the law of positive prescription should be given effect in a comprehensive statute relating to prescription. The legislation should repeal the existing statutes relating to positive prescription and enact provisions preserving the effect of positive prescription in accordance with the existing law with the amendments as to its scope, period and mode of interruption suggested in this Report.

PART III

Long Negative Prescription

23 The long negative or extinctive prescription applies to rights and obligations in general, whether or not they relate to heritable property, save that it does not extinguish a real right in heritable property. Its basis is explained by Napier as follows: '*Ut aliquot finis litium esset*—to prevent the immortality of actions—there is a period, to be fixed by positive law, at which a right of action, or of pursuing a claim in a court of law, must lose its vitality, simply in consequence of that claim having been dormant so long.' (*The Law of Prescription* (1839) p. 15). In Scotland its effect is to extinguish rights and obligations completely on the expiry of a period which in most cases is twenty years.

EXISTING LAW

24 The law of negative prescription is based upon the Prescription Act 1469 (c. 4), the Prescription Act 1474 (c. 9) and the Prescription Act 1617 (c. 12), as amended by the Conveyancing (Scotland) Act 1924 s. 17 and the Conveyancing Amendment (Scotland) Act 1938 s. 4. These statutes now regulate the application of the negative prescription to obligations whether relating to moveable or heritable property.

25 The prescription applies to rights and obligations generally with certain exceptions aftermentioned and the principal fields in which it operates in practice are loans of money, including sums placed on current account with banks, sums due under personal bonds and heritably secured loans and claims under corroborative obligations even although the principal obligation has been kept enforceable by payment of interest; rights to recover or claim damages; rights to enforce claims for money, such as legal rights in the estate of a deceased person, recovery of money paid in error and claims for arrears of periodical payments such as feuduty or annuities; and rights to enforce the provisions of contracts or to reduce a contract or deed on an extrinsic ground such as fraud. The prescription also applies to rights to land which are merely personal and to servitudes and rights of way. It does not apply to other rights in heritable property, to rights which are *res merae facultatis*, ie rights of such a character that their exercise would be expected only periodically or irregularly, nor to the obligations of trustees to account for trust funds to beneficiaries.

26 The period of the negative prescription, formerly forty years, is now twenty years, except in the cases of a servitude and a right of way when the period is forty years. The point of time from which the prescriptive period begins to run depends on the nature of the right or obligation affected. In the case of a debt the period starts from the date when the debt became payable; in the case of a positive servitude, from the date of the last exercise of the servitude; in the case of a negative servitude from the date when the owner of the servient tenement does something inconsistent with the restraint laid upon his property; and in the case of a claim to legal rights in the estate

of a deceased person, from the date of the death, or, as the case may be, later intestacy, which gave rise to the claim. In the case of a claim for damages it is not clear whether the long negative prescription runs from the date when the damage occurred or from the time when the facts upon which the claim to damages is founded come to the pursuer's knowledge. We refer to this again in paragraph 34.

27 The negative prescription may be interrupted judicially by citation or by appropriate action in court, by claiming in judicial proceedings or by diligence. It may also be interrupted extra-judicially by any act involving admission by the obligant of the adverse right (such as payment to account of principal or payment of interest) or by notarial protest. The running of the prescription is not affected by the fact that the party against whom the prescription is pleaded is in pupillarity or minority or under legal disability, except in the cases of a servitude and a right of way. A person may, however, avail himself of the plea of *non valens agere cum effectu* in order to suspend the running of the prescription.

CRITICISMS AND SUGGESTIONS

Period of Negative Prescription—Obligations in General

28 The Committee on Registration of Title to Land in Scotland (the Reid Committee) in paragraph 76 of its Report (Cmnd. 2032—July 1963) suggested that the period of the long negative prescription should be reduced from twenty years to ten years. The Halliday Committee (in paragraph 60 of its Report) found that suggestion unacceptable and recommended that the period should not be reduced to less than twenty years. The Halliday Committee's reasons for their recommendation were that to reduce the period of negative prescription of obligations in general to less than twenty years would be unreasonable and might operate to the prejudice of a pupil creditor, that the proposed reduction in the period of the positive prescription would substantially secure the benefit of reducing the period of examination of titles to heritable property without any alteration in the period of negative prescription and that the retention of the existing period of negative prescription would afford some measure of protection against any risks involved in reducing the period of positive prescription.

29 We considered the views of both the Reid Committee and the Halliday Committee, and in paragraph 23 of the Memorandum recorded our conclusion that, in the case of an extinctive prescription of such comprehensive scope, there might well be cases in which the extinction of the creditor's right to enforce an obligation in less than twenty years would result in hardship. The situation of a creditor in nonage or under legal disability is an obvious example. It was suggested that the rights of such a creditor could be safeguarded by providing that the running of the prescriptive period should be suspended during his nonage or disability and that in these circumstances the prescriptive period could be reduced to ten years, thereby reducing the number of different periods required in our law of prescription. The simplification in the law is, however, more apparent than real as an undesirable element of uncertainty would be introduced. The choice is between having

the same period for both the negative and positive prescriptions, but allowing the period in the negative prescription to be extended depending on the pupillarity, minority or legal disability of the creditor, and having two certain periods for these two prescriptions. Upon consideration of these arguments we supported the recommendation of the Halliday Committee that the period of the negative prescription of rights and obligations generally should remain unchanged.

30 Although our consultations disclosed that a minority favoured a reduction in the period to ten years, a substantial majority of those consulted agreed with the view that the period of the negative prescription should remain unchanged. We remain of the opinion that the period of twenty years should not be altered.

We recommend that the period and scope of the long negative prescription should remain unchanged in relation to rights and obligations in general.

Servitudes and Rights of Way

31 The Halliday Committee did, however, suggest (in paragraph 61 of its Report) one alteration in the period of negative prescription, namely, that the period of forty years' disuse necessary to extinguish a servitude or a right of way should be reduced to twenty years. In the case of private servitude rights created over one property for the benefit of another, we agree that it is reasonable that, if the right has not been exercised or its breach has gone unchallenged for a period of twenty years, the law should treat the right as extinguished. We have more difficulty in accepting that a public right of way, once constituted, should be lost by non-use for twenty years. For example, the usefulness of a public right of way may be temporarily diminished and subsequently revived by successive land developments in the locality, or changes in public awareness may result in disuse for a period followed by a revival of interest. In paragraph 25 of the Memorandum we expressed agreement with the recommendation that the period of disuse necessary for the extinction of private servitudes and rights of way should be reduced to twenty years. As regards public rights of way, local planning authorities now have valuable powers under the Countryside (Scotland) Act 1967 which afford a considerable degree of protection to the public in relation to paths and long-distance routes, and we considered that in these circumstances the period of the negative prescription applicable to public rights of way should also be reduced to twenty years. On consultation there was a considerable preponderance of opinion which favoured the reductions which we proposed. We suggest that in the computation of the period as regards private servitude rights no allowance should be made in respect of the years of pupillarity or minority or legal disability of the person against whom the prescription was used.

We recommend that the period of negative prescription applicable to servitudes and public rights of way should be reduced to twenty years. In the case of private servitude rights the period should not be extended on account of the pupillarity, minority or legal disability of the person against whom the prescription is used.

Interruption

32 We refer to the arguments adduced in paragraphs 20 and 21 in relation to positive prescription leading to the conclusions that extra-judicial interruption of prescription should not be effected by notarial protest and that judicial interruption of prescription should be effected by making a claim in a competent arbitration process but not by citation in an action which does not become a process. These arguments are also applicable to interruption of the long negative prescription and we have reached the same conclusions with regard to it.

We recommend that interruption of the long negative prescription should be effected by the making of a claim in an arbitration process but should not be effected by notarial protest nor by citation in an action which does not become a process.

Non Valens Agere Cum Effectu

33 We considered whether the plea of *non valens agere cum effectu* should continue to be available as a defence to the operation of the negative prescription. The circumstances in which the plea is applicable have been much reduced by the statutory exclusion of the defence of pupillarity, minority and legal disability, but extraordinary cases may yet occur in which the failure to prosecute a claim may be justified by extrinsic factors. In paragraph 24 of the Memorandum we stated our opinion that the plea should be retained to meet such cases, although we were aware that the possibility of such cases occurring might be thought too remote to warrant its retention, and that it could be abolished in the interests of certainty. The response to our invitation to express opinions on this matter disclosed considerable divergence of views. Our assessment of the results of consultation is that no sufficient case has been made out for amendment of the law and that the plea of *non valens agere cum effectu* should remain available as an equitable plea in appropriate circumstances.

We recommend that the law as to the availability of the plea of non valens agere cum effectu should remain unaltered.

Time of Commencement

34 In the case of a claim for damages, whether arising from delict (and this should be understood to include quasi-delict) or from breach of contract, the point of time from which the long negative prescription commences is not free from doubt. We consider that the long negative prescription should run from the date when the right of action actually accrued and that the starting point should not be related to the aggrieved party's knowledge, actual or constructive, of the accrual. Our reasons for this view are as follows:

(1) The general principle is that the long negative prescription runs from the date when a claim arises, and is not affected by absence of knowledge on the part of the person entitled to enforce it. It would be undesirable to have one rule for actions of damages and another for other kinds of actions.

(2) If the negative prescription in actions of damages were to commence only when knowledge of the material facts came to the pursuer, there would be a class of claims where the application of the prescription might be indefinitely deferred. The law should not give countenance to latent and antiquated claims which may affect even the successors of the person responsible and, if revived after many years, may disturb the basis upon which they have arranged their lives.

(3) Although lapse of time may handicap the pursuer in producing evidence, the fact that the pursuer can raise an action means that, perhaps fortuitously, evidence which his advisers deem sufficient has become available. There is no certainty, however, that chance will equally favour the defender. For example, in actions of damages for delict it may be difficult after a lengthy period for the defender to procure evidence rebutting contentions that the injured or deceased person worked at a particular process for a specified time, or that he took the precautions which the management required him to take, or that particular substances were or were not in use at the relevant times.

(4) In Part V of this Report we recommend that actions of damages should be subject to a short (five-year) prescription and that this short prescription should not begin to run until damage which is not readily ascertainable is, or could with reasonable diligence have been, ascertained by the aggrieved party; but we consider that twenty years is a reasonable period to allow for the ascertainment of damage and the raising of an action, and that claims of damages should be cut off after the lapse of twenty years from the date when the right of action actually accrued. This solution is analogous to that of the Swiss Federal Code of Obligations, Art. 60, which states: 'An action for payment of damages or of solatium prescribes after one year from the day that the injured party has knowledge of the damage and of the person who was responsible for it, and, in any case, after ten years from the day when the damage occurred.' Similar principles are adopted in the German Civil Code, Art. 852, the Polish Code of Obligations, Art. 238 and the Czech Law of 26 March 1935, Art. 50.

35 There is a further question relating to the time from which the long negative prescription should commence in relation to claims for damages resulting from a continuing delict or a continuing breach of contract. Should the prescription commence at the date when the delict or the breach first occurred or at the date when the delict or breach ceased? In the field of delict, s. 6(1)(*a*) of the Law Reform (Limitation of Actions, etc.) Act 1954 adopted the latter alternative and provided that the period of limitation of actions in respect of personal injuries, where the act, neglect or default giving rise to the action was a continuing one, should commence from the date on which the act, neglect or default ceased. That precedent, however, relates only to the case of damages for personal injuries and occurs in the context of a special short limitation. It does not afford grounds for the much broader conclusion that the long negative prescription should commence to operate from the date of cessation of any continuing delict or breach of contract. Nevertheless we consider that in all cases of continuing delict

or continuing breach of contract, the date of cessation is the proper date from which the long negative prescription should commence. It may be contended that, if the prescription runs from the date when the delict or breach first occurred, the pursuer would be compelled to exercise greater vigilance in the enforcement of his rights. It seems to us, however, that the law should not protect the person responsible for a continuing delict or breach of contract, but should favour the person aggrieved by it, and that, so long as the delict or breach continues, prescription should not commence to run in favour of the person who is continuing to inflict the damage. We consider it important that a clear direction to that effect should be given by statute to remove doubts.

We recommend that, in actions for damages based on delict, quasi-delict or breach of contract absence of knowledge of the material facts giving rise to the claim should not delay the commencement of the long negative prescription. When the delict, quasi-delict or breach from which the right of action accrued is of a continuing character, the long negative prescription should run from the date on which the delict, quasi-delict or breach ceased.

Amending Legislation

36 We suggest that our proposals for amendment of the law relating to the long negative prescription should also be included in the comprehensive statute relating to prescription which we have already advocated. The legislation should repeal the existing statutes relating to the long negative prescription. The amendments suggested as to the period of the prescription as affecting servitudes and rights of way, the date from which it commences in actions of damages and the methods whereby it may be interrupted should be incorporated in the new legislation.

PART IV

Shorter Negative Prescriptions

37 Under this heading we consider various special prescriptions all of which are applicable to certain rights and obligations based upon agreement or promise. These are:

The triennial prescription based on the Prescription Act 1579 (c. 21).

The quinquennial prescription based on the Prescription Act 1669 (c. 14).

The sexennial prescription of bills of exchange and promissory notes based on the Bills of Exchange (Scotland) Act 1772 s. 37.

The septennial prescription of cautionary obligations based on the Cautioners Act 1695 (c. 7).

The vicennial prescription of holograph writings based on the Prescription Act 1669 (c. 14).

EXISTING LAW

Triennial Prescription

38 (1) This prescription applies to all actions of debt for the rents of urban houses, for board and lodging, for arrears of aliment due under a contract, express or implied, for wages and salaries claimed in respect of a contract of service, express or implied, for accounts for professional charges, and for accounts of retail merchants and tradesmen. The prescription does not apply to claims founded on written obligations, to mercantile transactions between manufacturer and merchant or merchant and merchant, to accounts current between merchants in which there are goods furnished or services rendered on both sides of the account and to what are, in substance, demands for accounting between mercantile or other agents or mandatories and their principals.

(2) The period of the prescription is three years. The point of time from which the three years begin to run depends on the character of the transaction. Where payments should have been made periodically, as rent, wages, monthly accounts or instalments of a price, the relevant time is when each payment fell due. In the case of continuous accounts for professional charges or goods or services supplied by retail merchants or tradesmen, prescription runs from the date of the last item and is unaffected by the fact that trading continues between the parties provided the account of which the item forms part has been definitely closed. An account does not cease to be continuous because its items vary in character and value or because there is a gap of three years between certain of the items, provided that the employment or course of dealing has been continuous.

(3) The effect of this prescription is not to extinguish any right or obligation but to impose a limitation upon the mode of proof available after the expiry of the prescriptive period of three years to establish the right or

obligation. The creditor has to prove both the constitution and the resting owing of the rights or obligations affected by the prescription and in this proof he is limited to the writ or oath of the debtor.

(4) The prescription may be interrupted by founding on the claim in any competent judicial process during the prescriptive period, even if that process has not been completed or pursued to an effective conclusion. The presenting of, or concurring in, a petition for sequestration, or the lodging of a claim in a sequestration or liquidation also interrupts the prescription. The prescription is not pleadable if the action of the debtor has been the cause of the pursuer's failure to bring the action within the prescriptive period. The running of prescription is not affected by the fact that the creditor is in minority.

Quinquennial Prescription

39 (1) This prescription applies to contracts of sale, hiring, pledge and other consensual contracts which are not, in fact, constituted by writing; arrears of rent in respect of both urban and rural subjects whether the lease be written or verbal, the prescriptive period commencing on the date of the tenant's removal from the lands; arrears of ministers' stipends; and actions proceeding upon certain claims which are themselves subject to a short prescription. The prescription does not apply to an obligation to account as between agent and principal nor to obligations to return, or to account for, goods deposited in safe custody, or in security, or removed by the defender without authority.

(2) The period of the prescription is five years.

(3) The effect of the prescription is not to extinguish the right or obligation but to impose a limitation upon the mode of proof whereby, after the expiry of the prescriptive period of five years, the right or obligation may be established. The creditor has to prove both the constitution and the resting owing of the rights or obligations affected by the prescription and in this proof he is limited to the writ or oath of the debtor.

(4) The prescription may be interrupted by any competent judicial claim during the prescriptive period even if the process has not been completed or pursued to an effective conclusion. The presenting of, or concurring in, a petition for sequestration, or the lodging of a claim in a sequestration or liquidation also interrupts the prescription. The prescription does not run against minors during their minority.

Sexennial Prescription

40 (1) This prescription applies to all bills of exchange and promissory notes, except bank notes.

(2) The period of the prescription is six years.

(3) The effect of the prescription is not to extinguish the debt contained in the bill of exchange or promissory note but to impose a limitation upon

the mode of proof whereby, after the expiry of the prescriptive period of six years, the debt may be established. The creditor has to prove by writ or oath both the constitution and the resting owing of the debt. If, however, the bill of exchange or promissory note is granted as additional security for a pre-existing debt the basic contract may be proved by any competent evidence despite the fact that prescription has run upon the bill or note.

(4) The prescription may be interrupted by any competent judicial process raised on the bill or note during the prescriptive period even if that process has not been completed or pursued to an effective conclusion. An action against one of several obligants in a bill also interrupts the running of the prescription against the other obligants. The presenting of, or concurring in, a petition for sequestration, or the lodging of a claim in a sequestration or liquidation also interrupts the prescription. A verbal acknowledgement of liability within the prescriptive period is, however, insufficient to effect interruption as also is a written statement of claim not followed by any other action. The prescription does not run against minors during their minority.

Septennial Prescription

41 (1) Two types of cautionary obligation are affected by this prescription, namely, (*a*) an obligation where the cautioner is bound in the same writing as the principal debtor and is, by the form of the bond, bound expressly as cautioner, and (*b*) an obligation where the cautioner is bound as principal, or co-principal, and is shown to be a cautioner by a clause of relief in the bond itself or by a separate bond of relief formally intimated at its execution to the creditor. The prescription only affects those cautionary obligations in which the creditor might do diligence, if occasion arose, at some time within the seven years.

(2) The period of the prescription is seven years.

(3) The effect of the prescription, unlike that of the other short prescriptions, is to extinguish completely the cautioner's obligation after the expiry of the period of seven years; in practice a new obligation is obtained.

(4) Diligence done or a decree obtained against a cautioner within the seven years will deprive him of the benefit of the prescription, but will not render him liable for interest falling due after the prescriptive period. It is doubtful whether the mere raising of an action is effective interruption. The presenting of, or concurring in, a petition for sequestration, or the lodging of a claim in a sequestration or liquidation also interrupts the prescription. The running of the prescription is not affected by the fact that the creditor is in minority.

Vicennial Prescription

42 (1) This prescription applies to all holograph writings upon which an obligation can be founded, whether the writing itself expresses the obligation or is merely evidence from which an obligation can be inferred.

(2) The period of the prescription is twenty years commencing from the date of the holograph writing even when the obligation to which it refers is future or contingent.

(3) At the end of the prescriptive period the holograph quality of the whole of the writing must be established by the defender's oath, except in the case of entries in account books, when proof of the authenticity of the signature is enough. If the writing is proved by the oath to be holograph, it has the same effect as if the prescription had not applied; the ordinary rules as to proof of payment or discharge of the obligation contained in it come into operation and there is no onus upon the pursuer to prove that the debt is still resting owing. If the oath does not establish the holograph quality of the writing, it cannot be founded upon even as an adminicle of evidence in proof of the obligation.

(4) The prescription may be interrupted by the raising of an action upon the holograph writ, by a plea of compensation being founded upon it in the defences to an action or by diligence being done upon it. The presenting of, or concurring in, a petition for sequestration, or the lodging of a claim in a sequestration or liquidation also interrupts the prescription. Payment of interest on the obligation throughout the prescriptive period probably does not interrupt the prescription. The prescription does not run against minors during their minority.

CRITICISMS AND SUGGESTIONS

General

43 The various shorter prescriptions, based on old statutes, have been the subject of considerable judicial and professional criticism. We approach the problem by considering the particular defects of the various existing shorter prescriptions and the need for statutory restatement of the law. Our conclusion, as after appears, is that these criticisms are justified and that the law is in need of a comprehensive reappraisal.

Triennial, Quinquennial, Sexennial and Vicennial Prescriptions—Proof by Writ or Oath

44 In the case of these four prescriptions, the effect of expiry of the prescriptive period is not to extinguish the right or obligation but only to limit the mode of proof of its constitution, or of its constitution and resting owing, to the writ or oath of the debtor. The law with regard to proof by writ or oath is now voluminous; a summary of the principles of it is contained in Appendix B. The decisions in this field are not always consistent; many difficult problems have been and may yet be posed. In paragraphs 45 to 47 we indicate the main practical defects which appear from the operation of proof by writ or oath.

45 Litigation on technical procedural points has involved parties in unjustifiable expense. In particular, the following questions have caused difficulty:

(1) the competency of, and the evidential weight to be attached to, writs dated before and after the end of the prescriptive period,

(2) what writings may be admitted or recognised as writ of the debtor,
(3) the extent to which apparently false evidence of the debtor can be controverted by previous specific admissions or how far negative evidence can be countered by presumptions that the debtor must be able to recall the circumstances of the transaction,
(4) the interpretation of judicial admissions,
(5) the problem of whether qualifications of an oath are intrinsic or extrinsic, and
(6) the problem of reference to oath when the debtor is deceased or is a corporate body.

46 Reference to the debtor's oath is not a satisfactory mode of proof. It excludes the testimony of independent witnesses and restricts the evidence to the word of the least independent witness, the debtor himself, which must be accepted 'however palpably and disgracefully false it may appear' (*Hunter v Geddes* (1835) 13 S. 369, per Lord Jeffrey at p. 377). The circumstances of modern business, where many transactions are carried on by incorporated companies, make the procedure even less appropriate.

47 The law relating to proof by writ is also in an unsatisfactory state. For example, there has been conflict of judicial opinion, not yet conclusively resolved, as to whether the writ must be dated after the end of the prescriptive period to afford acceptable evidence of resting owing. Further, the recovery of a debt may depend upon the accident of the existence of unsigned jottings or the acceptance of some writ of the creditor which can be treated as constructive writ of the debtor. It is plainly right that a writ of the debtor acknowledging or admitting the debt should have the effect of interrupting prescription, but some clarification is required as to the nature and characteristics of the writing which will have that result.

48 As a matter of legal principle, the substitution of this limited mode of proof of certain claims after the expiry of a prescribed period is open to serious criticism. The logical penalty upon a creditor who fails to pursue such claims timeously is that he should be denied a right of action, or even that the obligation should be totally extinguished, and the greater severity of the penalty might be mitigated by permitting a longer period for recovery. To substitute proof by oath of the debtor for proof at large confers legal advantage on the dishonest debtor. To permit obligations of a short term character to be recoverable for twenty years solely because there is writing of any kind, even constructive writ, seems unjustifiable; written acknowledgement or admission by the debtor should suspend the operation of prescription but the law should state precisely the kind of writing necessary to have that effect.

49 The views expressed in the five preceding paragraphs were included in paragraphs 33 to 35 of the Memorandum, and on consultation our proposal to abolish proof by writ or oath in relation to these prescriptions received general approval.

We recommend that the special requirements as to proof of the constitution, or the constitution and resting owing, of obligations imposed by the present shorter prescriptions should be abolished.

Triennial and Quinquennial Prescriptions

50 We consider that it is right that a short period of prescription should apply to obligations of the kinds affected by these two prescriptions but that the method of attaining that object by specifying a series of particular claims to which two different periods of prescription apply is undesirable. It has resulted in a large volume of litigation to determine whether marginal cases were affected by the prescription statutes and has led to distinctions which are difficult to justify. For example, the triennial prescription of 'housse mailis' applies to rents of urban houses but not farms, whereas the quinquennial prescription of arrears of 'maills and dewties of tennents' applies to rents of both urban and rural subjects; the triennial prescription applies to a solicitor's professional fees and disbursements made in a professional capacity but not to advances made in the capacity of factor to his client. Moreover, the particularity of specification of categories, interpreted by old decisions, tends to rigidity of construction and the exclusion of obligations under new types of transaction which cannot be fitted into any of the precise categories expressed in the statutes. We think it preferable that the legislature should prescribe a much broader class of rights and obligations to which a short period of prescription would apply, thus giving the courts a wider discretion by way of interpretation and enabling new types of transaction within the general class to be accommodated without the need for amending legislation.

51 The triennial and quinquennial prescriptions apply only to debts not founded upon written obligations. This restriction has much decreased the field of their application in modern times, when the increase in literacy and the facilities of typing and reproduction of writing have resulted in more obligations, even comparatively minor ones, being reduced to writing. We consider that the applicability of a short period of prescription should be determined primarily by the nature and importance of the transaction and that, while it should be open to parties to elide the application of the prescription by contracting in solemn form such as attested writ, the operation of a short prescription should not be excluded in the case of obligations of a short-term character merely by reason of the existence of the kind of informal writing used in modern business practice.

Sexennial Prescription—Bills of Exchange and Promissory Notes

52 The main criticism which we make of this prescription is with regard to the length of the period. Bills of exchange and promissory notes are now generally granted in transactions of a comparatively short-term character and we consider it would not be unfair to creditors and would afford reasonable protection to debtors if the period of prescription were reduced.

Septennial Prescription—Cautionary Obligations

53 We make two major criticisms of this prescription. The first is that it is now of little practical effect. The requirements for its application are so well known to creditors and so easily avoided by framing cautionary documents in the form of joint and several obligations or separate guarantees that the application of the prescription is habitually excluded. Our examination of the reported cases has disclosed none of importance on the

prescription more recent than 1893, which may reflect the fact that techniques of avoidance by creditors have virtually eliminated it as a factor of importance in cautionary transactions. In effect a guarantor remains liable until his obligation is extinguished by the long negative prescription, which seems an unduly lengthy period for an obligation of this character, frequently undertaken without consideration. The second criticism is that the prescription commences to run from the date when the guarantee is given instead of the date when the obligation of the guarantor becomes enforceable. If the object of the law of prescription is to cut off the right of a creditor to enforce a claim which, with reasonable diligence, should have been pursued earlier, it follows that an obligation of guarantee, which is initially a contingent obligation, should be affected by prescription only from the time when the principal debtor fails to pay and the guarantor's obligation arises.

54 One effect of the prescription is that creditors will not accept a guarantee in the convenient form of a single deed by the principal debtor incorporating also the obligation of the guarantor. Hence it is usually impracticable to incorporate in one trust deed a debenture by a Scottish company secured over its assets and a guarantee by its subsidiaries with security over their assets, as is normally done in England. The result can be attained by having separate deeds, but this method is less convenient and unfamiliar to English financial institutions who tend to advise instead an issue of unsecured loan stock.

55 We consider that the defects of the existing prescription should be removed by providing for a short prescription applicable to cautionary obligations of all kinds, however constituted, which should run only from the date when the obligation of the cautioner became prestable.

Vicennial Prescription—Holograph Writs

56 When this vicennial prescription was introduced the period of the long negative prescription was forty years. Since the latter has been reduced to twenty years the vicennial prescription has largely become redundant. The vicennial prescription applies whether interest has been paid or not and it does not run against minors during nonage, but apart from these specialties obligations contained in holograph writings to which the vicennial prescription applies would be cut off with more decisive effect by the long negative prescription. We consider that the continuance of a separate vicennial prescription of holograph writs is no longer necessary.

Existing Shorter Prescriptions—The Need for Statutory Restatement

57 In addition to the particular defects which we have mentioned in paragraphs 50 to 56 there are certain general criticisms applicable to all the existing shorter prescriptions. The law has been developed in a series of unrelated enactments which provide for different categories of rights and obligations, varying periods of prescription having different effects. The relevant statutes have been enacted at various times over several centuries, the most recent of them almost two hundred years ago. From this background certain inevitable disadvantages arise. In particular:

(1) The terminology of the legislation is archaic or, at least, outmoded and its construction depends on *contemporanea expositio*, so that the meaning of modern business transactions has to be found in the context of the understanding of the distant past. 'It may be unfortunate that the obligations of business men in a commercial community should still depend on the doubtful interpretation of statutes which are three to four hundred years old' (*Haydock v Farquharsons (Aberdeen) Ltd* 1965 SLT 240 at p. 242).

(2) The enactment of the law piecemeal in compartments has militated against the development of a comprehensive logical scheme of shorter prescription.

(3) As a result, no easily comprehensible general rules of law are available to assist the business man in determining his policy with regard to the timeous enforcement of commercial obligations.

58 In paragraph 43 of the Memorandum we expressed the view that the law relating to these shorter prescriptions should be re-stated in a comprehensive statute with such amendment and rationalisation as might be thought appropriate. The opinions of those consulted by us almost unanimously favoured reform on these lines.

We recommend that the existing statutes relating to the triennial, quinquennial, sexennial and septennial prescriptions should be replaced by statutory provisions introducing a new short negative prescription of more general application. The vicennial prescription of holograph writings under the Prescription Act 1669 (c. 14) should be abolished.

GENERAL PRINCIPLES OF REFORM

59 We consider the principal problems relating to the amendment of the law of the shorter prescriptions under four main headings:

(1) the scope of the prescription, *ie* the nature of the rights and obligations affected (paragraphs 60 to 67),

(2) the period of the prescription (paragraphs 68 to 83),

(3) the effect of the prescription (paragraphs 84 to 88),

(4) the extension and interruption of the prescriptive period (paragraphs 89 to 93).

The Scope of the New Short Prescription

60 We have already noted the disadvantages of the principle of specifying particular kinds of rights and obligations to which the existing shorter prescriptions apply. In England and Wales the Limitation Act 1939 adopts a more comprehensive criterion and imposes a statutory limitation of six years upon the time for bringing certain broad categories of actions, principally actions founded on simple contract or tort and actions for an account, with a provision that an action upon a speciality, *eg* on a contract under seal, may be brought within a longer period of twelve years. We favour this broader approach and suggest the introduction of a new uniform short negative prescription on these lines. We exclude at this stage rights and obligations arising from delict and breach of contract (other than specific

implement) which would involve an addition to the existing law rather than amendment of it, and we deal separately with those matters in Part V of this Report. We include rights and obligations based on contract and unilateral promises, since in Scotland the latter may create enforceable obligations. We also include rights and obligations of accounting, since many obligations of accounting have a contractual basis, but we should make it clear that the short prescription suggested should be applicable to all rights and obligations of accounting, whether involving obligations *ex contractu* or not, but excluding accounting for trust funds. At present the shorter prescriptions do not apply to legal rights in succession and we think that the new short prescription should also not apply to such rights or to the prior rights of a surviving spouse under the Succession (Scotland) Act 1964. As we make clear in Part VII, claims for legal rights and these prior rights will be subject to the long negative prescription. Rights and obligations arising under a contract of partnership or agency should be excluded from the new prescription (see paragraph 73 below). As stated above, it is provided in English law that an action upon a speciality may be brought within a longer period of twelve years. We consider that it is desirable that there be a similar provision in Scots law to the effect that certain specified obligations should not be subject to the new prescription, but should be subject to the long negative prescription. In paragraph 45 of the Memorandum we suggested that the obligations which should be excepted from the application of the new prescription might be defined by using the well-known classifications of attested and non-attested writs, and that contracts, promises and obligations of accounting founded on attested writs should be exempted from the application of the new prescription. We invited views on this matter generally but no alternative basis of exclusion was proposed.

61 In paragraphs 46 and 47 of the Memorandum we put forward suggestions as to the character of the obligations to which the new short prescription should apply. We consider these suggestions further in the following paragraphs with certain amendments resulting from consultation.

62 We suggested that the new short prescription should apply to all rights and obligations based on contract or promise but only in so far as they involved payment of money. We also suggested that in the case of rights or obligations of which the payment of money formed only part, *eg* a part-exchange transaction, the new short prescription should not preclude the right to require performance of any part of the obligation outstanding at the expiry of the prescriptive period other than the payment of money. Certain of those whom we consulted pointed to the problems of defining obligations for payment of money and of making appropriate provision for the situation where a contract involved mutual obligations requiring payment of money by one party in exchange for an undertaking of another kind. We have given further thought to these problems and have come to the conclusion that the most satisfactory solution is that the short prescription should apply to obligations arising from contract generally, as is the case in England, and to obligations arising from promise, instead of restricting its application to obligations which involve the payment of money. This extension of the scope of the short prescription will prevent inequities which might result in mixed contracts from the operation of a prescription which

extinguishes some of the obligations while leaving others unaffected. Moreover, we believe that the wider application of the prescription will not in practice increase substantially the number of cases in which it will apply: the person entitled to enforce an obligation involving performance will seldom be content to wait for implement of it for any lengthy period.

We recommend that the new short prescription should apply to rights and obligations arising from contract (other than breach of contract), promise, or specific implement and to obligations of accounting, except accounting for trust funds. The prescription should not apply to rights or obligations constituted by attested writs.

63 We considered whether the scope of the proposed new short prescription should embrace also obligations founded upon unjustified enrichment, *eg* restitution, repetition, recompense, and obligations resulting from *negotiorum gestio*. These obligations arise *ex lege* in contrast to rights and obligations arising from agreement and promise, and it is arguable that to bring them within the scope of the new short prescription would confuse the principle. If, however, these obligations were excluded and were left to be cut off ultimately by the long negative prescription, much of the purpose of the new short prescription would be defeated as after the expiry of the shorter period the creditor might be in a position to found a claim upon recompense. We came to the conclusion that because of these practical considerations such obligations should be brought within the scope of the new short prescription. No criticism of this suggestion was made in consultation.

We recommend that the new short prescription should apply to all obligations based upon unjustified enrichment.

64 We thought it proper in paragraph 47 of the Memorandum to direct attention to certain particular categories of obligations which we suggested should be affected by the operation of the new short prescription. Those mentioned were obligations of accounting, bills of exchange, promissory notes and cautionary obligations. In paragraph 94(12) we made it clear that the prescription would not apply to a banknote. As regards the definition of cautionary obligations, we suggested (in paragraph 94(12) of the Memorandum) that for the purpose of the prescription a cautionary obligation should include any transaction whereby one or more persons made himself or themselves cautioners or guarantors for another and, where more than one person was bound in any document as principal, any of such persons should be deemed a cautioner unless the creditor established that such person had received money or credit in reliance on the document. No criticism was directed by those whom we consulted against the inclusion of these special categories within the class of obligations to which the new short prescription would apply, but some considered that a person bound as principal should not be treated as a cautioner. Upon further consideration of this point we remain of the view that such a provision is necessary, since without it avoidance of the prescription could be effected by framing cautionary obligations in a form which would bind the cautioner ostensibly as principal.

We recommend that the new short prescription should apply to bills of exchange and promissory notes (except banknotes) and also to cautionary obligations, including obligations constituted in a form in which the cautioner is bound as principal.

65 Certain kinds of rights and obligations would be excluded from the operation of the new short prescription. In particular:

(1) As already mentioned in paragraph 60 of this Report, contracts, promises and obligations of accounting founded on attested writs should be excepted. However, in paragraph 47 of the Memorandum we made it clear that cautionary obligations, however constituted, should be subject to the prescription. Our reason for doing so was that many cautionary obligations are created by attested writs and to extend the exclusion to them would largely result in denying the benefit of the prescription to cautioners. Our consultations disclosed general agreement with that suggestion.

(2) Rights and obligations of a kind excluded from the operation of the long negative prescription, such as those based on trust, *res merae facultatis* and real rights in heritable property would normally be excluded from the scope of the new short prescription as above defined, but should specifically be excluded from it even where some element of enforceable obligation to pay money is incidentally involved.

(3) Rights relating to land would in most cases be automatically excluded from the effect of the new short prescription by reason of the fact that they are normally constituted by attested writs but there should be a general exclusion of such rights in order to cover those which might be created otherwise, *eg* by holograph writing.

We recommend that the new short prescription should not apply to rights and obligations of a kind excluded from the operation of the long negative prescription, or to rights relating to land.

66 In paragraph 48 of the Memorandum we suggested that there should be a special exemption from the short prescription in the case of money transactions between specified classes of relatives, namely, husband and wife and parent and child. We had in mind particularly loan transactions between near relatives where obligations are frequently not pursued with the same vigilance as in commercial transactions or loans between strangers, and we considered that forbearance to press for repayment within the circle of a family should not result in the loan becoming irrecoverable after the expiry of the period of the short prescription. We suggested, however, that even within these degrees of relationship, the short prescription should apply as from the death of the creditor, or the divorce or judicial separation of the parties when the transaction was between spouses. On consultation some criticism was directed against this proposal to exclude from the ambit of the prescription this special category of transactions defined on a basis of family relationship. Family loans are frequently made without specification of any fixed date of repayment and one of the alternative suggestions made in paragraph 57 of the Memorandum was that the period of the prescription should commence from the date when the loan was made if no date of

repayment of a loan was specified. On consideration of the views expressed by those consulted we have not adopted that alternative (see paragraph 79 below) and we now propose that in such a case the prescription should commence to run from the date when a demand for repayment is made. The argument for creating a special exclusion for loans between members of a family thus loses much of its force, and we depart from our original suggestion.

We recommend that there should be no special exclusion from the operation of the new short prescription of loans between relatives.

67 We consider that a short prescription on the lines which we have suggested would provide an intelligible guide to persons concerned in contracts and obligations to account. If the character or importance of the transaction were such as to render exclusion of the short prescription desirable, the parties could ensure that the transaction was constituted in a manner which would except it from the short prescription. For the generality of less important transactions there would soon be a general understanding that rights arising from them must be pursued within the period of the short prescription.

The Period of the New Short Prescription

68 We think it would be of advantage if a single uniform period were established for the new short prescription. In England the period is six years, but we are aware that suggestions have been made that that period is now unduly long. In the case of commercial contracts the period of six years is out of line with the much shorter periods prescribed by certain Continental systems, and the possibility of participation in the Common Market strengthens the case for a shorter period. In paragraph 50 of the Memorandum we suggested for consideration that a uniform period of five years was adequate, subject to special provisions as to the effective date of commencement of the period in the case of particular kinds of obligations. We also expressed the hope that, in the interests of having a uniform period throughout the United Kingdom, the period in England might be reduced to five years. There was general acceptance among those consulted of the adoption of a single period. Opinions varied slightly as to the length of the period, but the majority of these who replied favoured the period of five years which we suggested.

We recommend that the period of the new short prescription should be five years.

Time of Commencement

69 We have examined the effect of the new short prescription in relation to particular kinds of obligations and have considered particularly the date from which the prescription should run in various circumstances.

Ordinary Contracts

70 The general rule should be that the prescription commences to run when the right becomes enforceable, *ie* when the obligation becomes prestable

and the creditor is entitled to sue. In the case of the types of obligation affected by the existing triennial prescription, house rents (which would now extend also to rents of other subjects), board and lodging, aliment, wages and salaries and accounts for goods supplied retail, our proposal involves an extension of the existing period but if, as we afterwards suggest, the effect of the new prescription is to cut off the right altogether, some extension of time seems to be reasonable.

Continuing Accounts and Long-term Contracts

71 Special provision would be required with regard to the date of commencement of the prescriptive period in the case of continuing accounts (*eg* accounts between merchants, and banking and other cash accounts) and long-term contracts (*eg* building or engineering contracts). In the case of continuing accounts we suggest that the prescription should run from the date of the last item of the account, excluding merely formal entries of charges inserted by one party as distinct from transactions in which the other actively participates. The death or bankruptcy or liquidation of either party should terminate the account. In the case of a firm, a change in the personnel of the partners should not terminate the account so long as any partner of the former firm continued as a member of the new firm, but the bankruptcy of any partner should have that effect. As regards long-term contracts we suggest that the prescription should run from the date when the last item of the contract becomes due for payment.

Accounts for Services

72 We suggest that accounts for services, including disbursements and outlays incidental to the performance of the services, should be treated as continuing accounts whether they relate to a single transaction or to a series of unrelated transactions, *ie* prescription would commence to run from the date of the last item of the account. The 'last item of account' should include any genuine and significant item in respect of service rendered or disbursement or outlay incurred on the direct instructions of the client or customer or in carrying out instructions previously given. The death or bankruptcy or liquidation of either party should terminate the account. In the case of a firm a change in the personnel of the partners should not terminate the account so long as any partner of the former firm continued as a member of the new firm, but the bankruptcy of any partner should have that effect.

Partnership and Agency

73 Rights and obligations arising under a contract of partnership or agency should not be subject to the short prescription so long as the partnership or agency continued to exist. Upon liquidation of the partnership, or the formation of a new partnership, or upon termination of the agency, rights and obligations arising from the contract should prescribe within five years from the date upon which they became prestable in terms of the dissolution or termination arrangements.

Banking Transactions

74 The legal relationship betwen banker and customer is that of debtor and creditor, not trustee and beneficiary. Accordingly the short prescription

should apply to current bank accounts and deposits. At present in Scotland the long negative prescription applies to banking transactions and, whether the bank is debtor or creditor, commences to run from the date of the deposit or advance (*Macdonald v North of Scotland Bank Ltd* 1942 SC 369). In England the legal position is different. When the bank is debtor, the six years' prescription under the Limitation Act 1939 commences to run against the customer only when repayment is required by him; when the bank is creditor, however, the transaction is in the nature of a loan repayable from the time when it is made and prescription commences to run immediately. In paragraph 55 of the Memorandum we suggested that in banking transactions prescription should run from the date when the customer requires payment in the case of current accounts or deposits where the bank is debtor, and in the case of current accounts where the bank is creditor, from the date of the last item of the account other than merely formal entries such as the bank's charge for keeping the account. The Committee of Scottish Bank General Managers submitted valuable criticisms of these suggestions. In particular it was pointed out that for the short prescription to run from the date of the last item of account in the case of overdrawn current accounts (*ie* where the bank is creditor) would be inequitable in view of the large number of dormant accounts of this type which banks maintain. As a result, we suggest that in the case of overdrawn current accounts the prescription should run from the date when the bank requires payment from the customer. Our proposal for bank current accounts and deposits may therefore be briefly stated—the prescription would run from the date when the creditor demands repayment. Our suggestions on the starting point of the new short prescription would leave the long negative prescription to run (as at present) from the date of the transaction, *ie* from the date of deposit in accounts where the bank is debtor, and from the date of advance in accounts where the bank is creditor. Thus banks would still be able to dispose of their ledgers within a fixed period of time.

Guarantees

75 The date when the liability of the guarantor would emerge would depend upon the construction of the document of guarantee. The rules suggested in the next three paragraphs should apply in the absence of express contractual provision.

Liability of guarantor to creditor

76 Since the liability of the guarantor to the creditor arises on default in payment by the principal debtor, the short prescription would commence to run in favour of both principal debtor and guarantor at the same time. In paragraph 56(1) of the Memorandum we suggested that in the case of a guarantee of a banking account the prescription should commence to run against the bank from the date of the last item of the account. After consultation we have come to the view that it is unnecessary, and may be unfair, to make this exceptional provision in the case of a banking account and that the prescription should commence to run on default in payment by the principal debtor.

Liability of principal debtor to guarantor

77 The principal debtor is liable to indemnify the guarantor from the time when the guarantee is given, but prescription of the right to indemnification would only begin to run when the guarantor actually made payment to the creditor. Apart from prescription, of course, the guarantor may require the principal debtor to pay the creditor at an earlier period, even before any demand for payment has been made by the creditor, since he is entitled to relief from his obligation at any stage.

Liability of co-guarantors inter se

78 The right of a guarantor to recover from his co-guarantors any amount paid by him to the creditor in excess of his proportionate share arises only when he has actually made the payment. Accordingly prescription of his claim to recover the excess from his co-guarantors would run from the time of such payment.

Loans

79 When the document constituting the loan gives a fixed date for repayment, prescription would commence to run from that date. When no date of payment is prescribed or when the loan is repayable on demand, we put forward alternative suggestions (in paragraph 57 of the Memorandum) that prescription should run from the date when the loan is made or that prescription should run from the date when a demand for payment is made. On consideration of the views expressed on consultation we have decided that the latter alternative is preferable.

Bills of Exchange and Promissory Notes

80 The general principle would remain applicable that the liability of any party to a negotiable instrument depends upon the express terms of the instrument itself, and prescription would run from the stipulated date of payment, irrespective of the time of the acquisition by the holder. In the absence of stipulations to the contrary the rules suggested in the next two paragraphs should apply.

Liability of acceptor

81 The liability of the acceptor would commence at the time when the instrument matured, unless acceptance was conditional upon presentment for payment; in that event the date of presentment would be the date of commencement of liability. Where the instrument is payable at a fixed period after date or on demand or sight, liability would arise only on presentment. Where the instrument is payable on demand, liability would arise on the date of its issue. In the case of bills of exchange where days of grace are allowed, liability would commence only on the expiry of the days of grace. In all these cases the period of prescription would commence from the date when liability arose.

Liability of drawer or indorser

82 The liability of the drawer or an indorser arises only when the instrument has been presented and dishonoured. It is suggested that prescription should

commence to run in favour of the drawer or an indorser only when he had received notice of dishonour, or, where notice of dishonour was dispensed with, from the date of dishonour. When an instrument is presented and dishonoured, and then re-presented and again dishonoured, prescription would commence from the date when he receives notice of the first dishonouring. These proposals were included in paragraph 58 of the Memorandum and on consultation it was suggested that it would be simpler and clearer in practice if provision were made that, subject to the express terms of the instrument itself, the prescription should run from the same date for all parties. We have considered this suggestion but, while we acknowledge that it has the merit of simplicity, we think that our original proposals are more consonant with legal principle.

Payments in respect of Ownership or Occupation of Land

83 Liability for periodic payments in respect of the ownership or possession of land (*eg* feuduties, ground annuals, rents or wayleaves) should prescribe upon the expiry of five years from the date when each payment became due. The expiry of the prescriptive period should not bar actions for recovery of possession of the property on the ground of non-payment (*eg* irritancies or removings), but it should render incompetent all forms of action designed to recover the payments, *eg* actions of maills and duties or sequestrations for rent or the enforcement of hypothecs.

We recommend that, in the case of each of the categories of transactions referred to in paragraphs 70 to 83, the new short negative prescription should run from the date or event proposed in the relevant paragraph as appropriate for the particular transaction.

Effect of the New Short Prescription

84 We suggested in paragraph 48 that when a creditor delays unreasonably to enforce an obligation to which the short prescription applies, either he should be denied a right of action upon the obligation or the obligation itself should be extinguished. If the former alternative is adopted, the effect of the prescription is procedural; the creditor may not directly enforce his right by court action but he may have recourse to any other legal means of enforcing payment, such as security or lien. If the latter alternative is adopted the effect of the prescription would be more than procedural; the obligation would be completely extinguished and any security right ancillary to the obligation would fall with it. This is the present effect of the septennial prescription although not of the other shorter prescriptions of Scots law. The choice between these two alternatives is not easy, and comparison of the solutions favoured by other legal systems gives no decisive guidance. We have, however, been greatly assisted by the careful analysis of the question by the New South Wales Law Reform Commission in 1967 and by the Ontario Law Reform Commission in 1969 in their respective Reports on Limitation of Actions. It is not without significance that, although in New South Wales and in Ontario the foundation of the law is English law which provides a time-bar for the remedy but not the right, both of these Commissions come to the conclusion that in future the right should be

extinguished with the remedy. The New South Wales Commission made one exception, which the Ontario Commission did not accept, in cases where a creditor has a possessory lien on goods, and we refer to this again in paragraph 88. We set out in the next three paragraphs the difference in effect of the two alternatives and the principal arguments for and against the adoption of one or other of them.

85 If the effect of the prescription is procedural the result would be that after expiry of the prescriptive period the creditor would have no right to recover the debt by court action or arbitration process, nor would he be entitled to plead the debt by way of compensation or as a counter claim, nor to claim it in any process of sequestration or liquidation. The creditor could enforce his claim by any other means not affected by the prescription such as security or lien, except that distraint for payments in respect of the ownership or occupation of land, which may be regarded as a special form of security, would also be incompetent. If the debtor made payment after the expiry of the prescriptive period, he would not be entitled to recover under a *condictio indebiti* since the obligation still subsisted. On the other hand if the effect of the short prescription were to extinguish the right or obligation, not only would all the rights of recovery, claim and counter-claim above-mentioned be lost but the creditor could not enforce his claim by way of security or otherwise since the principal obligation to which these rights were ancillary would have ceased to exist.

86 The principal arguments in favour of adopting a short prescription which is procedural in effect are:

(1) The adoption of the principle of limitation of action rather than extinction of obligation would be consonant with the principles of the law of England, and the harmonisation of the Scottish and English systems is a valuable immediate objective. As stated in paragraph 68 above, we hope that the periods of the respective short prescriptions in the two countries can be brought into line.

(2) Our suggestions involve both an extension of the scope of the shorter prescriptions and, in the case of some kinds of obligation, a reduction in the prescriptive period. In these circumstances the enlargement of the effect of prescription so as to extinguish the obligation completely might well be too drastic a reform.

(3) There may be many cases where a creditor is content to rely upon adequate security without involving the debtor in the costs of litigation or in sequestration. The object of prescription is to protect the debtor against old claims, not to accelerate his financial embarrassment.

87 The main arguments in favour of making the short prescription extinctive of the obligation are:

(1) To treat prescription as extinguishing obligations would be in consonance with the general philosophy of Scots law, where procedural rules are normally the handmaid of substantive law rather than a mode of expressing it.

(2) The procedural alternative has manifest disadvantages from the point of view of the debtor and his cautioners:

(*a*) The debtor would not be entirely freed from his debt until the expiry of the period of the long negative prescription.

(*b*) The present rule is that cautionary obligations are cut off completely by the septennial prescription. To substitute limitation of the right of action might expose the cautioner after the lapse of the period of prescription to manoeuvres on the part of creditors to secure payment of the sum due by him as obligant.

(3) If the effect of the prescription is merely procedural, the debtor would always be exposed to the risk of actions abroad, and that even in systems with the same or a shorter period of prescription. Most foreign systems regard prescription as pertaining to substance rather than procedure. They will not apply our rules because they are procedural, and they will not apply their own because—if the proper law of the transaction is Scots law—Scots substantive law applies.

(4) To make the short prescription extinctive of the obligation would simplify the statement of the law. If it is considered that the right of the creditor to enforce payment by utilising collateral rights of security should continue despite the expiry of the period of prescription, we consider that it would be practicable to provide that collateral rights should not prescribe although we realise that this would be inconsistent with the general principle.

88 The choice between the procedural and the extinctive alternatives and the principal arguments for and against the adoption of one or other of them were discussed fully in paragraphs 60 to 63 of the Memorandum and we invited views upon the question of which of the alternatives would be preferable. In formulating our proposals in the Memorandum we adopted the extinctive with the alternative proviso that collateral rights would not prescribe, but we emphasised that we had reached no concluded view on the matter. The extinctive alternative was favoured by the great majority of those whom we consulted and we accept their views. On the matter of collateral rights different views were expressed on consultation, and we have given further consideration to the subject. Collateral rights for this purpose include (*a*) rights of security, whether over heritable or moveable property (although the exemption of obligations constituted by probative writing will in most cases preserve the obligations for which heritable securities are granted from the effect of the short prescription) and (*b*) rights which involve retention of possession, such as retention and special and general liens, whether or not enforceable by a power of sale. We consider that so long as a creditor holds a sufficient security it would be inconvenient to both parties if he were compelled to enforce it or lose the benefit of it altogether, and accordingly that the short prescription should not affect a right of security even although the obligation to which it relates has prescribed. We have found more difficulty in reaching a conclusion with regard to rights of retention of possession, but on balance we propose that they also should be saved from extinction by the short prescription. Where the creditor has a power to sell the retained article, as in the case of a factor's lien or an innkeeper's lien, his position is analogous to that of a security holder, and the New South

Wales Law Reform Commission in its Report on Limitation of Actions (paragraph 315) recommended that short prescription should not apply to such rights. We agreed with that view. Even where the creditor has no power of sale, however, and has only a possessory lien, we consider that the short prescription should not extinguish the right. For example, a banker may have a lien over securities lodged with him by his customer and it might be contrary to the interests of the customer if, in order to avoid the effect of the prescription, the banker were required to pursue for the debt, and in effect compel his customer to realise some of the securities, possibly at an inopportune time.

We recommend that the new short prescription should extinguish all rights and obligations of the kinds specified but that collateral rights, such as rights in security and rights of retention of possession, should not be affected by the extinction of the principal obligation.

Extension and Interruption of the Prescription

Court Action

89 We suggest that the running of the proposed short prescription should be interrupted by founding on the right or document in any competent judicial process during the prescriptive period, even if that process is not completed or pursued to an effective conclusion. Founding upon the right or document would include founding upon it by way of counter-claim in a judicial process; founding upon it in a claim in a process of multiplepoinding or ranking and sale, and founding upon it in presenting or concurring in a petition for sequestration or liquidation of the debtor. For this purpose 'judicial process' would include any competent arbitration proceedings. The effect of interruption should be that the prescription would commence to run anew as from the date of the interruption.

Disability

90 The present law adopts no clear policy in relation to the disability of the creditor. Minority affects the running of the quinquennial and sexennial prescriptions but does not affect that of the triennial and septennial prescriptions. In paragraph 66 of the Memorandum we suggested that pupillarity, minority or legal disability should, in accordance with English practice, affect the new short prescription. On consultation opinions were expressed that the prescription should not be extended on account of pupillarity, minority or legal disability. We consider, however, that in the case of a comparatively short period of prescription it might be inequitable to disregard the effect of pupillarity, minority or disability as valid reasons for failure to press a claim, and we adhere to our proposal.

Acknowledgement of the Debt

91 We consider that a creditor should not be required to initiate a judicial process if the debtor is willing to make a written acknowledgement of the debt. It would be necessary, however, to prescribe the kind of writing which would be sufficient. We suggest that the writing should acknowledge in clear terms that the right or claim is renewed as of the date of the document,

that it should be granted by the debtor or an agent of the debtor duly authorised to do so and that it should be made to the creditor or his accredited agent. In the case of a bill of exchange or promissory note, the acknowledgement should comply with the requirements of law for a document of that kind, *ie* a fresh bill or promissory note would be granted. In the case of a guarantee it should be such an acknowledgement as will amount to a renewal of the guarantee, when read along with it. The effect of any such writing should be to renew the obligation as from the date of the writing and the prescription would run anew from that date. An acknowledgement of a pecuniary debt or liquid amount should bind the person making the acknowledgement and his successors but not any other person, *eg* a co-obligant.

Payment to Account of Principal or Interest

92 We consider that, when the claim is for a pecuniary debt or liquid amount, any payment by the debtor to account of principal or interest should have the effect of extending the prescription so that prescription commences to run afresh from the date of the payment. If a partial payment is made to account of any periodic payment such as rent or interest, the effect should be to extend the prescription in respect of both the principal and the unpaid balance of the periodic payment concerned. A payment made to account of a pecuniary debt or liquid amount by one of several co-obligants should bind all other co-obligants.

Fraud, Concealment and Error

93 It is a defence to the existing triennial prescription that the creditor has been induced by the action of the debtor to refrain from pursuing the claim within the prescriptive period. We consider that on equitable grounds a defence against the suggested new short negative prescription should similarly be available to the creditor if he has been deterred from taking action within the prescriptive period by fraud or concealment by the debtor or by error on the part of the creditor, but only where the error has been induced by the words or conduct of the debtor. For the purposes of such a defence the actions of any person through whom the creditor or debtor claimed or from whom the creditor or debtor derived right should be regarded as actions of the creditor or debtor respectively and the actions of an agent for either party should be regarded as the actions of his principal. The effect of such fraud, concealment or error should be to defer the commencement of the prescription until the date when the fraud, concealment or error was discovered by the creditor or could, with reasonable diligence on his part, have been discovered.

We recommend that the running of the new short prescription should be interrupted by court action, the pupillarity, minority or legal disability of the creditor, payment to account of principal or interest, or fraud, concealment or error in accordance with the suggestions made in paragraphs 89 to 93.

PART V

Rights and Obligations based on Delict, Quasi-delict and Breach of Contract

EXISTING LAW

94 In Scotland actions founded on delict or quasi-delict (other than those causing personal injury) may be brought at any time within the period of the long negative prescription, although in particular circumstances delay may affect the mode of trial. Limitation of actions for damages in respect of personal injuries is regulated by modern statutory provisions contained in the Law Reform (Limitation of Actions, etc.) Act 1954 and the Limitation Act 1963. This limitation is considered separately in Part VI of this Report, and rights and obligations relating to damages in respect of personal injuries are excluded from the scope of the short prescription proposed in the following paragraphs. In our consideration of these matters, delict should be understood as including quasi-delict.

CRITICISMS AND SUGGESTIONS

95 It seemed to us that there were good reasons for the law requiring a pursuer in an action of delict to initiate legal process earlier than twenty years after the occurrence of the event which gave rise to the claim. It is undesirable that a person who has committed a delict should remain under threat of an action for reparation for a lengthy period: the possibility of having to defend legal proceedings based on defamation or negligence is normally a cause for anxiety to the person concerned and there should be a limit of time after which he need no longer have such distracting fears. Moreover, it is in the interests of justice to both parties that proceedings are commenced as soon as is reasonably possible before the recollection of witnesses has become impaired. In England the Limitation Act 1939 provides that actions founded on tort (other than actions of damage for personal injury) may not be brought after the expiration of six years from the date on which the cause of action has accrued. We have looked at the various categories of delicts and have come to the conclusion that in general there is no reason why the pursuer in an action based on delict should not be required to commence it within a reasonably short period after the occurrence of the delict.

Nature, Effect and Period of the Prescription

96 Consistently with our proposal that the effect of the new short prescription should be to extinguish the rights or obligations affected, we suggested in paragraph 79 of the Memorandum that rights and obligations based on delict (other than rights and obligations for damages for personal injury) should be extinguished after the expiration of five years from the date of the delict. Our proposals on this subject were accepted by most of those who commented on them.

71 The point of time from which the prescription begins to run would depend on the circumstances of the case. In paragraph 80 of the Memorandum we suggested that in general the prescription should commence to run when the right becomes enforceable, *ie* when the damage is, or could with reasonable diligence have been, ascertained by the aggrieved party. Where the act, neglect or default giving rise to the delict is a continuing one, the period should run from the date when the act, neglect or default ceased. If the damage caused by the act, neglect or default is not immediately ascertainable, the period should run from the date when the damage is, or could reasonably have been, ascertained by the aggrieved party. In Part VI of this Report we suggest that, in the case of delicts which cause personal injuries, the three-year period of limitation should begin to run from the date when all the material facts of a decisive character relative to the claim are ascertainable. In the case of pecuniary loss or damage to property, with which this Part of this Report is concerned, we suggest a narrower approach, namely, that the start of the five-year period of prescription should be deferred, in circumstances where the fact that such damage has been caused by the delict is not immediately ascertainable, only to the date when that fact is, or could with reasonable diligence, have been ascertained. We think that this more limited extension is justified. In the case of delicts which cause personal injuries, the material facts relating to causation, the ground of action and the person liable may in certain circumstances, as when injuries result from industrial disease, be difficult to ascertain. Also, the period of limitation suggested is only three years. In the case of pecuniary loss or damage to property, the problems of ascertaining causation and liability are less difficult, and the longer period of five years from the time when any such loss or damage becomes ascertainable is available for discovery of the cause and the culprit. Although in England and Wales s. 26 of the Limitation Act 1939 makes special provision in the case of fraud for the deferment of the start of the limitation period to the discovery of the fraud, we consider that our general deferment of the start of the five-year prescriptive period until the damage caused by any delict is, or could with reasonable diligence have been, ascertained is sufficient to cover fraud. Discovery of fraud as the cause of the damage should follow closely on discovery of the damage unless prevented by further fraud; and we have made special provision in paragraph 102 for fraud of that type.

We recommend that:

(1) a short prescription should be enacted to extinguish rights and obligations based on delict and quasi-delict, other than those affected by the Law Reform (Limitation of Actions, etc) Act 1954 as amended,

(2) the prescriptive period should be five years and

(3) the period should commence (a) from the date of the delict or quasi-delict, or (b) if the act, neglect or default giving rise to the delict or quasi-delict is a continuing one, from the cessation of the act, neglect or default, or (c) if the fact that pecuniary loss or damage to property has been caused by the delict or quasi-delict is not immediately ascertainable, from the date when the fact that the aggrieved party has suffered pecuniary loss or damage is, or could with reasonable diligence have been, ascertained by him.

98 We dealt in Part IV with the prescription of rights to enforce obligations based on contract or promise, but we excluded rights and obligations arising on breach of contract with the exception of specific implement (paragraph 60). Where the party aggrieved by the breach seeks a remedy in damages we consider that his right to sue should be subject to the same broad prescriptive rule as the right to sue for damages for delict, namely, a five-year prescription running from the date of the breach or, when the fact that the breach has caused pecuniary loss or damage to property is not immediately ascertainable, from the date when that fact is, or could with reasonable diligence have been, ascertained by him. In the ordinary case the starting point will be the date of the actual breach, but there may be cases (*eg* contracts to perform services and building contracts) where the breach is a continuing one. In such cases the starting point for the prescriptive period should be the same for both the delictual and the contractual remedy, namely, the date of cessation of the breach. Anticipatory breach does not seem to present any special problem since both the accrual of the right to sue for damages, and the date thereof, are determined by the action taken by the obligee on receipt of intimation of the obligant's refusal to perform his contractual obligations or any of them.

We recommend that:

(1) a short prescription should be enacted to extinguish the right to sue for damages for breach of contract;

(2) the prescriptive period should be five years; and

(3) the period should commence (a) from the date of the breach, or (b) if the breach is a continuing one, from the cessation of the breach, or (c) if the fact that pecuniary loss or damage to property has been caused by the breach of contract is not immediately ascertainable, from the date when the fact that the aggrieved party has suffered pecuniary loss or damage is, or could with reasonable diligence have been, ascertained by him.

Extension and Interruption of the Prescription

99 In paragraphs 81 and 94(15) of the Memorandum we suggested that the running of this proposed prescription should be interrupted by founding on the right or obligation in any competent judicial process during the prescriptive period, even if that process were not completed or pursued to an effective conclusion. In that event, prescription would begin to run afresh from the date of commencement of the process. If a final decree or award were pronounced, no action or diligence to enforce it would be competent after the expiration of five years from the date of the decree or award. Founding upon the right or obligation would include founding upon it by way of counter-claim in a judicial process and founding upon it in presenting or concurring in a petition for sequestration or liquidation of the person liable in delict. For this purpose judicial process would include any competent arbitration proceedings. The effect of the interruption would be that the prescription would commence anew as from the date of the interruption.

100 In paragraph 82 of the Memorandum we suggested that the period of the prescription should be extended by the period of pupillarity, minority or legal disability of the original aggrieved party.

101 In paragraph 83 of the Memorandum we suggested that an aggrieved party should not be required to initiate a judicial process against any person liable in delict who is willing to make a written acknowledgment of his liability, but that it would be necessary to prescribe the kind of writing which would be sufficient. We suggested that the writing should acknowledge in clear terms that the right is renewed as of the date of the document, that it should be granted by the person liable in delict or his agent duly authorised (whether generally or specially) to do so and that it should be made to the aggrieved party or any person having authority, general or special, to act for him in the matter.

102 In paragraph 84 of the Memorandum we suggested that on equitable grounds a defence against this prescription should be available to the aggrieved party if he had been deterred from taking action within the prescriptive period by fraud or concealment by the person liable in delict or by error on the part of the aggrieved party, but only where such error had been induced by the words or conduct of the person liable in delict. For the purposes of such a defence the words or actions of any person through whom the aggrieved party claimed or from whom the aggrieved party derived right should be regarded as actions of the aggrieved party, and the words or actions of the agent for either the aggrieved party or the person liable in delict should be regarded as those of his principal. We suggested that the effect of such fraud, concealment or error should be to defer the commencement of the prescription until the date when the fraud, concealment or error was discovered by the aggrieved party or could, with reasonable diligence on his part, have been discovered. In paragraph 94(15) of the Memorandum we suggested that in any action or arbitration in which the prescription was pleaded the court or the arbiter should have power to reject the plea if the delay in commencing proceedings was induced by the conduct of the person liable in delict or his agent and the court or the arbiter considered that it would be inequitable to allow the prescription to be pleaded.

103 Those who commented on the proposals contained in paragraphs 81 to 84 of the Memorandum almost unanimously supported the proposals in principle. We did not include in our proposals the right to sue for damages for breach of contract. In relation to prescription, however, we see no material distinction between delictual remedies and the right to sue for damages for breach of contract. Accordingly we include the latter in our proposals.

We recommend that the running of the proposed short prescription of rights and obligations based on delict and the right to sue for damages for breach of contract should be interrupted by court action, the pupillarity, minority or legal disability of the aggrieved party or fraud, concealment or error in accordance with the suggestions made in paragraphs 99 to 102.

PART VI

Limitations of Actions for Damages in respect of Personal Injuries

104 Many statutes contain provisions regarding the limitation of civil actions in specific instances, but these provisions are not for the most part of wide general importance. There is, however, one statutory limitation of actions which is of more general significance, and which restricts the period within which actions of damages arising out of personal injuries may be brought.

EXISTING LAW

105 The basic statutory provisions are contained in the Law Reform (Limitation of Actions, etc) Act 1954 s. 6 as amended by the Limitation Act 1963 ss. 8, 9 and 13. The limitation applies to all actions of damages where the damages claimed consist of or include damages or solatium in respect of personal injuries as defined in s. 6(3) of the 1954 Act. The limitation, therefore, does not apply to actions of damages for breach of contract (unless involving personal injuries) nor to actions of damages *ex delicto* where there is no element of claim for personal injuries.

106 The period of the limitation depends upon (*a*) whether the action is at the instance of the injured party on the one hand or his executors or dependants on the other and (*b*) whether 'material facts' of a decisive character relating to the action were available at the date when the injuries were sustained or only became available at some later date. 'Material facts' are deemed to be of a decisive character, if a reasonable person would, with appropriate professional or other advice, have considered that they made it worth while to raise an action. A fact is deemed to be outside a person's knowledge if he did not know it and if he has without success taken all reasonable steps to ascertain it, including all reasonable steps to seek appropriate advice as to circumstances which might lead to ascertainment of the fact.

107 The effect of the statutes is to impose periods of limitation upon the raising of an action which may be tabulated thus:

(1) Action by Injured Person

(*a*) three years from the date of the act, neglect or default giving rise to the action or, where the act, neglect or default is a continuing one, from the date on which it ceased (whichever of these applies being here called 'the three-year period'); or

(*b*) where the 'material facts' relating to the right of action were or included facts of a decisive character which were then outwith the knowledge (actual or constructive) of the pursuer, either (i) twelve months from his acquisition (actual or constructive) of the relevant knowledge or (ii) the end of the three-year period, whichever is later.

(2) Action by Executors or Dependants of Injured Person

(*a*) three years from the date of death of the injured person; or

(*b*) where the injured person dies after the end of his three-year period without the relevant knowledge (actual or constructive) as to the material facts relating to his right of action, twelve months from the date of his death; or

(*c*) where the relevant knowledge (actual or constructive) is acquired by the injured person during the third year of the three-year period, twelve months from the date of such acquisition.

Where the person to whom the right of action accrues is under legal disability by reason of pupillarity or minority or unsoundness of mind and is not in the custody of a parent, the period begins to run from the date when the person ceases to be under such disability. A right of action does not accrue to an executor or dependant unless the deceased himself was immediately before his death entitled to bring an action.

108 The effect of the limitation is that unless the action is commenced within the appropriate period, the action is barred. Further, when the action is commenced after the expiry of the three-year period due to the material facts not being known in time, the action will be tried by a judge alone, and not by a judge and jury.

109 The only way in which the running of the limitation period can be interrupted is to commence the action, the date of commencement being the date when service has been effected by a proper citation. Commencement of the action against one defender is not held to be sufficient to commence it against all other possible defenders; service must be effected on them by a proper citation within the limitation period to prevent the action against them being barred.

CRITICISMS AND SUGGESTIONS

110 In paragraphs 74 and 75 of the Memorandum we considered criticisms which had been made to us of the limitation imposed by the 1954 and 1963 Acts and of its interpretation by the courts. The principal criticisms and our views with regard to them are summarised in the following paragraphs.

111 One fundamental criticism was made which challenges the whole basis of the legislation. It was submitted that the general principle of the law should be against imposing any limitation upon the right of a person to seek redress for injury caused by the negligence of another person. It was also suggested that the purpose of the statutes was to clear away an accumulation of stale claims, a purpose which had now been served. In paragraph 75 of the Memorandum we expressed our view that the purpose of the legislation was not merely to clear away an accumulation of stale claims but the more general one of substituting for the indefinite types of *mora* a precise period of limitation. A substantial majority of the comments which we received on the Memorandum favoured the retention of the limitation. We have considered the arguments and reaffirm our present view that the limitation should be retained. We adopt the reasoning of the Committee on Limitation of Actions in Cases of Personal Injury (1962

Cmnd. 1829 paragraph 17) that the imposition of a definite period of limitation is justified on the grounds that defenders should be protected against stale claims relating to long past incidents about which their records may be non-existent and the recollection of witnesses no longer accurate, that pursuers should be encouraged to institute proceedings as soon as it is reasonably possible to do so and that the law should ensure that a person may feel with confidence that after a given time he may treat as being finally closed an incident which could have resulted in a claim against him.

We recommend that the principle of the legislation should be retained.

112 A second series of criticisms related to defects and obscurities in the drafting of the 1954 and 1963 Acts. Among the points which have been drawn to our attention are these:

(1) The construction of s. 6(1)(*a*) of the 1954 Act presents problems and, in *Watson v Fram Reinforced Concrete Co (Scotland) Ltd and Winget Ltd* 1960 SC (HL) 92, led to divergent judicial opinions. Lord Reid remarked, 'The section appears to have been drafted on the erroneous assumption that there is never any appreciable interval between the act or neglect and the damage which caused it . . .' (at p. 110).

(2) The proviso to s. 6(1)(*b*) of the 1954 Act is unnecessary if it merely reaffirms, in their application to limitation of actions, the common law rules relating to survival of rights of action on death. However, if the proviso is intended to make clear that a dependant's claim is barred if the deceased's own action was time-barred before his death, then the proviso is not expressed in a helpful way.

(3) The construction of the two Acts together is complicated and unnecessarily difficult, particularly as regards ss. 9 and 10 of the 1963 Act.

113 Those whom we consulted agreed that the statutes are difficult for the practitioner to use. Our further consideration of the statutes has reinforced our view that their provisions should be restated in a clearer form.

We recommend that the statutory provisions with regard to limitation of actions of damages arising out of personal injuries should be re-enacted in a comprehensive Scottish statute relating to prescription and limitation of actions.

114 Although we did not canvass the point specifically in our Memorandum, several of those consulted expressed the view that if our proposal for a five-year limitation period for actions arising out of delict were implemented, this period should apply to all such actions, including those for damages in respect of personal injuries. We do not find it easy to justify the distinction made between cases of personal injury and cases of loss of or damage to property, and we considered recommending a uniform period applying to all actions based on delict. The reason for our not so recommending is that the legislature recently (1954 and 1963) curtailed the English six-year period for

all actions founded on *inter alia* tort to three years where the damage caused consisted of personal injuries, and also applied this rule to Scotland; and in view of this legislation which, we think, rightly applies the same period of limitation on each side of the Border, we feel precluded from recommending at this time a change in the period which would apply to Scotland only. If, however, it were thought fit to amend the law so as to assimilate the limitation periods for claims in respect of personal injuries and other claims for damages, we should welcome such assimilation.

115 In paragraph 74 of the Memorandum we referred to the criticism that s. 6(2) of the 1954 Act does not deal with unsoundness of mind which affects the person to whom the right of action has accrued after the date on which the right accrued. Those whom we consulted have not commented on this point. We therefore adhere to our view that this minor defect should be remedied in the re-enacting legislation.

We recommend that the running of the limitation should be suspended during supervening insanity or unsoundness of mind in the person to whom a right of action has accrued.

116 Criticism has also been directed against the interpretation of the statutes by the courts. It has been suggested that the courts could have been more liberal in permitting amendments after the expiry of the period of limitation in actions raised timeously. In paragraph 75 of the Memorandum we indicated that we did not consider this criticism to be of real substance. We referred to *Pompa's Trustees v Edinburgh Magistrates* 1942 SC 119 (a case of limitation under the Riotous Assemblies (Scotland) Act 1822), where it was stated at page 125 that 'the Court will not in general allow a pursuer by amendment to substitute the right defender for the wrong defender, or to cure a radical incompetence in his action, or to change the basis of his case if he seeks to make such amendments only after the expiry of a time limit which would have prevented him at that stage from raising proceedings afresh'. Following this *dictum*, the court in *Miller v National Coal Board* 1960 SC 376 refused leave to the pursuer to introduce additional defenders and in *Dryburgh v National Coal Board* 1962 SC 485 refused the pursuers leave to substitute entirely new grounds of fault based on new averments of fact. The court is, however, prepared to allow amendments of the pleadings after the expiry of the statutory period where the alterations do not amount to a new action (see *Coyle v National Coal Board* 1959 SLT 114; *McCluskie v National Coal Board* 1961 SC 87; *O'Hare's Executrix v Western Heritable Investment Co Ltd* 1965 SC 97; and *Mowatt v Shore Porters Society* 1965 SLT (Notes) 10). We received one suggestion that a pursuer should be permitted to amend his pleadings to cure a radical incompetence in the action. We consider, however, that our proposals later in this Part of this Report will go some way to meeting the difficulty and that it is preferable to leave the Courts to deal with the multiplicity of circumstances which may arise.

117 A further criticism which we mentioned in paragraph 75 of the Memorandum has been directed against the provisions of s. 8 of the 1963 Act which permit an injured person to raise an action outwith the period of three years from the date of the act, neglect or default giving rise to the action

where material facts come to his knowledge at a later date, but limit the period for raising the action to twelve months from the date of acquiring that knowledge, actually or constructively. The ground of criticism is that the period of twelve months is too short in certain cases for the injured party to verify the fact that his injuries were attributable to a particular incident or exposure to particular conditions, that a particular person was responsible in law for the negligent act or omission and that he has a subsisting right of action against that person. In paragraph 75 of the Memorandum we recorded our impression that no change was required in the law, but asked for views on the subject.

118 Few of those consulted expressed positive opinions but some believed that the twelve-month period had caused, and would cause, hardship in an appreciable number of cases and contended that it should be extended to three years. The 1954 Act allows three years for the raising of an action in the straightforward case where it is obvious that a right of action exists at the time of the act, neglect or default giving rise to it. The three-year period, however, also applies to the many cases in which a pursuer may know at once that he has been injured but a comparatively lengthy investigation into other relevant factors is nevertheless necessary. The primary purpose of the 1963 Act was to preclude the operation of the 1954 Act in industrial disease cases where the three-year limitation period had begun to run, or had even expired, before the injured party was aware that he had been injured. Once he knows, or ought to know, that he has been injured, the 1963 Act permits him only one year for the investigation of all the other relevant factors. There is an obvious inconsistency here. If a three-year period is appropriate for the case where there is no interval of time between the occurrence of personal injury and the recipient's knowledge of it, the same period of three years would seem to be appropriate in deferred knowledge cases. Indeed, there is a *prima facie* case for a longer period in industrial disease cases in which questions of causation, fault and liability are likely to be more difficult to resolve than in the straightforward 'accident' case. Reference to the Report of the Committee on Limitation of Actions in Cases of Personal Injury (the Edmund Davies Committee) (Cmnd. 1829, September 1962) does not explain this discrepancy. All that is said there (in paragraph 35) is: '. . . we are satisfied that a period of twelve months is normally sufficient for the injured party to obtain the necessary advice and help'. That suggests that the 1954 Act period is too long and should be reduced from three years to twelve months. We are not satisfied that the period of three years is too long, and we find no cogent reason why a man who is informed that he has contracted a disease, which may or may not be related to the conditions in which he worked, should thereafter have a shorter period for investigation of all the facts relevant to a right of action than a man who breaks his leg while at work. We agree with those who favour extending the period that the extension of the one-year period to three years would not materially prejudice defenders. The one-year period allowed by the 1963 Act may not begin to run until years after the date, or date of cessation, of the act, neglect or default which gives rise to the action. In such a case it seems unlikely that the extension of the existing one-year period to three years would materially affect the nature or quality of the evidence available to the defenders.

119 After we had come to the conclusion that the one-year period allowed by the 1963 Act should be extended to three years, both Law Commissions were asked by the Government to consider what changes, if any, should be made in the 1963 Act. We understand that the Law Commission are now seeking information in England relevant to the length of the 1963 Act period. While recognising that there is no justifiable ground for having different periods for Scotland and England, our opinion is that the 1954 and 1963 Act period should be the same and that the twelve-month period fixed by the 1963 Act should be extended to three years.

We recommend that a person who sustains personal injuries should have three years from acquiring knowledge (actual or constructive) of the material facts relating to a right of action within which to raise an action.

120 There is a historical reason for inclining to the longer rather than the shorter period. Until 1954 there was, in Scotland, no general limitation of actions of damages for personal injuries. There were certain special, and severely criticised, exceptions, such as the Public Authorities Protection Act 1893, but in general a claim for damages survived until cut down by the long negative prescription, *ie* for twenty years.

121 After our Memorandum was issued, the case of *Lucy v W T Henley's Telegraph Works Co Ltd* [1969] 3 All ER 456, [1970] 1 QB 393 was reported, and our attention was again directed to the provisions of s. 9 of the 1963 Act relating to the limitation on the right of action of executors or dependants of an injured person who has died in circumstances where knowledge of the material facts becomes available after the date of the injury. There are two main criticisms:

(1) The 1963 Act at present permits the injured person himself a period of twelve months from the discovery of the material facts within which to raise an action, which may be long after the occurrence of the incident, or the exposure to the conditions, which occasioned the injury. However, where the injured person has died without knowledge of the material facts, his executors or dependants are allowed only a period of twelve months from the date of his death in which to raise an action, and if knowledge of the material facts becomes available after that period has expired, the right of action is barred. It is difficult to justify a rule of law which in comparable circumstances allows a potentially longer period for an injured person who has survived to raise an action than it accords to the representatives of an injured person who has died.

(2) In certain circumstances the period allowed to executors or dependants to raise an action may in terms of the 1963 Act be much less than twelve months. For example, where knowledge of the material facts becomes available to the injured person during the third year after the date of the incident which occasioned the injury and he dies without instituting court proceedings, the period available to his executors or dependants to raise an action is limited to the balance of the period of twelve months after the date when the deceased acquired the relevant knowledge. That may be a very short time indeed. The neglect of a person, possibly seriously

ill, to institute judicial proceedings may thus result in his executors or dependants having an inadequate time to consider and take advice upon the policy of commencing a litigation which may involve considerable expense.

122 We received no representations about this and to avoid delay in presenting this Report we did not engage in consultations in Scotland on this particular point. The Law Commission are, however, now examining it in relation to the equivalent statutory provisions applying to England and Wales and have sought the views of interested organisations and individuals in England and Wales. Our own conclusion is that the criticisms of s. 9 of the 1963 Act are well founded. We suggest that the executors or dependants of an injured person should be placed in the same position as the injured person himself, *ie* the period of limitation of action applicable to them should also be three years from the date on which the material facts relating to the right of action came to the knowledge (actual or constructive) of the executors or dependants but their right of action would depend, as hitherto, on the entitlement of the deceased to raise an action himself up to the date of his death.

123 This suggestion not only extends the period fixed by the 1963 Act but also alters the policy of that Act in that the actual or constructive knowledge of the deceased is replaced by that of the executor or dependant with a right of action. We think it unreasonable to make the limitation period in a dependant's claim start from the date when the deceased acquired actual or constructive knowledge of his right of action, since the dependant's right of action is independent of that of the deceased and does not accrue until the death of the deceased. The effect of our suggestion is that, where the deceased had learned of his right of action prior to his death, his dependants will nevertheless have a period of three years after his death within which to raise an action; and, where the deceased died without actual or constructive knowledge of his right of action, the three-year period limiting a dependant's right of action will not begin until the dependant knew, or ought to have known, that he had a right of action. Since all dependants must be conjoined as pursuers or called as defenders in one action and the question to be determined is not the competency of individual claims but the competency of that action, the limitation period must begin to run at the same time for all pursuers, *ie* from the date when any pursuer first acquires actual or constructive knowledge of the material facts relating to an action at the instance of dependants. We considered whether an executor's action claiming patrimonial loss sustained by the deceased prior to his death should receive special treatment but decided that the principle before mentioned must be applied whether the pursuer is an executor or dependant because both may be pursuers in one action as, for example, where a widow claims as relict for solatium and loss of support and as executrix for patrimonial loss.

124 We appreciate that the substitution of knowledge for death in this context may lead to claims being presented by executors or dependants long after the occurrence of the events which caused the injury. We considered whether a special limitation period should apply to such claims, barring them after the lapse of, say, ten years from the date of injury. The long

negative prescription, however, applies and, having regard to our recommendation in paragraph 35 in relation to its commencement, we conclude that no special period of limitation should be introduced.

We recommend that the executors or dependants of a person who has died as a result of personal injuries should have three years within which to raise an action, commencing from the date on which any of the pursuers first acquired knowledge (actual or constructive) of the material facts relating to the right of action.

PART VII

Rights and Obligations in the Estates of Deceased Persons and Trusts

125 The law of prescription in Scotland affects persons having rights and obligations in connection with executry or trust estates according to the nature of the legal relationship. We summarise the law in respect of (1) creditors upon or debtors to the estate, (2) persons having legal rights or prior rights in the estate of a deceased person and (3) executors or trustees in relation to beneficiaries.

Creditors and Debtors

126 The executor of a deceased person cannot be compelled to pay creditors until after the expiration of six months from the death. After that period has elapsed the executor may proceed to pay creditors and he is not accountable to creditors who claim later, although such late claimants are entitled to participate in the division of any funds remaining in the hands of the executor. Where funds of the estate have been distributed to beneficiaries, however, creditors may pursue claims against the beneficiaries subject to any of the shorter prescriptions which may affect them and subject ultimately to the long negative prescription. Claims of creditors against trust estates may be made against the trustees or, if the trust funds have been distributed before the claim is made, against the beneficiaries, subject to any of the shorter prescriptions which affect them and subject ultimately to the long negative prescription.

127 The liability of debtors to pay or account for moneys due to an executry or trust estate is governed by the normal law of prescription applicable to any debtor—creditor relationship, *ie*, it is subject to any of the shorter prescriptions which affects it and to the long negative prescription. If an executor or trustee fails to ingather debts due to the estate he is liable in damages to the beneficiaries, but the claim of damages will be extinguished by the long negative prescription.

Legal Rights and Prior Rights

128 Claims for legal rights, *ie jus relicti* or *jus relictae* and legitim, are extinguished by the long negative prescription. The position of claims to prior rights by the spouse of a deceased person under the Succession (Scotland) Act 1964 is not clear, but since they are first in ranking order, taking precedence over legal rights, it is suggested that they should be similarly treated *quoad* prescription, *ie* they also will be extinguished by the long negative prescription.

Beneficiaries

129 In a question with a beneficiary the possession of a trustee or executor is not adverse possession since it is possession upon a title on which the

beneficiary claims, and for his benefit. So the long negative prescription would not affect (i) a claim to accounting for trust or executry property in the possession of the trustee or executor, nor (ii) recovery of trust property which the trustee or executor had in breach of trust appropriated to his own use, nor (iii) recovery of trust property which the trustee had fraudulently transferred to a third party who was not acting in good faith. Where the trustee or executor had fraudulently transferred trust property to a third party who had received it in good faith, prescription would not affect the claim of the beneficiary against the trustee or executor but would extinguish the right of the beneficiary to recover from the third party. Where the trustee or executor had in good faith transferred trust property to a person whom he believed to be beneficially entitled to it, and the true beneficiary had knowledge of the transaction, the right of the true beneficiary to challenge the action of the trustee or executor or to recover the property from the transferee would be extinguished by the long negative prescription. Claims by a beneficiary against a trustee or executor in respect of loss caused by *ultra vires* or negligent acts are also cut off by the long negative prescription.

130 In the case of *ultra vires* or negligent acts and in those cases of transfer of trust property to which the long negative prescription applies, the prescription would commence from the date of the *ultra vires* or negligent act or the wrongful transfer, except in circumstances where the claimant was unaware of the relevant facts or did not have a vested right, when it would commence from the date of the claimant's acquiring knowledge or the vesting of the right in him.

English Law

131 For comparative purposes we considered the position under English law in which the Limitation Act 1939 does not bar actions based on fraudulent breach of trust nor actions for recovery of trust property in possession of the trustee or received by the trustee and converted to his use. Subject to that, (i) a claim to the personal estate of a deceased person or any part thereof must be brought within twelve years from the date when the right to receive the estate or share accrued and (ii) the claim of a beneficiary to a share in a trust estate cannot be brought after six years. Actions in respect of *ultra vires* acts of trustees or negligence in managing trust investments or payments of trust property to the wrong persons where no question of fraud is involved are subject to the limitation of six years.

CRITICISMS AND SUGGESTIONS

132 In the Memorandum we suggested that there should be no change in the law of prescription in relation to the estates of deceased persons and trust estates, but that it should be made clear that the claim of a surviving spouse for prior rights in an intestate estate is subject to the long negative prescription. No serious criticism of this was made by those whom we consulted. We consider, however, that in consonance with our proposals relating to rights and obligations based on delict, actions by beneficiaries in respect of loss or damage caused by *ultra vires* or negligent acts of trustees or executors should be subject to the short prescription of five years. There seems to us no valid reason why such actions should not be commenced within a reasonably short period.

We recommend that:

(1) subject to the matters mentioned in the following sub-paragraphs, the law relating to prescription of trust property and interests in the estates of deceased persons should be re-stated in the proposed comprehensive statute, with the substitution of the new short prescription for those of the existing shorter prescriptions which at present apply;

(2) the long negative prescription should extinguish the claim of a surviving spouse for prior rights in an estate; and

(3) rights and obligations in respect of loss or damage caused by ultra vires or negligent acts of a trustee or executor should prescribe after five years commencing from (a) the date of the ultra vires or negligent act or (b) if the act is a continuing one, from the cessation of it or (c) if the fact that loss or damage has been caused by the act is not immediately known to the beneficiary affected by it, from the date when that fact is, or could with reasonable diligence have been, ascertained by him, or (d) if at the time of the ultra vires or negligent act the beneficiary affected did not have a vested interest, from the date on which his interest vested in him.

PART VIII

Quinquennial Prescription of Diligences relating to Heritable Property

EXISTING LAW

133 The combined effect of provisions contained in the Bankruptcy (Scotland) Act 1913 and the Conveyancing (Scotland) Act 1924 is that all forms of diligence which render land, leases and heritable securities litigious prescribe after the expiration of five years from their effective date. Inhibitions, notices of litigiosity in adjudications and abbreviates of sequestration are the principal forms of diligence affected. After the expiration of the prescriptive period the diligence ceases to have effect. New letters of inhibition can be taken out, however, which are effective for a period of five years. In bankruptcy the trustee must, if the sequestration is continuing, record before the end of the period of five years a memorandum which is effective for another five years.

CRITICISMS AND SUGGESTIONS

134 In paragraph 71 of the Memorandum we pointed out that the object of these comparatively modern statutory provisions was to ensure that a search in the Register of Inhibitions and Adjudications for a period of five years prior to the date of a transaction affecting heritable property would disclose any diligences which were still effective. The provisions operate satisfactorily in practice and it is convenient to retain these provisions in the statutes in which they at present appear as part of a logical conveyancing scheme. None of those whom we consulted proposed a change in the existing law.

We recommend that the law on this matter should remain unchanged, and that provisions to deal with it should not appear in the new statute which we propose.

PART IX

General

135 We mention here two matters of general application. These are the computation of periods of time and the question of whether contracting-out of the operation of prescription should be permitted. We also refer to various prescriptions and other time-limits which are not considered in detail in this Report.

Computation of Periods of Time

136 The Committee of Experts of the Council of Europe has considered the calculation of periods of time. In paragraph 91 of the Memorandum we suggested that there should be a clear statement of the method of calculating prescriptive periods applicable to all kinds of prescription, and we proposed rules which followed those provisionally proposed by the Committee of Experts.

137 Our proposed rules were:

(1) The rules apply to all prescriptive periods.

(2) The day in the course of which the prescriptive period begins is not included in that period, but the day in the course of which it expires is included.

(3) A day is taken to run from the midnight immediately after which it begins to the midnight at which it ends.

(4) A year is a calendar year of 365 or, in a leap year, 366 days.

138 The balance of opinion among those who commented on these proposed rules was in favour of them.

We recommend that the rules proposed in paragraph 137 should be enacted in the proposed new statute.

139 The Committee of Experts provisionally proposed a rule to the effect that, when a prescriptive period is due to end on a Saturday, a Sunday or an 'official holiday', the prescriptive period should be extended to the next working day thereafter. What is meant by an 'official holiday' is perhaps best explained by the use in England and Wales of the expression 'bank holiday', which is virtually a general public holiday throughout England and Wales. New Year's Day and, to an increasing extent, Christmas Day appear to be the nearest Scottish equivalent. In paragraph 93 of the Memorandum we asked whether this provisional rule would be a useful addition to the law of Scotland. Differing views on the desirability of introducing this rule were expressed by those whom we consulted. The expression 'official holiday' would present problems of definition in Scotland where there is a mixed pattern of one-day holidays, including bank holidays, observed by particular businesses and professions and trades holidays on

different dates in various districts. In any event we consider that, in relation to the period of prescription which we recommend, one or two additional days are not of sufficient importance to merit a special extension.

We recommend that extension of a prescriptive period because of an 'official holiday' should not be introduced in Scotland.

140 Although our concern here has chiefly been with calculation of prescriptive periods, we have incidentally had to look at the general rules of Scots law governing the calculation of other periods of time. Apart from particular statutes, the only general rule on computation of time is that in s. 3 of the Interpretation Act 1889 which provides that in statutes 'month' shall, unless the contrary intention appears, mean a calendar month. The common law, whereby 'week' means a calendar week and 'day' generally means a period of twenty-four hours from midnight to midnight, is confused by conflicting judicial decisions and *dicta*. A further complication is that in some instances time is reckoned from moment to moment (*eg* in calculating the attainment of majority), not from day to day. Clarification of this matter would, in our view, be a useful step towards simplification of the law, but would more appropriately be enacted separately at a suitable opportunity.

We recommend that, at a suitable opportunity, statutory rules of general application should be enacted for the calculation of periods of time.

Contracting-out

141 One other matter of general application to the law of prescription is the possibility of 'contracting-out', in the sense of agreement between parties that they will ignore a mandatory statutory provision. To permit contracting-out would clearly be undesirable and would not be consonant with the traditional approach to prescription in Scots law. We seek a clear statement of the law of prescription and limitation of actions, and we recommend that, for the avoidance of doubt, the proposed new statute on these subjects should state that the operation of its provisions may not be elided by agreement of the parties affected.

We recommend, for the avoidance of doubt, that the proposed new statute should render null any agreement to avoid its provisions.

Other Prescriptions

142 In this Report we have dealt at length with only the more important prescriptions and limitations. There are a number of other statutory prescriptions. The vicennial prescription of retours and services was introduced by the Reduction Act 1617 (c. 13). Retours and services will now only arise in relation to deaths before the Succession (Scotland) Act 1964 came into operation, and the long negative prescription (itself now of twenty years) will in any event apply. We therefore consider that the Reduction Act 1617 should be repealed. The decennial prescription of actions of accounting between pupils and minors and their tutors and curators was introduced by the Prescription Act 1696 (c. 9). Our proposed new short prescription will apply to obligations of accounting (paragraph 60). The

Prescription Act 1696 should therefore be repealed. The Prescription (Ejections) Act 1579 (c. 19) requires actions of spuilzie and ejections to be pursued within three years. These actions are covered by our proposed new short prescription for cases of delict and are therefore unnecessary.

We recommend the repeal of the Reduction Act 1617 (c. 13), the Prescription Act 1696 (c. 9) and the Prescription (Ejections) Act 1579 (c. 19).

143 We notice here a maxim of the common law which bears some resemblance to a positive prescription. This is the *decennalis et triennalis possessio*, which gives a churchman a presumptive but temporary title to the subjects included in his benefice if there has been thirteen years' possession (actual or constructive) of them. Unlike positive prescription, substantially continuous possession is required up to the raising of an action to assert the claim. Since the period of positive prescription has now become ten years, the *possessio* would appear to be of utility only if there were no title on which the positive prescription could operate.

We recommend that the decennalis et triennalis possessio should be declared by statute no longer to be part of the law of Scotland.

144 The Limitation (Enemies and War Prisoners) Act 1945 s. 4(*a*) relaxes certain prescriptions and limitations in favour of the necessary parties to an action or parties to an obligation who are enemy or detained in enemy territory. Any period of less than ten years prescribed by the statutes specified in the Act is suspended while the situation continues and does not expire until at least twelve months from the time when the party ceased to be an enemy or ceased to be detained. Two or more periods are treated as one continuous period. The statutes specified in the Act as amended include all those specified in paragraph 37 of this Report (which we propose should be repealed) and the Law Reform (Limitation of Actions, etc) Act 1954 s. 6 and the Limitation Act 1963 s. 10(1). The principle of the 1945 Act is clearly useful, and we recommend its retention.

We recommend that the provisions of the Limitation (Enemies and War Prisoners) Act 1945 should be re-enacted in the comprehensive Scottish statute which we propose.

145 There are also many statutory time-limits embodied incidentally in other statutes, relating to the subject-matter of the statutes themselves. We annex as Appendix C a list of those time-limits which our researches and enquiries have revealed, with the caveat that we make no claim that the list is comprehensive. We do this since it might be useful for an index of statutes containing time-limit provisions to be compiled, so that, when amendment of any of those statutes is proposed, consideration can be given to fitting the time-limit provisions into the pattern of the general law. Some of the provisions in the Appendix might well be repealed if our proposals become law. An example is s. 5 of the Limitations of Actions and Costs Act 1842 which has already been repealed for England and Wales and Northern Ireland.

PART X

Summary of Recommendations

146 The law of Scotland on prescription and limitation of actions for personal injury, both common law and statutory, should be stated in one comprehensive statute (paragraph 8).

POSITIVE PRESCRIPTION

147 Forty years' possession should continue to be required when the foundation writ of a prescriptive progress is a recorded extract decree of adjudication for debt (paragraph 13(4)).

148 The prescriptive period for registered leasehold titles and recorded titles to allodial property should be reduced to ten years (paragraphs 17(1) and 18).

149 The prescriptive period for unregistered leasehold titles and unrecorded titles to allodial property should be reduced to twenty years (paragraphs 17(2) and 18).

150 The prescriptive period for servitudes and rights of way should be reduced to twenty years. In the computation of this period no allowance should be made for the years of pupillarity, minority or legal disability of the person against whom the prescription is used (paragraph 19).

151 The prescription should continue to be available to found a title for a possessor in bad faith (paragraph 13(2)).

152 Where a deed contains an informality of execution and the appropriate court has pronounced a decree under the Conveyancing (Scotland) Act 1874 s. 39 declaring that the deed was subscribed by the grantor and the witnesses, the deed should be deemed to be, and always to have been, *ex facie* valid for the purposes of positive prescription (paragraph 13(3)).

153 Notices of title and notarial instruments should be sufficient foundation for prescription without production of the warrants upon which they proceed (paragraph 15).

154 The Titles to Land Consolidation (Scotland) Act 1868 should be amended to authorise re-registration of any deed or conveyance which contains an error or defect. Where any such deed or conveyance is registered after the amended legislation has taken effect and is subsequently re-registered, the prescriptive period should commence on the date of the original registration, except where the error or defect relates to the extent of the grant made in the deed or conveyance, in which case the prescriptive period should commence on the date of re-registration (paragraph 14).

155 Interruption of positive prescription by notarial protest should no longer be competent (paragraph 20).

156 It should be competent to interrupt positive prescription by making a claim in an arbitration process, but the positive prescription should not be interrupted by citation in an action which does not become a process (paragraph 21).

LONG NEGATIVE PRESCRIPTION

157 Except as otherwise specified, the period and scope of the long negative prescription should remain unchanged in relation to rights and obligations in general (paragraph 30).

158 The prescriptive period for servitudes and public rights of way should be reduced to twenty years. In private servitude rights, the prescriptive period should not be extended by reason of the pupillarity, minority or legal disability of the person against whom the prescription is used (paragraph 31).

159 In actions for damages based upon delict, quasi-delict or breach of contract absence of knowledge of the material facts giving rise to the claim should not delay the commencement of the prescription. When the delict, quasi-delict or breach from which the right of action accrued is of a continuing character, the prescription should run from the date on which the delict, quasi-delict or breach ceased (paragraph 35).

160 It should be competent to interrupt the long negative prescription by making a claim in an arbitration process but interruption should not be effected by notarial protest nor by citation in an action which does not become a process (paragraph 32).

161 The law as to the availability of the plea of *non valens agere cum effectu* should remain unaltered (paragraph 33).

SHORTER NEGATIVE PRESCRIPTIONS

162 The special requirements as to proof of the constitution, or the constitution and resting owing, of obligations imposed by the present shorter prescriptions should be abolished (paragraph 49).

163 The Prescription Act 1579 (c. 21), the Prescription Act 1669 (c. 14), the Cautioners Act 1695 (c. 7) and ss. 37, 39 and 40 of the Bills of Exchange (Scotland) Act 1772 should be replaced by provisions in the proposed comprehensive statute introducing a new short negative prescription of more general application (paragraph 58).

PROPOSED NEW SHORT NEGATIVE PRESCRIPTION

164 The proposed new prescription should apply to:

(1) rights and obligations arising from contract (other than breach of contract), promise and specific implement (paragraph 62);

(2) obligations based upon unjustified enrichment, including restitution, repetition, recompense and obligations resulting from *negotiorum gestio* (paragraph 63);

(3) obligations of accounting, other than accounting for trust funds (paragraph 60);

(4) bills of exchange and promissory notes (paragraph 64);

(5) cautionary obligations, including obligations constituted in a form whereby the cautioner is bound as principal (paragraph 64);

(6) money transactions between relatives (paragraph 66);

(7) current bank accounts and deposits (paragraph 74);

(8) actions to recover overdue payments in respect of ownership or occupation of land (paragraph 83);

(9) rights and obligations based on delict and quasi-delict other than personal injury (paragraph 97);

(10) rights to sue for damages for breach of contract (paragraph 98).

165 The proposed new prescription should not apply to:

(1) banknotes (paragraph 64);

(2) rights and obligations of a kind excluded from the operation of the long negative prescription (paragraph 65(2));

(3) rights relating to land (paragraph 65(3));

(4) actions for recovery of possession of land for failure in periodic payments in respect of the land (paragraph 83);

(5) contracts, promises and obligations of accounting founded on attested writs (paragraph 60);

(6) obligations of accounting for trust funds (paragraph 60);

(7) legal rights in succession and the prior rights of a surviving spouse under the Succession (Scotland) Act 1964 (paragraph 60);

(8) rights and obligations arising under contracts of partnership or agency (paragraph 60);

(9) delictual rights and obligations affected by the Law Reform (Limitation of Actions, etc) Act 1954 as amended (paragraph 94).

166 The proposed new prescription should extinguish rights and obligations to which it applies (paragraphs 88 and 96).

167 Collateral rights arising from contract or promise should not be extinguished along with the principal obligation (paragraph 88).

168 The period of the proposed new prescription should be five years (paragraphs 68 and 96).

169 The prescriptive period should commence as follows:

(1) ordinary contracts—when the right becomes enforceable (paragraph 70);

(2) continuing accounts, including accounts for services—the date of the last item of account (paragraphs 71 and 72);

(3) long-term contracts—the date when the last item of the contract becomes due for payment (paragraph 71);

(4) partnership and agency—the date when the right or obligation becomes prestable under the dissolution or termination arrangements (paragraph 73);

(5) banking transactions—the date when the creditor in the transaction demands payment (paragraph 74);

(6) guarantees—in the absence of express provision:

(*a*) liability of guarantor to creditor—on default in payment by the principal debtor (paragraph 76);

(*b*) liability of principal debtor to guarantor—on payment by the guarantor to the creditor (paragraph 77);

(*c*) liability of co-guarantors *inter se*—on payment by a guarantor to the creditor (paragraph 78);

(7) loans:

(*a*) the date of payment given in the document of loan (paragraph 79);

(*b*) if no date of payment is stated, or if the loan is repayable on demand —the date of the demand for repayment (paragraph 79);

(8) bills of exchange and promissory notes—in the absence of express provision:

(*a*) liability of acceptor—the date when the liability arises (paragraph 81);

(*b*) liability of drawer or indorser—on receipt of notice of dishonour, or date of dishonour, or notice of first dishonouring, as appropriate (paragraph 82);

(9) periodic payments in respect of ownership or occupation of land—the date when each payment becomes due (paragraph 83);

(10) loan transactions between relatives—the date of the demand for repayment (paragraph 66);

(11) rights and obligations arising from delict, quasi-delict or breach of contract—the date of the delict, quasi-delict or breach (paragraphs 97 and 98);

(12) continuing acts, neglects or defaults giving rise to delict, quasi-delict or breach of contract—the cessation of the act, neglect or default (paragraphs 97 and 98);

(13) if the damage caused by the delict, quasi-delict or breach of contract is not readily ascertainable—the date when the damage or breach of contract is, or could with reasonable diligence have been, ascertained by the aggrieved party (paragraphs 97 and 98).

170 The prescriptive period should be extended to allow for the pupillarity, minority or legal disability of the creditor or the original aggrieved party (paragraphs 90, 100 and 103).

171 The prescription should be interrupted by:

(1) court action (paragraphs 89, 99 and 103);

(2) written acknowledgement of the debt or liability (paragraphs 91, 101 and 103);

(3) payment to account of principal or interest (paragraph 92);

(4) fraud or concealment by the debtor or the person liable (paragraphs 93, 102 and 103);

(5) error induced by the conduct of the debtor or the person liable (paragraphs 93, 102 and 103).

172 In continuing accounts, the account should be terminated by the death, bankruptcy or liquidation of either party (paragraph 71).

LIMITATION OF ACTIONS FOR DAMAGES IN RESPECT OF PERSONAL INJURIES

173 The principle embodied in the Law Reform (Limitation of Actions, etc) Act 1954 as amended, should be retained (paragraph 111).

174 The statutory provisions relating to limitation of actions of damages arising out of personal injuries should be re-enacted in a comprehensive Scottish statute on prescription and limitation of actions (paragraph 113).

175 A person who sustains personal injuries should have three years from acquiring knowledge (actual or constructive) of the material facts relating to a right of action within which to raise an action (paragraph 119).

176 The executors or dependants of an injured person who has died as a result of his injuries should have three years within which to raise an action, commencing from the date on which any of the pursuers first acquired knowledge (actual or constructive) of the material facts relating to the right of action (paragraph 122).

177 The running of the limitation should be suspended during supervening insanity or unsoundness of mind in the person to whom the right of action has accrued (paragraph 115).

RIGHTS AND OBLIGATIONS IN THE ESTATES OF DECEASED PERSONS AND TRUSTS

178 The law relating to prescription of trust property and interests in the estates of deceased persons should be re-stated in the proposed comprehensive statute, with the substitution of the new short negative prescription for those of the existing shorter prescriptions which at present apply (paragraph 132).

179 The long negative prescription should extinguish the claim of a surviving spouse for prior rights in an estate under the Succession (Scotland) Act 1964 (paragraph 128).

180 Rights and obligations in respect of loss or damage caused by *ultra vires* or negligent acts of a trustee or executor should prescribe after five years commencing from:

(1) the date of the *ultra vires* or negligent act; or

(2) if the act is a continuing one, from the cessation of it; or

(3) if the fact that loss or damage has been caused by the act is not immediately known to the beneficiary affected by it, from the date when that fact is, or could with reasonable diligence have been, ascertained by him; or

(4) if at the time of the *ultra vires* or negligent act the beneficiary affected did not have a vested interest, from the date on which his interest vested in him (paragraph 132).

QUINQUENNIAL PRESCRIPTION OF DILIGENCES RELATING TO HERITABLE PROPERTY

181 The law on this matter should remain unchanged, and provisions to deal with it should not be included in the proposed comprehensive statute (paragraph 134).

GENERAL

182 The proposed new statute should include rules for computation of prescriptive periods as follows:

(1) the rules should apply to all prescriptive periods;

(2) the day in the course of which the prescriptive period begins should not be included in the period, but the day in the course of which it ends should be included;

(3) a day should be taken to run from the midnight immediately after which it begins to the midnight at which it ends;

(4) a year should be a calendar year of 365 or, in a leap year, 366 days;

(5) prescriptive periods should not be extended to include 'official holidays' (paragraphs 137 and 139).

183 At a suitable opportunity, statutory rules of general application should be enacted for the calculation of all periods of time (paragraph 140).

184 For the avoidance of doubt, any legislation following on our proposals should render null any agreement to avoid its provisions (paragraph 141).

185 The Reduction Act 1617 (c. 13), the Prescription Act 1696 (c. 9), and the Prescription (Ejections) Act 1579 (c. 19) should be repealed (paragraph 142).

186 The *decennalis et triennalis possessio* should be declared by statute no longer to be part of the law of Scotland (paragraph 143).

187 The provisions of the Limitation (Enemies and War Prisoners) Act 1945 should be re-enacted in the proposed comprehensive statute (paragraph 144).

Appendix A

ORGANISATIONS AND INDIVIDUALS WHO COMMENTED ON MEMORANDUM No 9

Association of County Councils in Scotland

Automobile Association

Mr J A Beaton, Scottish Office

Mr J W Bourne, Lord Chancellor's Office

Mr W F Bowker, Institute of Law Research and Reform, Alberta

British Insurance Association

Building Societies Association

Committee of Scottish Bank General Managers

Confederation of British Industry

Consumer Council

Mr J N Dandie

District Councils' Association for Scotland

Faculty of Advocates

Dr W M Gordon, University of Glasgow

Professor G L F Henry, University of Edinburgh

Institute of Chartered Accountants of Scotland

Keeper of the Registers of Scotland

The Hon Lord Kissen

Law Society of Scotland

Lloyd's

Professor I P Miller, University of Strathclyde

Mr W J McFadden

Professor F MacRitchie, University of Aberdeen

The Rt Hon Lord Reid of Drem

Royal Faculty of Procurators in Glasgow

Royal Incorporation of Architects in Scotland

Scottish Counties of Cities Association

Scottish Financiers Association

Scottish Law Agents Society

Scottish Rights of Way Society Ltd

Society of Solicitors in the Supreme Courts of Scotland

Scottish Trades Union Congress

Society of Writers to HM Signet

Town Planning Institute

Appendix B

NOTE ON PROOF BY WRIT OR OATH

General

1 The vicennial prescription of holograph writs, the sexennial prescription of bills of exchange and promissory notes, the quinquennial prescription and the triennial prescription do not render an obligation unenforceable but restrict the method of proving it. In the case of holograph writs, proof is confined to the oath of the party against whom the claim is made and, in the case of the other prescriptions mentioned, to his writ or oath.

2 The defender who founds upon one of these prescriptions must so plead in his defences. After considering the pursuer's averments and the terms of the account or other document sued upon (*Caledonian Railway Co v Chisholm* (1886) 13 R 773, per Lord President Inglis at p. 775) the court sustains or repels the plea, usually before a proof is allowed. Occasionally a preliminary proof has been allowed to enable the plea to be disposed of (*eg McKinlay v Wilson* (1885) 13 R 210). If the defender pleads prescription after proof *prout de jure* on the merits has been heard, the case must be decided on the evidence brought out by that proof (*Wyse v Wyse* (1847) 9 D 1405).

Proof of Prescribed Writs and Obligations

3 The creditor is not required to prove both the constitution and the resting owing of the debt by either writ or oath. If constitution of the debt is proved by writ or judicial admission, resting owing may be proved by reference to oath (*Wilson v Strang* (1830) 8 S 625; *Deans v Steele* (1853) 16 D 317).

Judicial Admissions

4 A judicial admission of a fact is equivalent to proving it by writ or oath (*Wilson v Strang supra*; *Darnley v Kirkwood* (1845) 7 D 595, per Lord Mackenzie at p. 598 and Lord Fullerton at p. 600). Apart from prescription, legal presumptions from the actings of the parties may impose upon the debtor an additional onus of proof of his case; but when one of these prescriptions applies, the onus is upon the creditor. Hence an inference from averments of facts made by the defender or a failure by him to deny an averment of fact within his knowledge are insufficient; the judicial admission must be express and unequivocal (*Noble v Scott* (1843) 5 D 723, per Lord Justice-Clerk Hope at p. 727; *Darnley v Kirkwood supra* per Lord Fullerton at p. 600). A defender may wish not merely to plead prescription, but also to make alternative averments of fact in case his attempt to plead prescription is unsuccessful. Only if he is unsuccessful in pleading prescription and his averments or alternative defences infer an admission of the constitution of the debt will the inferred admission be construed as a judicial admission (*Alcock v Easson* (1842) 5 D 356, per Lord Justice-Clerk Hope at p. 366). The judicial admission, though express and unequivocal, may be subject to a qualification. If prescription applies, the admission can be founded on only if the qualification is disproved by the writ or oath of the debtor (*Walker v Garlick* 1940 SLT 208; *McKie v Wilson* 1951 SC 15).

Proof by Writ

5 There seems little doubt that the constitution of a debt may be proved by a writ dated either before or after the end of the prescriptive period. The position however is much less clear in connection with the value of a writ dated within the prescriptive period for proving the resting owing of a debt. In *Lindsay v Moffat* (1797) M 11137 it was held that a writ dated on the last day of the prescriptive period was sufficient. In *Johnson v Tillie, Whyte & Co* 1917 SC 211 (a case on the triennial prescription) it was conceded by counsel and accepted by a majority of the court that a writ dated within the prescriptive period could prove the resting owing of the debt. However, Lord Johnston gave a very strong dissenting judgment which was approved by Lord Morison in *Robb & Co v Stornoway Pier and Harbour Commission* 1932 SC 290 at p. 299. Lord Mackay in *Borland v Macdonald Ltd* 1940 SC 124 at p. 136 also stated that *Johnson v Tillie, Whyte & Co* should be reconsidered. In Walkers on Evidence at p. 137 it is stated that 'a writ is useless

unless it is dated after the end of the prescriptive period'; but in two Sheriff Court cases *Halliday v Watt & Co Ltd* 1950 SLT (Sh Ct) 58 and *Alexander Wilson (Aberdeen) Ltd v Stewart & Co Ltd* 1957 SLT (Sh Ct) 62, *Johnson v Tillie, Whyte & Co* has been followed. A debt proved by writ to have been resting owing after the end of the prescriptive period will usually be regarded as still subsisting at the date of the action, unless the debtor proves otherwise (*Drummond v Lees* (1880) 7 R 452); the reverse was however held in *Storeys v Paxton* (1878) 6 R 293. Payments of interest after the end of the prescriptive period must be proved by writ of the debtor if they are to establish the resting owing of the debt (Dickson, *A Treatise on the Law of Evidence in Scotland* 3rd Edition, §§ 458, 520).

6 Entries in a party's business books are his writ (*Jackson v Ogilvie's Exor* 1935 SC 154; *Hope v Derwent Rolling Mills Co Ltd* (1905) 7 F 837). Even unsigned jottings in books may be writ if they are admitted or proved to be holograph (*Storeys v Paxton supra*). Parole evidence is admissible to prove that the signature is genuine or that the writing is holograph (*Borland v Macdonald Ltd supra*). Markings by the debtor on the back of a bill of interest paid have been held to be his writ (*Drummond v Lees supra*).

7 A writing by another person (*eg* his factor) may be constructively the writ of the party (*Smith v Falconer* (1831) 9 S 474), provided that the agency of the writer is proved or admitted to bind his principal, the party (*McGregor v McGregor* (1860) 22 D 1264). But if the debtor can be considered to be acting for the creditor, a writ granted by the debtor in these circumstances is still the debtor's writ. Examples are entries by the debtor, as factor on the creditor's trust estate, in the trust cash book (*Drummond v Lees supra*) and signature by the debtor, as executor of the creditor, of an inventory of the latter's estate which included the debt (*Jackson v Ogilvie's Exor supra*).

8 Documents granted by the creditor (such as receipts) become constructively the writ of the debtor if the latter retains them (*Campbell's Trs v Hudson's Exor* (1895) 22 R 943; *Wood v Howden* (1843 5 D 507). A letter from the creditor may become the debtor's writ if required to explain a communication from the debtor (*MacBain v MacBain* 1930 SC (HL) 72; *Rennie v Urquhart* (1880) 7 R 1030); the creditor's letter may be recovered by diligence (*Stevenson v Kyle* (1849) 11 D 1086).

9 When the obligation has been proved by writ to exist, the amount of the debt may be proved by parole evidence (*Borland v Macdonald supra* per Lord Justice-Clerk Aitchison at p. 130).

Proof by Oath

10 Lord Jeffrey stated in *Hunter v Geddes* (1835) 13 S 369 at p. 377 that a judge must give effect to the oath 'if at all intelligible, however palpably and disgracefully false it may appear. But, in order to give effect to it, its true tenor and importance must, at all events, be ascertained'. In that case a general denial was disregarded because previous specific admissions led to the inference that it was untrue. A statement by the deponent that he does not remember or does not know is generally treated as a denial (*Fyfe v Miller* (1837) 15 S 1188), unless he can hardly have forgotten or have been unaware of the fact in question without being able to show good reason. In that event, he is held to have admitted knowledge (Dickson, *A Treatise on the Law of Evidence in Scotland*, 3rd edition § 1499).

11 Documents cannot supplement or explain or contradict the oath. However, they may be made part of the oath by being put before the deponent who is then examined on their contents (*Heddle v Baikie* (1847) 9 D 1254, per Lord Moncrieff at p. 1263). If the deponent seeks to support his statement by referring to a document which does not support it, the appropriate part of the oath will be rejected (*Cooper v Hamilton* (1824) 2 S 728, (1826) II W & S 59).

12 One of the most common problems in interpreting an oath is whether a qualification of an admission in the oath is intrinsic or extrinsic. If the qualification is intrinsic, it receives effect as part of the oath, but if it is extrinsic it is disregarded. The Reports are

inkled with cases on this point but a useful summary of the law is given by Lord Deas in *Cowbrough & Co v Robertson* (1879) 6 R 1301 at p. 1312:

'I hold:

1st That if the oath bear that some other mode of satisfaction or extinction than payment in money was stipulated or bargained for at the contraction of the debt, that other mode, if the debtor swears it was acted on, will be a competent and intrinsic quality of the oath, although not made the subject of subsequent agreement.

2nd That if the debtor depones to an express subsequent agreement to hold the debt satisfied or extinguished by some other specific mode than payment in money, that other mode will be a competent and intrinsic quality of the oath, although not stipulated for when the debt was contracted.

3rd That an express subsequent agreement to forgive the debt, in whole or in part, deponed to by the debtor, will in like manner be intrinsic, and receive effect accordingly, because, so far as thus deponed to, the debt cannot be said to be resting owing.

'If I am asked how these views are reconcilable with holding that an allegation in the oath that the debt has been compensated is held, in the general case, extrinsic, my answer is that compensation, if not sworn to have been sanctioned and agreed to by the creditor, will be extrinsic, because compensation usually involves matter of law, and although the deponent may establish any relevant matter of fact by his own oath he cannot thereby establish matter of law.'

13 If there are several defenders, the reference to oath must generally be to the oaths of all of them. However, if one of them depones that the debt has been paid, it appears that all are freed (*Darnley v Kirkwood supra* per Lord Jeffrey at p. 603), as are any who do not admit the constitution of the debt (*Duncan v Forbes* (1831) 9 S 540). It also appears that when only some of the defenders are sued, and they admit constitution of the debt but cannot depone to payment, resting owing is held to be proved, even though the debt might have been paid by one of the co-obligants not called as defenders (*Christie v Henderson* (1833) 11 S 744). This case, although never overruled, has been criticised, notably in *Drummond v Crichton* (1848) 10 D 340.

14 Reference to the oath of an agent is generally incompetent if his principal is the party to the action (*Bertram & Co v Stewart's Trs* (1874) 2 R 255). However, in *Borland v Macdonald Ltd supra*, where the defender was a limited company, reference was allowed to the oath of the managing director, apparently without objection.

15 In a debt due by a partnership while the oath as a general rule cannot be held affirmative unless all the partners have had an opportunity to depone (*McNab v Lockhart* (1843) 5 D 1014), there are circumstances in which it is competent to refer to some of the partners only. Thus in *Neill & Co v Hopkirk* (1850) 12 D 618, where the firm had been dissolved and one of the partners sequestrated and discharged, the oath of the other partner was competent to prove resting owing. In an earlier stage in the same case, under the name *Neill & Co v Campbell & Hopkirk* (1849) 11 D 979, the court refused a reference to the oath of the sequestrated and discharged partner. When a partnership has been dissolved the oath of a dead partner's representative will not suffice to prove the constitution and resting owing of a debt to the partnership (*Nisbet's Trs v Morrison's Trs* (1829) 7 S 307).

16 Reference to the oath of the representative or executor of the deceased debtor is competent (*Stirling v Henderson* 11 March 1817 FC; *Hamilton v Hamilton's Exrx* 1950 SC 39). Reference to the oath of the deceased's trustees is apparently also competent (*Murray v Laurie's Trs* (1827) 5 S 515; *Bertram & Co v Stewart's Trs supra*).

17 As regards a husband's liability for debts incurred by his wife within the *praepositura*, constitution of the debt may be proved by the oath of the wife but liability will rest upon the husband only if resting owing is proved by his oath (*Mitchells v Moultrys* (1882) 10 R 378).

Appendix C

LIST OF STATUTORY TIME-LIMITS IN CIVIL CASES IN SCOTS LAW

This list includes provisions in force as at 15 June 1970

STATUTE	APPLICATION	STARTING DATE
	TEN DAYS	
Marriage (Scotland) Act 1939 s. 2(2)	Duration of licence for marriage issued under s. 2 of the Act.	Issue of licence.
	FOURTEEN DAYS	
Representation of the People Act 1949 s. 66(1)	Every claim against a candidate or his election agent in respect of his election expenses.	Day on which result of election is declared.
Social Work (Scotland) Act 1968 s. 16(2), (3)	Lapse of resolution by local authority vesting rights and powers of parent in the authority.	Service of notice of objection to resolution.
Gaming Act 1968 s. 14(4)(*b*)	Imposition of charges for gaming in a gaming club.	Notification of proposed charges to licensing authority.
	TWENTY-EIGHT DAYS OR FOUR WEEKS	
Representation of the People Act 1949 s. 66(2)	All election expenses to be paid by candidate or his agent.	Day on which result of election is declared.
Social Work (Scotland) Act 1968 s. 62(8)	Continuation of an establishment intended to accommodate persons for the purposes of the Act after death of person registered in respect of the establishment.	Date of death of person registered.
Income and Corporation Taxes Act 1970 s. 335(3)	Period within which Chief Registrar of Friendly Societies must consider representations or undertakings made by a friendly society under s. 335.	Service of notice by Chief Registrar under s. 335(2).

STATUTE	APPLICATION	STARTING DATE
	TWO MONTHS	
Summary Jurisdiction (Scotland) Act 1954 s. 75(3)	Action of damages in respect of proceedings taken etc under the Act against any judge, clerk of court, or prosecutor in the public interest.	Proceedings founded on, unless Act under which action is brought specifies a shorter period.
Licensing (Scotland) Act 1959 s. 195 as amended by Licensing (Scotland) Act 1962 s. 26(1)	Proceedings, such as actions for damages, against sheriffs and other officials on account of anything done in execution of the Act or the Licensing (Scotland) Act 1962.	The cause of the proceedings.
	THREE MONTHS	
Small Debt (Scotland) Act 1837 s. 6	Any arrestment, unless renewed or followed by proceedings in court.	Date of arrestment.
Burgh Police (Scotland) Act 1892 s. 413	Action by broker or dealer to recover possession of goods or articles delivered to owner by magistrate's order.	Making of order.
Allotments (Scotland) Act 1922 s. 13(1)	Notice to treat following on order for compulsory acquisition of land under the Allotments Acts.	Making of order.
Social Work (Scotland) Act 1968 s. 15(4)	Transfer from one local authority to another of care of child determined to be ordinarily resident in the other local authority's area.	Date of determination of child's ordinary residence.
Medicines Act 1968 s. 62(4)	Duration of order prohibiting sale, supply or importation of medicinal products and animal feeding stuffs.	Date of prohibition coming into operation.
Transport Act 1968 s. 144(8)(*a*)	Removal by claimant of record or relic vested in the Railways Board.	Date of claim. Claim is invalid unless removal is timeous.
Customs Duties (Dumping and Subsidies) Act 1969 s. 8(3)	Preliminary order by Board of Trade imposing provisional charge to duty.	Date of order coming into force.

STATUTE	APPLICATION	STARTING DATE
	SIX MONTHS	
Game (Scotland) Act 1832 s. 17	Damages for trespass on land.	Commission of trespass: one month's notice to be given of action.
Foreign Jurisdiction Act 1890 s. 13	Action against any person for anything done in pursuance of the Act or an order thereunder.	Act etc complained of, or date when parties came within the jurisdiction, or end of a continuing wrong.
Compensation (Defence) Act 1939 s. 11	Notice of claim for compensation under the Act.	Date on which compensation accrues or date of passing of Act, if later, the Treasury having discretion to extend this period.
Trade Disputes Act 1965 s. 1(2)	Action of reparation arising out of act defined in s. 1(1) of the Act where that act done prior to the passing of Act.	Date of passing of Act.
Transport Act 1968 s. 144(2), (3), (4), (7)	Claims by various Government Departments and authorities for records or relics vested in the Railways Board.	Making of offer by Railways Board to transfer records or relics to the Department or authority.
Customs Duties (Dumping and Subsidies) Act 1969 s. 2(4)	Application by importer to Board of Trade for relief from duty to which s. 2 of the Act applies.	Payment of duty.
Customs Duties (Dumping and Subsidies) Act 1969 s. 8(3)	Maximum duration of extended preliminary order by Board of Trade imposing provisional charge to duty.	Date of order coming into force.
Medical Act 1969 s. 3(5)	Erasure from register of medical practitioners of entry relating to person who fails to reply to inquiry as to change of address.	Posting of letter of inquiry.
Roads (Scotland) Act 1970 s. 24(2)	Maximum period of maintenance of filled-in excavation by person making such excavation.	Completion of filling-in.

STATUTE	APPLICATION	STARTING DATE
	TWELVE MONTHS OR ONE YEAR	
Criminal Procedure Act 1701 (1701 c. 6)	Process in action raised for damages for wrongous imprisonment.	Raising of action.
Limitation of Actions and Costs Act 1842 s. 5	Action for continuing damage done under any public local and personal, or local and personal Act.	Termination of damage.
Maritime Conventions Act 1911 s. 8	Action to enforce contribution in respect of overpaid proportion of damages resulting from maritime collision etc.	Date of payment; period extensible by Court.
Carriage of Goods by Sea Act 1924, Schedule Art. III, 6	Liability of carrier and ship for loss of or damage to goods.	Date of delivery of goods or date when goods should have been delivered.
Moneylenders Act 1927 s. 13(1)	Proceedings by a moneylender for any money lent or interest, or enforcement of any agreement made or security taken in respect of a loan.	Date on which cause of action accrued. Extension of time for written acknowledgements, lunacy or absence of the debtor.
Industrial and Provident Societies Act 1965 s. 66(2)	Proceedings for the recovery of a fine which under the Act is recoverable on the summary conviction of the offender.	First discovery of the offence by appropriate registrar.
National Insurance Act 1965 s. 52(2) as amended; S.I. 1969/289, reg. 3	Right to payment of any sum by way of benefit.	Date on which right is treated as having arisen.
National Insurance (Industrial Injuries) Act 1965 s. 27(2) as amended; S.I. 1969/291, reg. 2	Right of payment of any sum by way of benefit, not being a gratuity.	Date on which right is treated as having arisen.
Ministry of Social Security Act 1966 s. 17(1)(*e*) as amended; S.I. 1969/293 reg. 2	Right to payment of supplementary benefit.	Date on which right is treated as having arisen.
Parliamentary Commissioner Act 1967 s. 6(3)	A complaint under the Act of maladministration by certain Government Departments.	Date on which person aggrieved first had notice of matters alleged in complaint.

STATUTE	APPLICATION	STARTING DATE
	TWELVE MONTHS OR ONE YEAR (*continued*)	
Forestry Act 1967 s. 11(3)	Claims for compensation in respect of deterioration of trees taking place after the refusal of a felling licence for the trees.	If trees are felled, date of the felling.
Sewerage (Scotland) Act 1968 s. 20(3)	Claim for compensation against an authority under s. 20.	Date on which claim arose.
Social Work (Scotland) Act 1968 s. 48(3)	Duration of supervision requirement in respect of a child, unless requirement is reviewed or continued.	Making or continuing of the requirement.
Post Office Act 1969 s. 30(1)	Proceedings against the Post Office in respect of loss of, or damage to, a registered inland packet.	Day on which packet posted.
Taxes Management Act 1970 ss. 7(1), 12(1)	Notice of liability to income tax or capital gains tax to be given by person chargeable to tax who has not delivered a return.	End of relevant year of assessment.
Taxes Management Act 1970 s. 10(1)	Notice of liability to corporation tax to be given by company chargeable which has not made a return of profits.	Relevant accounting period.
Taxes Management Act 1970 s. 39(3)	Assessment to corporation tax to recover loss of tax due to fraud, wilful default or neglect.	Final determination of tax covered by the assessment.
Taxes Management Act 1970 s. 42(10)	Assessment to give effect to a claim for relief.	Final determination of claim.
	TWO YEARS	
Limitation of Actions and Costs Act 1842 s. 5	Any action for anything done under a public local and person, or local and personal Act.	Date on which thing done in pursuance of said Acts.
Habitual Drunkards Act 1879 s. 31	Action against any person for anything done in execution of the Act.	Date of thing done in execution of Act. One month's notice of action to be given.

STATUTE	APPLICATION	STARTING DATE
	TWO YEARS (*continued*)	
Merchant Shipping Act 1894 s. 178(2)	Creditor of the deceased seaman obtaining debt from his property.	Debt must have accrued not more than three years before death and demand must be made not more than two years after death.
Maritime Conventions Act 1911 s. 8	Action to enforce claim against vessel or owners for damage to another vessel, or cargo, freight, property, life or injuries, or for salavage services.	Date of damage, loss or injury or salvage services. Period extensible by Court.
Carriage by Air Act 1961 Schedule I, Art. 29(1)	Damages for death, injury, delay in carriage of passengers, luggage or goods.	Date of arrival, or date on which aircraft ought to have arrived or date on which the carriage stopped.
Civic Amenities Act 1967 s. 14(1), (5)	Failure to comply with provisions of s. 13 of the Act (replacement of felled trees) or conditions of a consent given under a tree preservation order which requires replacement of trees.	Date on which failure to comply with the said provisions or conditions came to the knowledge of the local planning authority.
Superannuation (Miscellaneous Provisions) Act 1967 s. 8(3)(*b*)	Proceedings to recover any amount due under the section.	Date on which a right to and the amount of the damages is finally determined or date on which that final determination came to the knowledge of the Minister, whichever is later. Proceedings cannot be begun after death of recipient of payments.
Medicines Act 1968 s. 38(1), (2)	Duration of clinical trial certificate or annual test certificate, unless renewed or revoked.	Date of issue or last renewal of certificate.
Medicines Act 1968 s. 68(1)	Maximum duration of disqualification from using premises as a retail pharmacy.	Conviction under s. 67 of the Act.
Income and Corporation Taxes Act 1970 s. 341(9)	Maximum period for claim by housing association under s. 341.	End of year of assessment or accounting period to which claim relates.

STATUTE	APPLICATION	STARTING DATE
	THREE YEARS	
Criminal Procedure Act 1701 (1701 c. 6)	Damages for wrongful imprisonment on criminal charge.	Last day of wrongful imprisonment.
Debtors (Scotland) Act 1838 s. 22	All arrestments.	Date of arrestment. Arrestments used on future or contingent debt prescribe in three years from the debt becoming due or the contingency being purified.
Lands Clauses (Scotland) Act 1845 s. 116	Powers of promoters of undertaking for compulsory purchase or taking of lands.	Passing of the special Act, unless another period is laid down.
Allotments (Scotland) Act 1922 s. 13(2)	Order authorising compulsory acquisition of land where a previous Order has become void under s. 13(1) of the Act.	Expiry of three months referred to in s. 13(1), unless special reasons exist.
Industrial and Provident Societies Act 1965 s. 66(2)	Proceedings for recovery of a fine which is recoverable under the Act on summary conviction of the offender.	Commission of the offence.
Taxes Management Act 1970 s. 40(1), (2)	Assessment on personal representatives for income tax or capital gains tax on income or personal gains of deceased.	Year of assessment in which deceased died.
Taxes Management Act 1970 s. 103(2)	Proceedings to recover penalty where fraud or wilful default is involved.	Final determination of amount of tax covered by the assessment.
Taxes Management Act 1970 s. 103(3)	Proceedings for recovery of penalty the amount of which is determined by reference to tax charged in certain assessments.	Final determination of amount of the tax concerned.
	FIVE YEARS	
Gaming Act 1968 s. 24(2)	Maximum duration of disqualification order under s. 24 of the Act.	Order coming into force.

STATUTE	APPLICATION	STARTING DATE
	FIVE YEARS (*continued*)	
Medicines Act 1968 s. 24(1), (2)	Duration of licence granted under Part II of the Act, unless renewed or revoked.	Date of granting or last renewal of licence.
Town and Country Planning (Scotland) Act 1969 s. 66	Duration of planning permission.	Date of grant of permission.
	SIX YEARS	
Income Tax Act 1952 s. 501(1) as amended by Finance Act 1966 s. 27	Proceedings for recovery of any fine or penalty incurred under the Act in connection with certain forms of taxation.	Date on which fine or penalty incurred. Extension in cases of fraud (s. 501(2)).
Land Commission Act 1967 s. 44(3)	Service of notice of assessment of levy resulting from an increase in value of land as a result of certain improvements made on the land.	The 'relevant date' as defined in sections 29(5)(*d*), 30(5)(*c*), 31(5)(*d*), 33(5)(*c*) and 34(5)(*c*), *ie* date of sale of the land or date on which relevant project is begun or date by reference to which compensation falls to be assessed.
Land Commission Act 1967 s. 54(1)	Applications for relief of levy paid when assessment of levy was excessive by reason of some mistake of fact in any document served or produced or information furnished.	Date of service of notice of assessment of levy.
Land Commission Act 1967 s. 71(2)	Application for relief in consequence of the issue of a certificate under Part III of Schedule 7 or Part IV of Schedule 8 of the Act.	Date of service of notice of assessment of levy.
Mines and Quarries (Tips) Act 1969 s. 20 and Sch. 3 paragraph 6	Proceedings by owner of disused tip or contributory to recover compensation for damage or distrubance.	As provided in Schedule.
Taxes Management Act 1970 s. 33(1)	Claim for relief for tax paid under excessive assessment.	End of year of assessment (or accounting period in respect of corporation tax).

STATUTE	APPLICATION	STARTING DATE
	SIX YEARS (*continued*)	
Taxes Management Act 1970 s. 34(1)	Period within which assessment to tax may be made.	End of chargeable period to which assessment relates.
Taxes Management Act 1970 s. 35(1), (2)	Assessment to income tax on income received after the year for which it is assessable.	Year of assessment in which income received.
Taxes Management Act 1970 s. 43(1)	General period for making claim for relief under the Taxes Acts.	End of chargeable period to which claim relates.
Taxes Management Act 1970 s. 81	Maximum period for election of basis of assessment by person in whose name a non-resident person is chargeable to income tax.	End of year of assessment for which person is chargeable.
Taxes Management Act 1970 s. 103(1)	General period for bringing proceedings for recovery of a penalty incurred under the Taxes Acts.	Date on which penalty incurred.
Income and Corporation Taxes Act 1970 s. 418(2)	Period for making assessment in respect of certain unremittable overseas income.	Date when conditions specified in the section cease to be satisfied.
Income and Corporation Taxes Act 1970 s. 419(6)	Period for claiming tax relief on delayed remittances.	End of year of assessment in which income received in United Kingdom.
Income and Corporation Taxes Act 1970 s. 492(8)	Period for adjustment of tax under s. 492.	End of chargeable period in which payment was made.
	SEVEN YEARS	
Income and Corporation Taxes Act 1970 s. 297(9)	Application of ss. 33(1) and 34(1) of the Taxes Management Act 1970 to assessment of surtax on a close company.	For these sections see under six years.

STATUTE	APPLICATION	STARTING DATE
	TEN YEARS	
Forestry Act 1967 s. 11(3)	Claims for compensation in respect of deterioration of trees taking place after the refusal of a felling licence for the trees.	If trees are not felled, ten years prior to date of making claim.
	THIRTEEN YEARS	
Presumption of Life Limitation (Scotland) Act 1891 s. 7	Demand or recovery by person who has disappeared (or any person deriving right from him) of any estate whose title can be made up by registration in a public register or any other estate which has been obtained under the provisions of the Act.	Date at which title made up or possession obtained under the Act.
	TWENTY YEARS	
Nuclear Installations Act 1965 s. 15(2)	Claim in respect of injury or damage caused by an occurrence involving nuclear matter stolen from, or lost, jettisoned or abandoned by, person whose breach of duty (imposed by sections 7, 8, 9 or 10 of the Act) gave rise to the claim.	Date of nuclear matter in question being stolen, lost, jettisoned or abandoned.
	TWENTY-FIVE YEARS	
Copyright Act 1956 s. 15(2)	Duration of copyright in a published edition of a literary, dramatic or musical work.	End of calendar year in which edition was first published.
	THIRTY YEARS	
Nuclear Installations Act 1965 s. 15(1)	Claim under sections 7-11 of the Act.	Date of arising of the cause of the claim.
	FIFTY YEARS	
Copyright Act 1956 ss. 2(3); 3(2); 12(3); 13(3); (8); 14(2); 33(3); 39(3)(*b*)	Duration of copyright in unpublished work or published sound recording or cinematograph film or television or sound broadcast.	End of calendar year in which author died, or work published or film registered, or main events in newsreel film occurred, or year in which broadcast made.

Printed in Scotland for Her Majesty's Stationery Office by Howie & Seath Ltd., Edinburgh. Dd. 247533/2822 K6