Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 74

Prescription and Limitation of Actions (Latent Damage)

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The Commission would be grateful if comments on this Consultative Memorandum were submitted by 15th January 1988. All correspondence should be addressed to:-

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Note In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultative Memorandum. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultative Memorandum can be used in this way.

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PART I - INTRODUCTION

1.1 The subject of prescription and limitation of actions was one of the branches of law included for examination in our First Programme of Law Reform[1] approved on 21 October 1965.

(1) Developments in the law of prescription and limitation of actions in Scotland

1.2 Since that date we have carried out considerable work in this field. Initially in 1970 we put forward for consideration a modernised scheme of prescription which "rationalised and restated the law in relation to the positive prescription of rights to immoveable property, the long negative prescription",[2] and replaced the old "short" prescriptions[3] by a new short negative prescription of five years which extinguishes rights or obligations based on delict, quasi-delict and breach of contract, but not those arising from personal injuries. Our recommendations for reform,[4] with minor amendments, were

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[1] Item 3

[2] See para. 1.1 of Prescription and the Limitation of Actions - Report on Personal Injuries Acions and Private International Law Questions Scot. Law Com. No. 74.

[3] We recommended 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 and that the vicennial prescription of holograph writings should be abolished.

[4] Reform of the Law Relating to Prescription and Limitation of Actions Scot. Law Com. No. 15.

implemented by the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). In so far as personal injuries were concerned Part II of the 1973 Act re-enacted in consolidated form the rules of limitation in this field introduced by earlier legislation.[1]

1.3 Thereafter in 1980[2] we undertook a review of the law relating to personal injuries and considered the problems of prescription and limitation in private international law. During that year Parliament passed the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 which provided for the introduction of a judicial discretion (in personal injury claims) to dispense with the then existing rules of limitation where it seemed to the court "equitable to do so".[3] Our Report on the law relating to personal injuries actions and private international law questions, with draft Bill annexed, was published in 1983.[4] The Prescription and Limitation (Scotland) Act 1984 ("the 1984 Act") was based on this draft Bill.

(2) Developments in the law of limitation of actions in England

1.4 In England - which adopted a system of limitation of action for all obligations, rather than extinction of obligations

[1] The rules of limitation introduced by the Law Reform (Limitation of Actions etc.) Act 1954, and amended by the Limitation Act 1963, and the Law Reform (Miscellaneous Provisions) Act 1971.

[2] Consultative Memorandum No. 45, Time-limits in actions for personal injuries (April 1980); Consultation paper published for limited circulation on prescription and limitation in private international law (July 1980).

[3] S.23, which incorporated a new s.19A into the 1973 Act.

[4] Prescription and the Limitation of Actions - Report on Personal Injuries Actions and Private International Law Questions Scot. Law. Com. No. 74.

for those not involving personal injury - a review of the law was also undertaken about the same time. In 1971 the Law Reform Committee was invited by the Lord Chancellor to consider what changes in the law relating to the limitation of actions were desirable. This invitation led to the publication in 1974 of an Interim Report on Limitation of Actions in Personal Injury Claims,[1] and in 1977 of the Committee's Twenty-First Report (Final report on limitations of actions).[2]

1.5 Under English law at that time an action for damages (other than an action based on personal injury) had to be raised within 6 years of the start of the limitation period (often referred to by lawyers as the terminus a quo, but referred to in this Consultative Memorandum as "the starting point"). The starting point in such a case was the date on which the cause of action accrued. It is understood that where an action is founded on negligence the cause of action accrues on the date when the damage occurs, and where the action is founded on breach of contract the cause of action accrues on the date of the breach.

1.6 During the course of their review of the law of limitations the Law Reform Committee gave consideration to the starting point in relation to problems arising from latent

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[1] Cmnd. 5630. This Report was substantially implemented by the Limitation Act 1975.

[2] Cmnd. 6923. Most of the recommendations in this Report were implemented by the Limitation Amendment Act 1980. In the same year the Limitation Act 1980 consolidated the Limitation Acts 1939-1980 (the Limitation Acts of 1939, '63, '75 and the Limitation Amendment Act 1980).

damage.[1] In their Twenty-first Report[2] the view was expressed that although it was probably not very often that a plaintiff was unable to discover within the normal limitation period of six years that he had suffered damage, nevertheless if he should fail to make this discovery the consequences could involve considerable hardship.

> "Such hardship is particularly likely to arise out of building or civil engineering contracts, where a breach of contract may give rise to physical damage which remains latent for very many years and then causes heavy financial loss. Apart from building and engineering contracts, hardship can also be caused in the context of professional negligence where defective advice may cause the adviser's client to take steps which prove to be financially unsound, but only after the lapse of a period much longer than the limitation period; an obvious example is the purchase of a house from a vendor with a defective title, where the defect comes to light only when the purchaser tries to re-sell."

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[1] This topic had already been studied by a Committee set up in 1961 by the Lord High Chancellor and the Secretary of State for Scotland under the chairmanship of the Honourable Mr Justice Edmund Davies to consider whether there should be any change in the law of limitation applicable to personal injury claims "where the injury or disease giving rise to the claim has not become apparent in sufficient time" to enable proceedings to be begun within the normal three-year limitation period. Their findings were incorporated in the Report of the Committee on Limitation of Actions in Cases of Personal Injury published in 1962, Cmnd. 1829.

[2] Para. 2.7.

1.7 In referring to the law then applicable to "latent defects in negligence"[1] the Committee remarked upon the decision given in Sparham-Souter and Another v. Town and Country Developments (Essex) Ltd. and Another[2] where the Court of Appeal held that in the assumed circumstances of the case the cause of action did not accrue (and consequently the starting point was not fixed) until physical damage to the structure of the dwellinghouses became reasonably detectable, thus suggesting in latent damage situations a move away from the recognised principle that the cause of action accrues in negligence cases on the date when damage occurs. The Committee pointed out, however, that it was not clear from the judgment whether the court was putting forward a new principle to the effect that the cause of action accrues in such situations where the damage caused by the negligent act or omission becomes reasonably ascertainable, or alternatively whether it was saying that, "... in practice, where the negligent act causes physical damage to property and the loss to the plaintiff is only the fall in the market value of that piece of property caused by the physical damage, then, as a question of fact, the plaintiff suffers no damage until the defect is readily discoverable and produces an effect on the market value."[3]

1.8 In 1980 the problem of latent damage was again pursued in England when the Lord Chancellor invited the Law Reform Committee to consider the law relating to -

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[1] P. 8 of the Report.

[2] [1976] 1 Q.B. 858.

[3] Para. 2.14 of the Report.

"(i) the accrual of the cause of action; and

(ii) limitation

in negligence cases involving latent defects (other than latent disease or injury to the person), and to make recommendations."

1.9 A Consultative Document on "Latent Damage" was issued in 1981, and subsequently in 1984 the Committee published its Twenty-fourth Report (Latent Damage)[1] in which it put forward for consideration recommendations for changes in the law in "negligence cases involving latent defects"[2] (other than personal injuries). The terms of reference did not cover breach of contract cases involving latent defects.

1.10 In the period intervening between the issue of the Consultative Document and the publication of the subsequent Report an important decision was taken by the English courts in the field of latent damage. The House of Lords ruled in Pirelli General Cable Works Ltd v. Oscar Faber and Partners[3] ("the Pirelli case") that in the case of latent damage to buildings a plaintiff's cause of action accrues, and time starts to run against him, when physical damage actually occurs to the building, although it may not be discovered or reasonably discoverable until a later date. Lord Fraser of Tullybelton in that case expressed considerable misgivings about the implications of this decision.

"I am respectfully in agreement with Lord Reid's view expressed in Cartledge v. E. Jopling and Sons Ltd. [1963] A.C. 758, that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it. Postponement of the accrual of the cause

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1 Cmnd. 9390.

2 Para. 1.2.

3 [1983] 2 A.C. 1.

> of action until the date of discoverability may involve the investigation of facts many years after their occurrence - see, for example, Dennis v. Charnwood Borough Council [1983] Q.B. 409 - with possible unfairness to the defendants, unless a final longstop date is prescribed, as in sections 6 and 7 of the Prescription and Limitation (Scotland) Act 1973. If there is any question of altering this branch of the law, this is, in my opinion, a clear case where any alteration should be made by legislation, and not by judicial decision, ...".

1.11 In the same case Lord Scarman made the following observations:

> "It must be, as Lord Reid said in Cartledge v. E.Jopling & Sons Ltd. [1963] A.C. 758 and quoted by my noble and learned friend in his speech, unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury (or damage). A law which produces such a result, ... is harsh and absurd."

1.12 Accordingly the Conclusions and Recommendations put forward by the Committee in their Twenty Fourth Report took into consideration the problems arising from the decision reached in the Pirelli case. There are two important proposals to which we would like to make a passing reference at this stage.

1.13 Firstly, although the Committee did not recommend any change in the present rule that a cause of action in negligence accrues at the date on which the damage occurs, it suggested that "in negligence cases involving latent defects the existing six year period of limitation should be subject to an extension which would allow a plaintiff three years from the date of the discovery, or reasonable discoverability, of significant damage".[1] This recommendation introduced discoverability into

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[1] Part V, Conclusions and Recommendations, para. 5.3(b).

the formula for defining the starting point of the limitation period in certain circumstances ("discoverability concept").

1.14 Secondly, the Committee also suggested that there should be a "long stop" which would prevent a plaintiff from instituting court proceedings more than 15 years after the defendant had committed a breach of duty, even if damage had not occurred, or had occurred but was not discoverable, by that time[1] ("the long stop provision").

1.15 Early in 1986 the Lord Chancellor announced the Government's intention to implement the Committee's recommendations on latent damage as soon as Parliamentary time was available, and the Latent Damage Bill was subsequently introduced in the House of Lords on 17 March 1986. The Latent Damage Act 1986 ("the 1986 Act") received Royal Assent on 18 July 1986 and came into operation on 18 September of that year. References to the provisions of the 1986 Act will be made throughout this Consultative Memorandum, where appropriate, as a means of comparison with the Scottish provisions relating to prescription and limitation of action within the context of latent damage.

(3) Consideration of latent damage problems in Scotland

1.16 In Scotland some attention was given to the problem of latent damage in the Consultation Paper "The Future of Building Control in Scotland" circulated by the Scottish Development Department in 1983.

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[1] Part V, Conclusions and Recommendations, para. 5.3(c).

1.17 In June 1984 the Contractual and Delictual Working Party set up by the Law Reform Committee of the Law Society of Scotland issued and circulated a Report on the application of the five year short negative and twenty year long negative prescriptive periods to defects in construction works. The Report examined the problems in this area; and set out proposals for reform ("the Law Society's Report"). Subsequent to the introduction of the Latent Damage Bill in Parliament the Contractual and Delictual Working Party was reconvened to consider whether any further proposals should be made as a consequence of the Bill provisions and the Parliamentary debates thereon. In July 1986 the Working Party's Supplementary Report was circulated ("The Law Society's Supplementary Report").

(4) Product Liability Directive

1.18 In July 1985 the Council of the European Communities issued an EEC Directive (85/374/EEC) providing for strict liability for defective products ("the Product Liability Directive"), which required to be implemented throughout the United Kingdom by July 1988. It provided inter alia for a three year limitation period for recovery of damages for damage caused by death or by personal injuries, or for damage to, or destruction of, property, (other than the defective product itself), as a result of a defective product; introduced discoverability into the formula for defining the starting point of the limitation period; and adopted a ten year long stop provision after which the potential claimant's right to reparation may be extinguished. Part I and Schedule 1 of the Consumer Protection Act 1987, which received Royal Assent on

15 May 1987, implements the Product Liability Directive for Scotland, England and Wales.

(5) The purpose of this Consultative Memorandum

1.19 Over the past few years we have received informal approaches from the Secretary of State for Scotland and from the Faculty of Advocates and the Law Society of Scotland, following discussion at one of the Commission's regular liaison meetings with them, to resume work on prescription and limitation of actions in order to consider the problems arising in latent damage cases which do not involve personal injury. More recently a similar request has been received from the Lord Advocate subsequent to the publication of the Lord Chancellor's most recent Law Reform Committee Report on latent damage.

1.20 Accordingly, in view of the interest expressed on this topic, we agreed to review the law in this area under our First Programme of Law Reform, for the purpose of identifying any problems, and seeking guidance from consultees on possible solutions. However, as Scots law has already adopted a discoverability concept, and a long stop provision, we should like to make the preliminary comment that in our view the problems arising from our current legislation on prescription, in its application to latent damage claims, are of a less fundamental nature than those identified by the Lord Chancellor's Law Reform Committee under English law.

1.21 To the extent that this exercise will include consideration of claims for damage to property caused by a

defective product it is arguable that there is a certain degree of overlap between this exercise and the Product Liability Directive as implemented by the Consumer Protection Act 1987. However, as Article 13 of the Directive and section 2(6) of the 1987 Act preserve existing remedies for damage to property based on fault, we take the view that the proposals put forward in this Consultative Memorandum should be able to co-exist with the scheme outlined in the Directive.

1.22 Parts II and III of this Consultative Memorandum provide a brief summary of the current statutory provisions relative to the five year short negative and twenty year long negative prescriptive periods, and outline the general policy thinking behind those provisions. Parts IV and V examine the operation of these statutory provisions in relation to claims involving latent damage (other than latent disease or injury of persons) and put forward for consideration possible problems arising out of this examination. During the course of this exercise we also identified some general miscellaneous issues which we thought should be put to consultees for their views, notwithstanding that they do not relate exclusively, and in some instances do not relate at all, to latent damage problems. Part VI considers such miscellaneous issues. We should perhaps make it clear at this stage that although the nature and extent of delictual liability has a close bearing on the operation of the rules of prescription and limitation of action, the scope of our Consultative Memorandum does not extend to a consideration of this area of the law. We do not attempt to identify and resolve the problems of who should be liable in delict for any particular type of loss sustained, or - with the exception of a brief reference in paras. 2.12 to 2.14 below to

some examples of actionable damage, and to the particular problem discussed in paras.4.56 to 4.75 relating to the discoverability of a defect before physical damage has occurred, - to assess when, or if, an act, neglect or default should give rise to actionable damage.

PART II - THE PRESENT LAW

(1) The Five Year Short Negative Prescription

(a) The Statutory Provisions

2.1 The five year short negative prescription was introduced into our law by section 6 of the 1973 Act.

> "Extinction of obligations by prescriptive periods of five years"
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> "6.-(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years-
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> (a) without any relevant claim having been made in relation to the obligation, and
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> (b) without the subsistence of the obligation having been relevantly acknowledged,
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> then as from the expiration of that period the obligation shall be extinguished: ...".

2.2 The obligations referred to in section 6(1) are identified in Schedule 1 and include a statutory or common law obligation to make reparation,[1] other than reparation in respect of personal injuries and death,[2] and an obligation arising from breach of contract or promise.[3]

2.3 The "appropriate date" ("the starting point") for the purposes of section 6, unless where specifically provided otherwise in Schedule 2, (irrelevant for the present exercise), is "the date when the obligation becomes enforceable".

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[1] Paragraph 1(d).

[2] Paragraph 2(g).

[3] Paragraph 1(g), but where the contract is evidenced by a probative writ an obligation arising thereunder, subject to the exceptions therein referred to, prescribes under the long negative prescription - paragraph 2(c).

2.4 The date when an obligation to make reparation becomes enforceable is defined for the purposes of section 6 in section 11 of the 1973 Act as follows:-

"Obligations to make reparation"

> "11.-(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.
>
> (2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.
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> (3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

It should be noted that "reparation" in this context is not confined to actions arising from delict, but also covers actions for breach of contract or promise.

2.5 There is excluded from the calculation of the prescriptive period, any time during which the creditor is induced to refrain from making a relevant claim because of

the debtor's fraudulent actings, or through error induced by his words or conduct (providing neither was discoverable by the creditor with reasonable diligence), or where the original creditor is under a legal disability.[1]

(b) Some comments on the statutory provisions in relation to reparation claims (within the context of section 11 of the 1973 Act)

(i) Concurrence of a legal wrong and damage

2.6 Although an act, neglect or default (often collectively referred to by the legal profession as "iniuria", but referred to, from time to time, in this Consultative Memorandum as "a legal wrong") can give rise to immediate loss, injury or damage (often collectively referred to by the legal profession as "damnum", but referred to, from time to time in this Consultative Memorandum as "damage") where, for example, a negligent act results in an immediate explosion, frequently the damage occurs some time after the legal wrong - cracks may appear in a building some years after defective foundations have been laid.[2] Prescription does not start to run against the potential claimant until there has been concurrence between the legal wrong and the damage i.e. until the loss, injury or damage has been sustained as a result of the act, neglect or default.[3]

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[1] Section 6(4) of the 1973 Act.

[2] Dennis & Another v. Charnwood Borough Council [1983] Q.B. 409; Dutton v. Bognor Regis United Building Co. Ltd. & Another [1972] 1 All E.R. 462; Pirelli General Cable Works Ltd. v. Oscar Faber & Partners [1983] 2 A.C. 1.

[3] Section 11(1) of the 1973 Act. Dunlop v. McGowans 1979 S.C. 22 and 1980 S.C. (H.L.) 73.

(ii) The "discoverability concept"

2.7 If the concurrence of the legal wrong and damage always constituted the starting point for the prescriptive period the interests of a potential claimant could be prejudiced if the damage which occurred was not immediately discoverable (i.e. was latent). This situation can be illustrated by reference to the circumstances which arose in the Pirelli case.[1] The plaintiffs engaged a firm of consulting engineers to design an extension to their factory premises, including the provision of a chimney. The material recommended and used in the construction of the chimney was later discovered to be unsuitable. The chimney was built in June and July 1969; cracks developed at the top of the chimney not later than April 1970; but the plaintiffs did not discover the damage until November 1977. The court held that although the plaintiffs could not with reasonable diligence have discovered the damage before October 1972 the starting point for the limitation period was the date when the damage actually occurred in 1970. As a consequence the plaintiff's claim was time barred. Accordingly on the basis of the decision reached in the Pirelli case if prescription always starts to run from the point where there is concurrence between the legal wrong and the damage the injured party's right to reparation may expire before he discovers that damage has occurred.

2.8 In order to achieve a more equitable balance between the interests of the pursuer and defender in such a situation section 11(3) of the 1973 Act introduced a discoverability concept by providing that where damage is initially latent the

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[1] [1983] 2 A.C. 1.

starting point for the prescriptive period becomes the point at which the pursuer first becomes or could with reasonable diligence have become, aware - had actual or constructive knowledge - that the loss, injury or damage caused by an act, neglect or default, has occcurred.

(iii) **Actual or constructive knowledge of what?**

2.9 Our Report on the Reform of the Law Relating to Prescription and Limitation of Actions,[1] in defining the starting point for the prescriptive period for actions relating to pecuniary loss or damage to property, drew a distinction between that type of action and one arising from personal injuries. Whereas, in the latter situation we proposed that the three year limitation period should begin to run from the date when all the material facts of a decisive character relative to the claim were ascertainable, in the former situation the starting point recommended was the date upon which the damage only was ascertainable. We justified this narrower approach to pecuniary loss or damage to property claims on the following basis.

> "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."

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[1] Scot. Law Com. No. 15 (1970) para. 97.

This policy was intended to be reflected in section 11(3) of the 1973 Act.

2.10 In the recent Outer House case of Dunfermline District Council v. Blyth and Blyth Associates[1] ("Dunfermline District Council case") however the court gave a wider interpretation to section 11. The third defenders had submitted the argument to the court that in terms of section 11(3) the prescriptive period started to run as soon as the loss, injury or damage became known, or could with reasonable diligence have become known to the creditor. They pointed out that the loss, injury or damage must have been "caused as aforesaid", i.e. caused by an act, or neglect or default within the meaning of section 11(1). Accordingly it was contended that - "It was sufficient, ... that loss, injury and damage emerged which was attributable to the act of someone, whether identifiable or not, without necessarily being due to neglect or default". Although the issue before the court had already been decided Lord McDonald chose to comment upon the third defenders' submission observing that in his view it disclosed too restricted an interpretation of the words "caused as aforesaid".

> "They mean loss, injury or damage caused not only by the act, neglect or default of someone, but also giving rise to an obligation to make reparation. In other words the creditor must not only know that he has suffered loss, but that this has occurred in circumstances giving rise to an obligation upon someone (who may not be immediately identifiable) to make reparation to him. From that date he has five years in which to identify the person concerned and bring his claim against him. Counsel were agreed that there was, so far, no authority on this matter and, although not essential to my decision, I offer this interpretation of s.11(1) and (3) of the 1973 Act for what it is worth. If it is correct it is a further reason for allowing proof before answer quoad the third defenders."

[1] 1985 S.L.T. 345.

2.11 Lord McDonald's observations, albeit obiter, indicate that in a situation involving latent damage the starting point for the prescriptive period is fixed at the point where the claimant has actual or constructive knowledge of (First) the loss, injury or damage sustained, and (Second) the act, neglect or default which gives rise to the damage - i.e. the cause of the damage. It remains to be seen, however, to what extent Lord McDonald's obiter observations on the interpretation of section 11 will be regarded as persuasive in any future case where the interpretation of this provision is before the court.

(iv) Definition of damage

2.12 No attempt has been made in the 1973 Act to provide a definition of damage, and we consider that any such attempt would have presented considerable difficulties.

2.13 In Dunlop v. McGowans[1] the Lord Justice Clerk observed that -

> "The phrase 'loss, injury and damage' is a phrase of style commonly used to comprehend the various types of loss which may be sustained as a result of breach of a legal duty or obligation. It covers all kinds of damnum [damage]."

2.14 There are limitless variations in the nature of damage which can arise. Damage may consist of actual physical damage to property - the cracks which appear in a building,[2] the damage done by water to golf greens which flood.[3] It

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[1] 1979 S.C. 22 at p.33.

[2] Dennis & Another v. Charnwood Borough Council [1983] Q.B. 409.

[3] Renfrew Golf Club v. Ravenstone Securities Ltd & Others 1984 S.L.T. 170.

may arise in the form of a discovered defect in property[1] as in the case of Junior Books Ltd. v. The Veitchi Co. Ltd.[2] In that case the damage arose when new flooring installed in the pursuer's factory was discovered to be defective, subsequently involving the pursuer in the cost of replacing the floor, and in loss of profit caused by the disruption of the company's business. In Dunlop v. McGowans[3] the damage was the loss of a landlord's legal right to obtain vacant possession of his property owing to his solicitor's failure to serve a notice to quit timeously upon the tenant. As expressed by the court the damage was "the loss of the practical advantages which unfettered use of the premises would have given him". In Foster v. Outred & Co.[4] the damage arose where the plaintiff, on the negligent advice of her legal advisers, executed a mortgage deed in terms of which her property was encumbered with a legal charge, thus reducing the value of her equity and subjecting her to a liability which might mature into a financial loss. In George Porteous (Arts) Ltd. v. Dollar Rae Ltd.[5] the damage was the consequence to the pursuer of the enforcement notice served upon him by the planning authority, requiring demolition of an extension to his shop, which at best would involve him in the costs of an appeal to the Secretary of State against this notice, and at worst would result in the demolition of his property.

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[1] See paras.4.56-4.75 below for further consideration of this form of damage.

[2] 1982 S.L.T. (Reports) 492.

[3] 1979 S.C. 22 and 1980 S.C. (H.L.) 73.

[4] [1982] 1 W.L.R. 86.

[5] 1979 S.L.T. (Sheriff Court Reports) 51.

(v) Quantifying the damage

2.15 Problems may be experienced in accurately quantifying the damage within the prescriptive period. Once the initial loss, injury or damage has been discovered further loss may arise from the same act, neglect or default. For example, physical damage to property can be progressive, developing over the years from damage of a minor nature into serious structural defects. In Dunlop v. McGowans, where the damage involved the loss of a legal right to obtain vacant possession of property, the pursuer averred that he had sustained financial losses for more than five years after he failed to obtain entry to his property at Whitsunday 1971 owing to the negligence of his solicitors. In an attempt to prevent prescription running against him he argued that each item of loss incurred constituted a new starting point for the prescriptive period, and thus a new right of action against his legal advisers. His argument failed before the court. The Lord Justice Clerk observed - "There may be further loss injury and/or damage which arises consequential upon and the natural and probable result of that breach, but these do not constitute separate breaches so as to give rise to the right to raise separate actions therefor". In calculating his claim against the defender the pursuer must endeavour to quantify and include therein such future losses. The principle underlying this observation was laid down by Lord President Inglis in Stevenson v. Pontifex & Wood[1]. "... a single act amounting either to a delict or a breach of contract cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods but caused by the same act." The problem of quantifying damage is referred to more fully below when the

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[1] 1887 15 R. 125.

possibility of adopting a scheme of provisional damages is considered.

(2) The Twenty Year Long Negative Prescription (a long stop provision)

2.16 The long negative prescriptive period of twenty years was retained by section 7 of the 1973 Act. The prescription affects all obligations (including those to which section 6 applies), except the impresCribable obligations identified in Schedule 3.

"Extinction of obligations by prescriptive periods of twenty years"

> "7.-(1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years-
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> (a) without any relevant claim having been made in relation to the obligation, and
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> (b) without the subsistence of the obligation having been relevantly acknowledged,
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> then as from the expiration of that period the obligation shall be extinguished:".

The date when an obligation to make reparation becomes enforceable is defined for the purposes of section 7[1] in section 11 of the 1973 Act as follows:

> "11.-(1) Subject to subsection (2) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be

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[1] See section 11(4) of the 1973 Act (as amended by Schedule 2 to the 1984 Act).

regarded for the purposes of section 7 of this Act as having become enforceable on the date when the loss injury or damage occurred.

(2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased."

2.17 In the computation of the prescriptive period any time during which a person against whom prescription is pled is under a legal disability will be reckoned as if the person were free from that disability.[1] Furthermore the twenty year negative prescription is not extended to take account of any time during which the creditor is induced to refrain from making a relevant claim because of the debtor's fraudulent actings, or through error induced by his words or conduct.

2.18 The main point to emphasise regarding the long negative prescription is the omission from the statutory provisions of a discoverability concept. The starting point of the prescriptive period is the date when the damage occurs (whether or not discoverable by the potential claimant at that time) as a result of the legal wrong.

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[1] Section 14(1)(b) of the 1973 Act.

PART III - THE GENERAL POLICY THINKING BEHIND PRESCRIPTION AND LIMITATION

3.1 The Lord Chancellor's Law Reform Committee's Twenty First Report summarised as follows what the Edmund Davies Committee considered to be the accepted function of the law of limitation.[1]

> "(a) first, to protect defendants from stale claims;
>
> (b) secondly, to encourage plaintiffs to institute proceedings without unreasonable delay and thus enable actions to be tried at a time when the recollection of witnesses was still clear, and
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> (c) thirdly, to enable a person to feel confident, after the lapse of a given period of time, that an incident which might have led to a claim against him is finally closed."

3.2 The Edmund Davies Committee pointed out, however, that even if this law is principally designed for the benefit of defendants, nevertheless, the interests of the injured plaintiff must also be safeguarded particularly in the situation where the damage sustained is not immediately ascertainable. Accordingly in their view in framing any recommendations the right balance must be achieved between the interests of the plaintiff and the defendant even if this approach should result in some hard cases.

3.3 In the context of latent damage recent policy has suggested a balancing of interests more favourable to the plaintiff. During the course of the Second Reading of the Latent Damage Bill (subsequently the 1986 Act) in the House of Lords the Lord Chancellor, although conceding that the

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[1] Para. 1.7.

potential plaintiff (or alleged victim of the negligence), and the potential defendant (or alleged tortfeasor), are both equally important, considered that there was a difference between them.

> "In the main the potential defendants are well represented by professional associations of one kind or another who are extremely articulate, extremely competent and very well advised. The potential plaintiffs, however, do not constitute an identifiable class, since at any given point of time, ex hypothesi, they are unknown and, since they cannot be identified, cannot be represented and have no articulate voice at all."

He outlined three principles which influenced the provisions of the Bill - that plaintiffs should have sufficient opportunity to pursue their remedy; that the defendants were entitled to be protected against stale claims; and that uncertainty in the law is to be avoided wherever possible. These principles resulted in the recommendation for the two major changes in the law referred to above, namely the introduction of the discoverability concept and a long stop provision.

3.4 Keeping in mind that our law has already adopted a discoverability concept and a long stop provision we now propose to examine the statutory provisions outlined above in Part II of this Memorandum in their application to claims involving latent damage (other than those relating to personal injury) for the purpose of identifying problems which prevent an equitable balancing of the competing interests of the pursuer and defender.

PART IV - IDENTIFICATION OF POSSIBLE PROBLEMS ARISING FROM THE STATUTORY PROVISIONS RELATING TO THE FIVE YEAR SHORT NEGATIVE PRESCRIPTION WITHIN THE CONTEXT OF LATENT DAMAGE

(1) "The Discoverability Concept"

4.1 We have assumed for the following reasons that consultees would not seek to abandon the discoverability concept in relation to the short negative prescription.

4.2 Although the inclusion of discoverability in the formula provided for determining the starting point for the prescriptive period may give rise to uncertainty as to the period in which a potential defender is at risk, its removal could impose upon the potential pursuer unjustified hardship.

> "Whatever hardship there may be to a defendant in dealing with a claim years afterwards, it must be less than the hardship to a plaintiff whose action is barred before he knows he has one."[1]

4.3 It is in recognition of this hardship to the plaintiff that the Lord Chancellor's Law Reform Committee put forward its proposal to introduce the discoverability concept into English law where the claim is based on tort (delict).

4.4 As indicated briefly above the Product Liability Directive (now implemented by the Consumer Protection Act 1987) also recognises the discoverability concept. Article 10 of the Directive[2] provides that a limitation period of 3 years will apply to proceedings for the recovery of damages arising from a defective product, the starting point for the limitation period being the date upon which the plaintiff becomes aware, or should reasonably have become aware, of the damage, the

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[1] Morgan v. Park Developments Ltd. [1983] I.L.R.M. 156.

[2] Now reflected for Scotland in paragraph 10 (in the new section 22B of the 1973 Act) of Part II of Schedule 1 to the Consumer Protection Act 1987.

defect and the identity of the producer. As the terms of this Directive are to be implemented throughout the United Kingdom it might seem inappropriate and inconsistent for us to consider removing this concept in its application to claims prescribable under the five year negative prescription at the same time as we are obliged to introduce it in relation to claims under the Directive which are subject to a limitation period of three years.

4.5 Notwithstanding the acceptance of the principle, however, that the discoverability concept is a necessary protection to the potential claimant, which outweighs disadvantages experienced by the defender, it is necessary to consider whether the discoverability formula adopted for the purpose of fixing the starting point for the five year prescriptive period adequately achieves this purpose.

(2) The discoverability formula

(i) Knowledge of damage

4.6 As indicated above[1] we initially intended that the formula provided in section 11(3) of the 1973 Act should be confined to discoverability of the damage, (i.e. loss, injury or damage), sustained by the potential claimant.

4.7 This statutory formula, however, does not indicate the severity of damage required to be within the pursuer's knowledge before time starts to run against him. Concern has been expressed that this omission is likely to cause hardship to the pursuer, particularly in cases where the claim involves physical damage to property, and that damage is of a progressive nature.

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[1] See para. 2.9 above.

4.8 Minor cracks developing in a newly constructed building may be followed some years later by more serious building defects which indicate, on investigation, that the foundations are faulty, and as a consequence extensive remedial work will be required to render the building safe. The purchaser of the new building may be assured by the builder or architect that the minor cracks appearing in the property are only attributable to initial settlement difficulties and should not re-occur. With these assurances the contractor, in compliance with his obligations under a defects liability clause in the building contract,[1] may plaster over the cracks that have appeared.

4.9 It is thought that in the circumstances described above, where the minor settlement cracks are the first evidence of faulty foundations, the starting point under existing law would be fixed at the point at which the pursuer becomes aware or should have become aware of the minor cracks. Accordingly by the time he ascertains the full extent of the damage his claims against those found to be responsible may be time barred.

4.10 This problem was considered in the Twenty Fourth Report of the Lord Chancellor's Law Reform Committee.

> "Latent damage is by definition hard to detect and may in many cases be heralded by defects that at first appear to be minor and isolated. It may not be until much later that the full significance of these early defects becomes apparent and it might be harsh if an extended period of limitation based on discovery or discoverability started to run against the plaintiff from

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[1] Clause 15 of the RIBA Standard form of Building Contract.

the moment that the first apparently trivial damage appeared."[1]

4.11 In our view the discoverability formula should provide that the damage within the pursuer's actual or constructive knowledge must be material, or as Lord Evershed M.R. indicated in Cartledge v. E Jopling & Sons Ltd,[2] must be "real damage as distinct from purely minimal damage", before time starts to run against him.

4.12 In the discoverability formula adopted under Scots law for personal injury claims the injury in question must be "sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree".[3] A similar formula has been adopted for England and Wales, both in regard to personal injury claims[4] and other latent damage claims.[5]

4.13 We expressed the view in our Report on Personal Injuries Actions and Private International Law Questions that such a formula should provide a clear indication to the courts

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1 Para. 4.7.

2 [1963] A.C. 758.

3 Section 17(2)(b)(i) of the 1973 Act (as substituted by section 2 of the 1984 Act).

4 Section 14(1)(a) and (2) of the Limitation Act 1980: "... an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

5 Section 14A(6)(a) and (7) of the Limitation Act 1980 as introduced into that Act by section 1 of the 1986 Act.

that the damage must have achieved a reasonably advanced stage before time begins to run against the pursuer.[1]

4.14 Consultees are invited to respond to the following provisional proposal and alternative option.

Provisional proposal

1.(a) The discoverability formula should provide that the damage within the pursuer's actual or constructive knowledge must be sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action is brought does not dispute liability and is able to satisfy a decree.

Alternative Option

(b) If consultees do not favour the formula put forward in this provisional proposal for defining the degree of damage which requires to be within the pursuer's knowledge before time starts to run against him, their views on an alternative formula are invited.

(ii) Knowledge of cause of damage (causation)

4.15 The next issue which we wish to consider is whether the discoverability formula should include knowledge of the link between the damage sustained and the act, neglect or default which gave rise to the damage. This aspect of knowledge has been adopted as part of the discoverability formula in the legal systems of Scotland, and England and Wales, in respect of actions relating to personal injuries.[2] In addition it has been

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[1] Para. 3.9.

[2] Section 17(2)(b)(ii) of the 1973 Act (as substituted by section 2 of the 1984 Act) and section 14(1)(b) of the Limitation Act 1980.

incorporated in the 1986 Act;[1] in the Consumer Protection Act 1987;[2] and it is arguably already part of our own discoverability formula under section 11(3) of the 1973 Act on the basis of Lord McDonald's obiter observations in the Dunfermline District Council case.[3]

4.16 The importance of this knowledge can, once again, be illustrated by reference to structural damage which can take place to a building which has inadequate foundations. The appearance of initial minor cracks may be thought to represent normal settlement in a newly constructed building. It could take some time, possibly years, before it is discovered that the main source of the problem lies in insecure foundations, attributable possibly to the architect's faulty design, the inadequacy of the materials used, or the failure to carry out efficiently the initial soil mechanics investigation. In Dennis v. Charnwood Borough Council[4] the plaintiffs commissioned the building of a house in 1955. The property was erected on an infilled sand pit with a concrete raft foundation to take account of any possible instability in the ground. In 1966 minor cracks appeared in the brickwork which were attributed to normal settlement. Some ten years later in 1976 more serious cracks developed. An investigation at that time disclosed that the concrete raft had been inadequately constructed, and the house was likely to become unsafe.

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1 Section 1, which introduces a new section 14A(8)(a) into the Limitation Act 1980.

2 Paragraph 10 (in the new section 22B(3)(b) of the 1973 Act) of Part II of Schedule 1 to the Consumer Protection Act 1987.

3 See paras. 2.10-2.11 above.

4 [1983] Q.B. 409.

4.17 On the basis that the starting point is fixed at the point when the minor cracks are discovered it is quite possible that the prescriptive period will have passed before the cause of the damage becomes known. Such a situation could impose undue hardship upon the potential claimant. This aspect of knowledge is closely linked with the problem of the significance of the damage discussed above in that the real cause of damage may only be ascertainable when the damage is sufficiently serious to justify raising a court action.

4.18 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

2. **Knowledge of the cause of the loss injury or damage sustained as a consequence of the act, neglect or default should be included in the discoverability formula.**

(iii) Knowledge of the identity of a person liable for the damage sustained

4.19 Should the discoverability formula include knowledge of the identity of a person liable for the damage sustained? At present, in defining the starting point under section 11 of the 1973 Act, no reference is made to the pursuer's awareness of the identity of such a person. This interpretation of section 11 was confirmed by Lord McDonald in the Dunfermline District Council case where he observed that the knowledge required by the claimant to fix the starting point under that

section was knowledge that he had suffered loss and that this had occurred in circumstances giving rise to an obligation upon someone "(who may not be immediately identifiable)" to make reparation to him. "From that date he has five years in which to identify the person concerned and bring his claim against him."

4.20 The problem of identifying a person liable (albeit within a three year limitation period, as opposed to a five year prescriptive period) has been experienced in relation to reparation actions in personal injury claims,[1] and is particularly apparent where that person is one of a number of linked companies. For example in Comer v. James Scott & Co (Electrical Engineers) Ltd.[2] the injured party identified the defenders (his employers) in the Summons as James Scott & Co (Electrical Engineers) Ltd., whereas the defences lodged disclosed to the pursuer that his employers were James Scott & Co (Electrical Transmission) Ltd. During the course of the hearing it came to the attention of the court that there were no less than 7 companies registered with the Registrar of Companies whose name began with James Scott! This problem within the context of personal injury claims was finally resolved by including knowledge of the identity of a person liable within the discoverability formula.[3]

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[1] See Love v. Haran Sealant Services Ltd. 1979 S.C. 279; Kerr v. J.A. Stewart (Plant) Ltd. & Another 1976 S.C. 120; and Comer v. James Scott & Co (Electrical Engineers) Ltd. 1978 S.L.T. (Reports) 235.

[2] 1978 S.L.T. (Reports) 235.

[3] Section 17(2)(b)(iii) of the 1973 Act as substituted by section 2 of the 1984 Act.

4.21 In our view the difficulties of identifying a person liable can also arise in actions relating to latent damage claims, not involving personal injury, particularly where the party concerned is connected with the building and construction industry. The incorporation of this aspect of knowledge in the discoverability formula adopted by the 1986 Act[1] and by the Consumer Protection Act 1987[2] provides further support for this view.

4.22 In his article "Limitation of Actions in Personal Injuries Claims"[3] J.R. Campbell quotes comments made by Mr Ronald King Murray QC, as he then was, when the 1973 Prescription and Limitation (Scotland) Bill was being debated before Parliament. In the Scottish Grand Committee Mr Murray spoke of the difficulties experienced in identifying those responsible in actions involving personal injuries.

> "There are many cases, for example, of work on construction sites when a pursuer is injured through someone's fault. Owing to the complex legal relationships and the mobile nature of the work, with contractors coming and going, contractors going out of business and being taken over, it may be extremely difficult for an injured workman to discover who is the proper defendant. His triennium is ticking up and he sues a defendant and it turns out to be the wrong one. At present if he comes to court to try and obtain an action against the right one whom he has now discovered he is time-barred."

His remarks could apply equally to cases involving damage to property.

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[1] Section 14A(8)(b) of the 1980 Limitation Act as incorporated by section 1 of the 1986 Act.

[2] Paragraph 10 (in the new section 22B(3)(d) of the 1973 Act) of Part II of Schedule 1.

[3] 1980 J.L.S.S. 60 at p.64.

4.23 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

3.(a) Knowledge of the identity of a person liable for the damage sustained should be included in the discoverability formula.

4.24 There is one further issue which arises in this connection. The potential claimant may identify a person liable for the damage sustained, and then subsequently discover that another is also responsible. In these circumstances, where the potential claimant has knowledge of material damage and its cause, should prescription start to run in favour of each person liable at the time he is identified, or alternatively only when all persons liable for the damage are discovered? In our view, subject to one exception to which we refer below, the former proposal offers a fairer solution, and appears to accord with the present approach adopted with regard to personal injury claims where the discoverability formula includes knowledge "that the defender was a person to whose act or omission the injuries were attributable in whole or in part ...". [our emphasis]

4.25 The exception which we have in mind concerns the person who is found to be vicariously liable to the potential claimant for loss sustained. A situation could arise, for example, where an injured party identifies one person liable for his loss, and then subsequently discovers that that person's employer is vicariously liable for his employee's act, neglect or

default. If we adopt the proposal favoured in paragraph 4.24 above - that prescription should start to run in favour of each person liable at the time he is identified - it is possible in the situation referred to that discovery of the employer's identity may be made after the claim against the employee has prescribed. It may be thought conceptually wrong to propose a rule which could result in a person, vicariously liable for another as in the example given above, becoming responsible for the consequences of the other person's wrongful actions at a time when any claim for reparation against that other person has prescribed.

4.26 Consultees are invited to respond to the following provisional proposal and question.

Provisional proposal

3.(b) Where the potential claimant has discovered material damage and its cause prescription will start to run in favour of each person liable at the time his or her identity becomes known to the potential claimant.

Question for consultees

(c) Should the above provisional proposal be subject to the exception that where the potential claimant identifies a person liable for damage substained ('the first person') and subsequently discovers that another is vicariously liable for that person's wrongful actions ('the second person') prescription will start to run in favour of the first and second persons at the time the second person is identified?

(iv) Knowledge of fault or liability

4.27 Should the discoverability formula include knowledge not only that the defender's act, neglect or default has given rise to the loss, injury or damage sustained by the potential claimant, but also that such act, neglect or default is actionable in law? In other words should ignorance of the defender's liability in law for the damage sustained prevent the start of the running of the prescriptive period?

4.28 In identifying the "material facts of a decisive nature" referred to in section 7(3) of the Limitation Act 1963,[1] ignorance of which delayed the start of the running of the three year limitation period in a personal injury claim, a series of judgments given in the English courts from 1968 onwards held that the starting point for the limitation period was not fixed until the plaintiff had knowledge (actual or constructive) not only that acts or omissions of the defendant caused his injury but also that they amounted in law to negligence or other breach of duty on the part of the defendant - "the worthwhile cause of action test". It would appear, however, that the worthwhile cause of action test was subsequently rejected by a majority in the House of Lords in Central Asbestos Co. Ltd. v. Dodd (on appeal from Smith and Others v. Central Asbestos Co. Ltd.).[2] In that case although Lords Reid

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[1] "(3) In this Part of this Act any reference to the material facts relating to a cause of action is a reference to any one or more of the following, that is to say--

(a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action; ...

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable."

[2] [1973] A.C. 518.

and Morris considered that it was reasonable that an injured man should not be deprived of his remedy simply because ignorance of his legal rights had caused him to delay in putting forward his claim, Lords Pearson, Simon and Salmon, took the view that it would be unfair to a defendant if a plaintiff could extend the limitation period simply because some years before he had received bad legal advice and accordingly had remained ignorant of the defendant's liability in law to make reparation.

4.29 The Lord Chancellor's Law Reform Committee considered this issue in their Twentieth Report[1] pointing out that to accept this aspect of knowledge in a discoverability formula (applicable to personal injury claims) would involve a departure from the fundamental principle "that a man's legal rights and liabilities do not depend on his knowledge of the law, or - as it is sometimes put - that ignorance of the law is no excuse".

4.30 The Committee took the view that to pursue the "worthwhile cause of action test" could cause considerable hardship to the defendant "by enabling a plaintiff to institute proceedings, many years after receiving advice that he had no case, on the basis that the advice was wrong when given or that a later decision had shown the law to be other than it was thought to be or that a later statute had changed the law".[2]

4.31 The Limitation Acts 1975 and 1980 finally rejected this test in English law by specifically providing that this aspect

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[1] Interim Report on Limitation of Actions: In Personal Injury Claims, Cmnd. 5630 paras. 42-55.

[2] Para. 50.

of knowledge is irrelevant in fixing the starting point in personal injury claims.[1] This rejection is also reflected in the 1986 Act.[2]

4.32 In the Scottish case McIntyre v. Armitage Shanks Ltd.[3] the pursuer, during the course of his employment, had contracted pneumoconiosis. His disablement became so severe that he was obliged to give up working in 1961. Shortly before he did so he indicated to the local secretary of his trade union that he intended to sue his employers for compensation for his illness, but was advised by the secretary that he could not do so. Accordingly he did not pursue the matter for some years. Finally, he discovered that the local secretary, who had also contracted pneumoconiosis, had raised an action against their mutual employers. At this stage the pursuer consulted a solicitor for the first time and subsequently instituted court proceedings against the defenders maintaining that until 1973 he had been ignorant of one "material fact"

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[1] Section 2A(6) of the Limitation Act 1939 introduced by section 1 of the 1975 Act; the proviso to section 14(1)(d) of 1980 Act.

[2] "Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above." - section 14A(9) of the Limitation Act 1980 as incorporated by section 1 of the 1986 Act.

[3] 1980 S.C. (H.L.) 46.

within the meaning of section 22(2) of the 1973 Act,[1] namely, that the defender's failure to protect him from working in excessively dusty conditions constituted negligence in law giving him the right to reparation. The argument put forward was that ignorance of this material fact delayed the running of the three year limitation period against him. The House of Lords held that ignorance of legal liability, actual or constructive, was not a "material fact" within the meaning of section 22(2) of the 1973 Act, and accordingly the pursuer's claim was time barred.

4.33 This issue was considered by us, within the context of personal injury claims, in our Report No. 74 (on personal injuries actions and private international law questions).[2] For reasons similar to those given by the Lord Chancellor's Law Reform Committee we recommended the omission of "the worthwhile cause of action test" from the discoverability formula. In our view to recognise such a test would "create undue uncertainty in the law and would increase the incidence of stale claims." The matter was placed beyond doubt in section 3 of the 1984 Act (which substituted a new section 22 in the 1973 Act) by providing in the discoverability formula for personal injury claims that knowledge that any act or omission was, or was not, as a matter of law, actionable, is irrelevant.

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[1] "(2) For the purposes of this Part of this Act any reference therein to the material facts relating to a right of action is a reference to any one or more of the following, that is to say--

(a) the fact that personal injuries resulted from a wrongful act or omission;

(b) the nature or extent of the personal injuries so resulting;

(c) the fact that the personal injuries so resulting were attributable to that wrongful act or omission, or the extent to which any of those personal injuries were so attributable."

Note This provision has now been replaced by section 3 of the 1984 Act.

[2] Paras. 3.10, 3.13-3.15.

4.34 It is not clear to us whether section 11 of the 1973 Act provides a discoverability formula which includes or excludes knowledge of fault or liability in law. As we pointed out in our Report No. 74 there is a danger that the words used in section 11(1) - "act, neglect or default" - could be taken "to connote elements of fault and liability as well as of causation".[1] Furthermore we are uncertain whether Lord McDonald's observations in the Dunfermline District Council case go as far as to suggest that knowledge that the party responsible for the act, neglect or default is liable in law to make reparation to the claimant for the loss sustained forms part of the discoverability formula.

4.35 It would appear that the reasons for rejecting "the worthwhile cause of action test" in personal injury claims are equally valid when applied to other claims involving latent damage. Inclusion of such knowledge in the discoverability formula would not achieve the appropriate balance between the interests of the pursuer and defender. It could involve the defender in stale claims, and create a greater uncertainty as to the period during which he is at risk.

4.36 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

4. **For the avoidance of doubt, the discoverability formula provided in section 11 of the 1973 Act should incorporate a proviso to the effect that knowledge that any act, neglect or default (or act or omission if one prefers to avoid any suggestion of legal fault or**

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[1] See para. 3.10.

liability)[1] is or is not, as a matter of law, actionable, is irrelevant.

(v) Actual and constructive knowledge

4.37 The discoverability formula provided in section 11(3) of the 1973 Act, is based on the claimant's actual or constructive knowledge of the relevant facts - "when the creditor first became, or could with reasonable diligence have become, so aware". There are, we think, two main policy issues to consider in relation to this provision.

4.38 Firstly, should the discoverability formula disregard constructive knowledge and define knowledge only in terms of what the claimant actually knows?

4.39 Secondly, if constructive knowledge is to remain part of this formula, what test should be applied in attributing knowledge to the claimant?

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[1] Strict liability can arise in various circumstances and has recently come into prominence by virtue of the Consumer Protection Act 1987. Unless otherwise provided in any statute which imposes strict liability, the prescription/limitation periods laid down by the 1973 Act should apply to a claim for damages based on strict liability. We may wish to consider, therefore, at the Report stage whether the words "act, neglect or default" or "act or omission" are sufficiently wide to cover such a claim. We have not included this point in our consultation exercise as we take the view that consideration of this matter does not involve a policy issue.

(a) Actual knowledge

4.40 With regard to the first policy issue we would suggest that to define knowledge only in terms of what the claimant actually knows is unacceptable. It would be unduly prejudicial to the defender, thus failing to achieve an equitable balance between the conflicting interests of the claimant and himself. As the Lord Chancellor's Law Reform Committee observed in their Twenty Fourth Report,[1] this approach "would favour dilatory plaintiffs and it would effectively hand to claimants the option of choosing when the special limitation period should start to run against them".

4.41 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

5.(a) The discoverability formula should not define knowledge only in terms of what the claimant actually knows.

(b) Constructive Knowledge

4.42 With regard to the second policy issue, there are, we think, two options available for consideration.

4.43 The first option would apply the test of the reasonableness of the average man. In adopting this approach no account would be taken of the particular circumstances of

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[1] (Latent Damage) Cmnd. 9390 para. 4.6.

the claimant - whether he was a highly articulate businessman or an elderly person of uncertain health. In imputing knowledge of the relevant facts to any claimant, the question to be answered would be what facts would it have been reasonable for the average man to have discovered about the damage sustained.

4.44 The second option would adopt a more subjective approach taking account of the circumstances of the particular claimant, and applying the test of reasonableness within these circumstances. In imputing knowledge the question to be answered would be what facts would it have been reasonable for that claimant to have discovered taking into account his or her particular circumstances. Where the injured party is under a legal disability,[1] and has a tutor, curator or curator bonis to protect his interests, subject to the exception mentioned below, the actual or constructive knowledge of that tutor, curator or curator bonis, as the case may be, (applying the subjective approach outlined above) would be imputed to him.[2] The one exception to this rule would be where the claim of the legally disabled injured party is directed against his tutor, curator or curator bonis.

4.45 The first option offers the defender a greater degree of certainty in identifying the start of the prescriptive period in that fixing the starting point is not dependant upon ascertaining, and giving consideration to, the claimant's

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[1] See section 15 of the 1973 Act.

[2] A general review of the effect of legal disability upon the operation of prescription, and limitation of actions, is undertaken in Part VI, Section (1) of this Consultative Memorandum.

personal characteristics and circumstances. We are of the view, however, that some account should be taken of such circumstances in imputing knowledge and accordingly we favour the second option. The greater degree of uncertainty for the defender is in our opinion justified by the fairer treatment afforded to the claimant under this option.

4.46 Consultees are invited to respond to the following provisional proposals.

Provisional proposals

5.(b) Subject to paragraph (c) below in imputing knowledge to the claimant of the relevant facts the test to be applied should be what it would have been reasonable for the claimant to have discovered taking into account his or her particular characteristics and circumstances.

(c) Where the claimant is under a legal disability and has a tutor, curator or curator bonis, as the case may be, to protect his interests, any knowledge of the relevant facts which it would be reasonable for the tutor, curator or curator bonis to have acquired, taking into account his or her particular characteristics and circumstances, will be imputed to the claimant, unless the claim is directed against that tutor, curator or curator bonis.

(c) Seeking the advice of experts

4.47 In many circumstances a potential claimant may only be able to discover some of the facts necessary to pursue his claim by seeking the advice of experts - for example where he

is endeavouring to identify the cause of damage sustained to his property, or to ascertain the accuracy of legal advice given to him.

4.48 In imputing knowledge to the potential claimant a court might take the view that a pursuer who has failed to take appropriate expert advice has acted unreasonably, and that consequently he must be held to have constructive knowledge of the facts which a reasonable expert would have given to him in response to such an enquiry.

4.49 But what of the pursuer who acts reasonably and consults an expert but is wrongly advised by him? One of the issues which has been frequently discussed in imputing knowledge to the pursuer, as part of the discoverability formula, is whether the pursuer in these circumstances should be fixed with constructive knowledge of what he ought to have been told, but was not told by the expert. A situation which comes to mind is where a building expert wrongly advises that cracks appearing in the walls of a house have been caused by minor settlement problems instead of faulty foundations.

4.50 On the one hand to fix the pursuer with such knowledge, when he has acted reasonably by approaching the expert in the first place, seems unfair. On the other hand it is questionable whether the defender should be prejudiced by the expert's failure to give correct advice.

4.51 In England and Wales this dilemma was resolved initially within the context of personal injury claims by the proviso to section 14(3) of the Limitation Act 1980, which provides that

"a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice".

4.52 In his Article "Limitations of the Law of Limitation"[1] P.J. Davies identified various problems arising from this formula. In particular where the expert involved is a solicitor, he considered that the proviso rested uneasily with the proviso to section 14(1)(d) of the 1980 Act[2] in that whereas it could be argued that time will not start to run against the pursuer, where, for example, the solicitor should have, but did not discover and advise his client of the relevant facts under section 14(1), incorrect advice given by that solicitor to his client that he has no cause of action in law against the potential defender will not prevent time running against him.

4.53 Notwithstanding the reservations expressed in this Article the 1986 Act adopts the section 14(3) proviso in relation to latent damage claims not involving personal injury,[3] and a similar proviso has been incorporated, for England and Wales, in section 5(7) of the Consumer Protection Act 1987 in relation to defective products.

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[1] 1982 L.Q.R. 249.

[2] Section 14(1)(d) provides inter alia that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant". See also paras. 4.27-4.36 above - "Knowledge of fault or liability".

[3] Section 1 which inserts section 14A into the Limitation Act 1980 - see the proviso to section 14A(10).

4.54 The alternative approach to this issue is to make no specific reference to seeking the advice of experts in that part of the discoverability formula which concerns constructive knowledge, relying upon the courts to decide in particular cases what knowledge can be reasonably imputed to the pursuer. This approach was put forward in our Consultative Memorandum No. 45 - Time Limits in Actions for Personal Injuries,[1] and was recommended in our subsequent Report.[2] We would suggest a similar approach in this current exercise.

4.55 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

5.(d) No specific reference to seeking the advice of experts should be made in that part of the discoverability formula which concerns constructive knowledge, reliance being placed upon the courts to decide in particular cases what knowledge can be reasonably imputed to the claimant.

(vi) Discoverability of a defect

4.56 There is a close inter relationship between the basic concepts of reparation - reparation for the purposes of this section, unless otherwise stated, meaning payment for loss sustained by reason of delict - and the operation of the rules of prescription. Developments in the former may have implications for the latter.

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[1] Paras. 2.46-2.49.

[2] Prescription and the Limitation of Actions (Scot. Law Com. No. 74) - Report on Personal Injuries Actions and Private International Law Questions, para. 3.7.

4.57 As we have indicated above the existing law fixes the starting point for the running of the five year prescriptive period in respect of, among others, a claim in delict, at the date when the obligation becomes enforceable, which, in accordance with section 11 of the 1973 Act, is the date when there is a concurrence between the legal wrong and the ensuing damage (i.e. a right of action), except in cases where it is deemed to be postponed by the discoverability test in section 11(3).

4.58 We are concerned that a problem could arise in identifying the start of the prescriptive period in respect of such a claim in the following circumstances. A builder is commissioned to construct a dwellinghouse for a customer but owing to his negligence the foundations of the house are defective. As a result of this defect serious physical damage occurs to the structure of the building some years later. After taking entry to the property, on completion, the owner discovers that the foundations are faulty, notwithstanding that no physical damage has occurred at that time.

4.59 These circumstances will arise infrequently in that normally the existence of a defect will only become discoverable when physical damage is apparent. Nevertheless in the exceptional situation referred to it is for consideration whether the owner has one right of action against the builder at the date the defective foundations are discovered, actually or constructively, and another right of action at the later date when physical damage, arising as a consequence of the defect, becomes discoverable. This approach presupposes that the

builder has been in breach of more than one duty of care owed to the owner, each breach (or legal wrong) giving rise to a claim for damages. If there are separate rights of action in such a situation, presumably separate prescriptive periods will also operate in respect of each.

4.60 Alternatively, the situation could be analysed in terms of there being only one breach of duty - the failure to construct sound foundations - giving rise to one right of action, at least regarding all damage thereby occasioned in relation to the defectively constructed property itself.[1] This damage could be the diminution in the market value of the property, or the cost of remedying the defect either before or after physical damage has occurred to the property. On this analysis, however, it is for consideration whether the prescriptive period will commence, in respect of all such damage, from the date that defect, or the physical damage arising therefrom, is discoverable.[2]

4.61 Uncertainty as to when prescriptive periods commence could prejudice both the defender, whose period of risk might be difficult to ascertain, and the pursuer who has to know what time he has within which to vindicate his rights.

4.62 Before a claimant has a right to institute court proceedings in a reparation claim (i.e. before the obligation becomes enforceable) damage must have arisen as a

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[1] Dunlop v. McGowan 1979 S.C. 22 at p.33.

[2] In accordance with our provisional proposals above, by use of the term "discoverable" we mean that there would be actual or constructive knowledge of material damage, its cause, and the identity of the person liable.

consequence of a legal wrong. As we suggested in paras.2.12-2.14 above damage is not easily defined comprehending "the various types of loss which may be sustained as a result of a breach of a legal duty or obligaton".[1] Actionable damage, however, can be divided into certain broad categories - personal injuries; physical damage to other property; and, economic loss.

4.63 Economic loss now covers more than just loss sustained through negligent professional advice relating to legal or financial matters.[2] The House of Lords' decision in Junior Books Ltd. v. Veitchi Co. Ltd.[3] made a significant development in that area of the law. In that case the pursuers maintained that the defenders had laid defective flooring in their factory, and claimed damages as a consequence for the cost of replacing the floor, and for the loss of profit which would be incurred because of the temporary closure of the factory while the remedial work was being carried out. The pursuer's claim was upheld. There was no question of the defender's negligence giving rise to injury or threatened injury to any other property belonging to the pursuers or to any persons occupying the factory, although the floor itself had sustained physical damage. The damage in the circumstances of that case has been referred to as "pure economic loss",[4] arising in consequence of a breach of duty owed to another, (in a relationship of sufficient proximity), to avoid such loss being caused through negligence.

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[1] Dunlop v. McGowan 1979 S.C. 22 at p.33.

[2] Hedley Byrne & Co. v. Heller & Partners [1964] A.C. 465.

[3] 1982 S.C. (H.L.) 244.

[4] See Lord Keith of Kinkel at p.267. See also "Pure Economic Loss - A Scottish Perspective", A.B. Wilkinson and A.D.M. Forte, 198, 30 J.R. 1

4.64 Applying the decision given in the Junior Books case to the situation described above in para.4.58, discoverability of the defective foundations arguably provides the owner of the new building with a claim at that time for reparation against the builder, either for the loss in value of the property as a result of the defect, or the cost of rectifying the defect. Concurrence has taken place between the legal wrong and the damage (falling within the category of economic loss) resulting from that wrong. Accordingly the prescriptive period in respect of that claim should be fixed at the date the defect in the foundations becomes discoverable. The physical damage subsequently occurring to the building itself as a result of the defect would be further consequential loss sustained from the same breach of duty. Thus the prescriptive period in respect of that further loss would also commence from the date of the discoverability of the defect in the foundations.

4.65 A recent decision given in Renfrew Golf Club v. Ravenstone Securities Ltd.[1] however, raises doubts as to the validity of this view. In that case Lord Allanbridge, in attempting to identify when the legal wrong and damage ("damnum") concurred in the circumstances of that case, so as to give the pursuer a right of action and fix the start of the prescriptive period, made the following observation:

> "... the distinction between defect and actual damage to a building or other property is of vital importance and must be applied by me in this case. Thus in the case of a golf course any defect in design or workmanship will not give rise to damnum until actual damage is caused to the course."

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[1] 1984 S.L.T. (Reports) 170.

4.66 Referring again to our example, it would appear, therefore, that there may be some uncertainty as to whether the start of the prescriptive period in respect of the owner's claim against the builder is fixed at the time the defect or the physical damage becomes discoverable.

4.67 Furthermore, as we referred to briefly in para.4.59 above, another possible approach to fixing the start of the prescriptive period in our example is to argue that there are two separate prescriptive periods applicable to separate rights of action relating to either simple economic loss (which in our example would arise before physical damage had occurred to the building) or to economic loss sustained after there has been some physical damage to the property itself.

4.68 The implications of this last approach can be seen, albeit in an Australian context, from the article by C.J. Rossiter and Margaret Stone, "Latent Defects in Buildings: When Does the Cause of Action Arise?"[1]

> "A building's value cannot be affected by a defect which is neither known nor capable of detection upon a reasonable inspection. Conversely, discovery of the defect will be the cause of the economic loss. In this context it will be seen that the discoverability test is not an artificial creation designed to soften the harsh consequences of the common law. Rather, discoverability and the 'terminus a quo' coincide. Acceptance of this analysis will, of course, produce further anomalies whilst mitigating others. In particular, if the building suffers physical damage, the plaintiff will have more than one cause of action in respect of the commission of the one wrong and the commencement of the limitation period for each cause of action will lack synchronism. That a plaintiff may

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[1] 1985 Australian Law Journal 606, at p. 612

be statute-barred from claiming relief for physical damage caused by a once latent defect in a building, and yet recover for economic loss caused by the same defect is absurd and no cause for pride. It is obvious that it will be no easy task to apportion recoverable damage between the two distinct causes of action, a process that would become criticial in the event of one cause of action being barred."

4.69 As far as we are aware a full analysis of the operation of the rules of prescription in relation to reparation claims similar to the one discussed above has not yet been given by a Scottish Court.

4.70 Whereas we can envisage that separate rights of action may arise when the defective foundations of a new building result in damage to adjoining property or physical injury to the occupiers of the new building, we are doubtful of the validity of an argument which suggests that discoverability of the defect, and subsequent discoverability of physical damage caused by that defect, provides the potential claimant with two rights of action.[1]

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[1] See Junior Books, 1982 S.C. (H.L.)224, per Lord Roskill, at p.276:

> "I think today the proper control lies not in asking whether the proper remedy should lie in contract or instead in delict or tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not - it is sometimes overlooked that virtually all damage including physical damage is in one sense financial or economic for it is compensated by an award of damages - but in the first instance establishing the relevant principles and then in deciding whether the particular case falls within or without those principles."

4.71 In our view when a builder's negligence, for example, results in the creation of a new building with defective foundations, the owner has a right of action if, for example, the result of the defect adversely affects the market value or requires him to incur expense in taking remedial action whether he knows those facts or not. Of course he will not be able to exercise the right unless and until he becomes aware of the fact, and so long as he is in reasonable ignorance, he is protected from the running of prescription by section 11(3). Subject to this and on the basis of the decision given in the Junior Books case, he should be able to recover from the builder his economic loss.[1] Moreover, given the concurrence of the legal wrong and the damage we would argue that any subsequent physical damage to the property which directly relates to the defective foundations would be a further manifestation of the initial damage. In the words of the Lord Justice- Clerk (Wheatley) in Dunlop v. McGowans:[2]

> "As soon as any form of loss, injury or damage occurs following a breach of legal duty or obligation (the injuria) the concurrence takes place. There can only be one point of concurrence and this is it. There may be further loss, injury and/or damage which arises consequential upon and the natural and probable result of that breach, but these do not constitute separate breaches so as to give rise to the right to raise separate actions therefor."

We would not regard the discovery of the physical damage as conferring upon the owner a further right of action against the builder, giving rise to the start of another prescriptive period.

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[1] We discuss below in paras.6.21-6.41 the possibility of introducing a scheme of provisional damages to mitigate hardship for pursuers in quantifying loss at an early stage.

[2] 1979 S.C. 22 at p.33.

To put it another way, it would be odd if, in circumstances where the owner of a building had actual or constructive knowledge of the defective foundations, the appearance, or not, of some minor physical damage were radically to determine what rights of action there were and the running of prescriptive periods relative thereto. Whether or not some physical damage has arisen, from the time of discoverability of the defect the owner would be faced with the same problems of damage and loss in respect of diminution in the value of the building, or the cost of remedying the defect, and of mitigating damage. Indeed, the owner's obligation to mitigate damage may require him to take remedial or other action before physical damage to the building has occurred.

4.72 Although we have raised the above issues, indicating that there may be uncertainties in the present law affecting reparation claims and the rules of prescripton, we are of the view, nonetheless, that these uncertainties could best be resolved by the courts in their development of the law of reparation. The operation of the rules of prescription would thus continue to be based on the development of that area of the general law. Accordingly, we prefer to make no provisional proposal in this area.

4.73 **If, however, consultees take a different view** and are of the opinion that some attempt should be made in this context to adjust the operation of the rules of prescription, then possibly a rule along the following lines might be adopted.

> For the avoidance of doubt, where actionable damage, including economic loss, is sustained through the breach of a duty, the prescriptive period in relation to an obligation to make reparation in respect of that and all

consequential damage caused by that breach of duty, other than personal injuries, should commence from the date that damage was discoverable (i.e. from the date when the pursuer first had actual or constructive knowledge of material damage, its cause and the identity of the person liable).

Arguably this result should already be achieved under the existing law[1] (subject to the narrower meaning given at present to the word "discoverable") but the judgment given in Renfrew Golf Club v. Ravenstone Securities Ltd. raises doubt on this point.[2]

4.74 **Consultees views are sought on the need for any rule such as that given above.**[3]

4.75 Comments are invited on the following.

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[1] Section 11 of the 1973 Act.

[2] 1984 S.L.T. (Reports) 170.

[3] There could be circumstances where a contractual obligation, such as a duty to exercise a reasonable standard of care in the fulfilment of a particular task, is for all practical purposes the same as a delictual obligation, the breach of which may give rise to a claim in contract or in delict. It is in effect standard practice to sue for some types of professional negligence claims in both contract and delict, the grounds of breach of delictual and contractual duty being identically stated. Breach of contract causing some loss would be the starting point for the running of prescription, subject to the discoverability test, in respect of that and all consequential loss, be it economic or loss through the damage to property. Our preferred analysis for the running of prescription in delictual claims has, therefore, the advantage of avoiding disparity in the operation of the rules of prescription as they affect respectively delictual and contractual obligations.

Questions for consultees

6.(a) Should any attempt be made to adjust the operation of the current rules of prescription to clarify the start of the prescriptive period in respect of a claim arising in circumstances similar to that illustrated by us in paragraph 4.58?

(b) If consultees answer question 6(a) in the affirmative should a rule be adopted along the lines of that suggested in paragraph 4.73, or alternatively if consultees do not favour such a rule what provision should be recommended to clarify the start of the prescriptive period?

(3) Duration of Short Negative Prescriptive Period

4.76 If the discoverability formula adopted in respect of claims involving latent damage (other than personal injuries) includes actual or constructive knowledge of the following facts - material damage, the cause of the damage, and the identity of the person(s) liable - the starting point fixed for the prescriptive period will be similar to that applicable to the limitation period in respect of claims involving latent physical injury.

4.77 This similarity might suggest that a five year prescription cannot continue to be justified where the limitation period for personal injury claims is only three years.

4.78 We doubt, however, whether a comparison in this respect between these two categories of claim is appropriate.

A shorter period for personal injury claims may have been selected by Parliament for good policy reasons - possibly because of the greater reliance placed upon the evidence of eye witnesses in such claims, and consequently the corresponding need to encourage an expeditious processing of actions before memories of the facts become less accurate.

4.79 The Law Society's Report, which, however, was concerned only with latent damage claims arising from defective construction works, also proposed a discoverability formula similar to that outlined above, but it recommended that the present five year prescriptive period should be extended to a period of ten years.[1] On the other hand, the Consumer Protection Act 1987, which implements the provisions of the Product Liability Directive, provides only for a three year limitation period calculated from the discovery of the damage, the defect, and the identity of the person liable, although it should be kept in mind that the Act provides for strict liability rather than for liability based on fault, and accordingly it is arguable that in these circumstances a shorter limitation period is justified.

4.80 One of the results of extending the discoverability formula, as discussed above, is to provide a starting point for the running of prescription in respect of reparation claims involving latent damage similar to that which applies in claims for reparation where the damage is apparent when it occurs. In those circumstances, logically, the prescriptive period to be applied in latent damage claims should be consistent with that in operation for all other reparation claims prescribable under

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[1] This recommendation was repeated in the Law Society's Supplementary Report.

section 6 of the 1973 Act. On this approach the five year period should be retained.

4.81 Consultees views are invited on the following provisional proposal.

Provisional proposal

7. On the basis that the extended discoverability formula outlined in paras. 4.6–4.55 above is adopted for claims involving latent damage (other than personal injuries) the short negative prescriptive period applicable to such claims should be retained at five years.

(4) Judicial discretion to extend the prescriptive period

4.82 It is for consideration whether the latent damage scheme proposed in this Consultative Memorandum should confer upon the courts a discretion to allow a potential claimant to bring an action outwith the prescriptive period if it appears equitable to do so. A precedent for such an approach can be found in section 19A of the 1973 Act[1] in respect of personal injuries.

4.83 In our Report No. 74[2], however, we expressed the view that the exercise of a judicial discretion, although suitable in relation to a limitation of actions procedure, would be incompatible with a system of prescription.

> "On balance, however, we consider that a combination of prescription and discretion would be conceptually unsatisfactory. It would create practical difficulties which would have to be resolved by legislation. It would, for example, have to be made clear whether the effect of the exercise of discretion was that the right

[1] Incorporated by section 23 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.

[2] Report on Personal Injuries Actions and Private International Law Questions, para. 7.17.

had never been extinguished, despite the principles of the substantive law, or that the right was in some way being revived. Even if the first possibility were adopted the court would be declaring retrospectively that a right still subsisted."

Having said that, the conceptual problems disclosed above could possibly be overcome if a sufficient need was shown for the introduction of a judicial discretion in respect of such other latent damage claims.

4.84 In order to reach a decision on this issue we think that it would be helpful to examine how the adoption of a judicial discretion has operated in relation to personal injury claims. Several applications have been submitted to the court under section 19A of the 1973 Act. Although it was stressed by Lord Ross in Carson v. Howard Doris Ltd.[1] that the court's discretion should only be exercised in exceptional circumstances[2] in most of the cases which have come before the court a discretion has been exercised in favour of the pursuer. Two of the actions involved difficulties in identifying the person liable,[3] and another two claimed that the delay in instituting court proceedings against the defender had been caused by the professional negligence of the claimant's solicitor[4] who had failed to raise the necessary actions within the triennium. In exercising its discretion the court's predominant consideration has been one of fairness to both

[1] 1981 S.C. 278.

[2] Lord Ross's view was endorsed by Lord Grieve in Munro v. Anderson-Grice Engineering Co. Ltd 1983 S.L.T. (Reports) 295.

[3] This problem should no longer require the application of the court's discretion, as the discoverability formula provided in the new section 17 of the 1973 Act (as substituted by section 2 of the 1984 Act) includes knowledge of identity of the person liable.

[4] Henderson v. Singer (U.K.) Ltd. 1983 S.L.T. (Reports) 198; Donald v. Rutherford 1983 S.L.T. 253.

parties ensuring that consent to a pursuer's application will not cause undue prejudice to the defender.

4.85 With regard to the applications which have already come before the court those situations which have involved professional negligence on the part of a solicitor who has failed to raise an action timeously on behalf of his client could also arise in relation to other claims involving latent damage, and for that matter to any claim which is subject to the five year negative prescription. The argument presented against the exercise of the court's discretion in such circumstances - that the injured party can recover his losses instead from his legal adviser - is not always valid. The solicitor may have inadequate financial resources to meet such a claim (having insufficient professional indemnity insurance cover), or where there is more than one solicitor involved[1] there may be problems of apportioning the liability.

4.86 The Lord Chancellor's Law Reform Committee in their Twenty Fourth Report also considered the possibility of recommending the exercise of a judicial discretion with regard to the three year extension of time which they proposed in respect of claims for latent damage (other than personal injuries) but came to the conclusion that it would introduce an unacceptable element of uncertainty for the defender. The Committee considered that a distinction could be drawn in this respect between personal injury claims, where a judicial discretion is available,[2] and other claims involving latent damage.

> "In cases of latent personal injury, the court does have a discretion to extend the limitation period, but such cases are we think different from the type of latent

[1] Henderson v. Singer (U.K.) Ltd 1983 S.L.T. (Reports) 198.

[2] S.33 of the Limitation Act 1980.

damage that we are presently discussing and require a different balance to be drawn between plaintiffs and defendants. In the present context we believe that a period of three years from the date of (presumed) knowledge is long enough to dispense with the need for a discretionary power of extension and it is much less uncertain in operation."[1]

4.87 We favour the Law Reform Committee's approach to the introduction of a judicial discretion in respect of latent damage claims. We agree that a justifiable distinction can be drawn in this respect between latent damage claims involving personal injuries and other latent damage claims. Furthermore in our view the exercise of such a discretion in claims not involving personal injury would give rise to an unacceptable degree of uncertainty as to the period during which a defender is at risk, with a possible adverse effect on the insurance facilities available to cover such risk. Introduction of a judicial discretion would also give rise to the problems of deciding to which obligations such a discretion should apply.

4.88 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

8. A judicial discretion should not be conferred upon the courts to permit a potential claimant to raise his action outwith the short negative prescriptive period.

(5) Successors in title to damaged property

4.89 Another problem which may arise in latent damage claims within the context of prescription concerns the successor in title to damaged property. When damage to a

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[1] (Latent Damage) Cmnd. 9390, para. 4.19.

new building is discoverable during the first owner's possession of that property should the five year prescriptive period for submitting a claim against the builder start to run at the time of discoverability not only against the first owner but also against all subsequent owners? In giving consideration to this problem we make no assessment of the subsequent owner's right, if any to claim his loss from the original builder, but proceed on the assumption that he may have such a claim.

4.90 This problem of successors in title to damaged property has already been considered in the English courts. In Eames London Estates Ltd. v. North Herts. District Council[1] ("the Eames decision") it was held that in the case of successive owners of property time might not begin to run against the plaintiff until the later of either the date on which damage becomes detectable or the date on which he acquires his interest in the property. This decision was criticised on the basis that it opened the way to indefinite liability on the part of defendants. In Jones and Another v. Stroud District Council[2] the Court of Appeal, commenting upon the 5 propositions made by Lord Justice Slade in Investors in Industry Commercial Properties Limited v. South Bedfordshire District Council and Others[3] made the following observation:

> "To these five propositions it is necessary to add a sixth, based on Lord Fraser's speech in Pirelli ... to the effect that any duty owed by the local authority is a duty owed to the owners - I would add: and occupiers - of the property as a class, and that if time runs against one owner or occupier it also runs against all his successors in title. No owner or occupier in the chain can have a better claim than his predecessors in title." (Our emphasis)

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[1] [1982] 19 Build. L.R. 50; [1981] 259 E.G. 491.

[2] [1986] 1 W.L.R. 1141 at 1149.

[3] [1986] 2 W.L.R. 937.

The Lord Chancellor's Law Reform Committee in their Twenty Fourth Report,[1] recommended that, for the avoidance of doubt, Lord Fraser's ruling in this respect should have legislative effect. This recommendation was implemented by section 3 of the 1986 Act.

4.91 It is thought, but it is by no means certain, that the position now attained under English law may already be achieved in Scotland by section 11(3) of the 1973 Act on the basis that "the creditor" referred to therein is meant to exclude a new creditor such as a subsequent purchaser, the latter becoming fixed with the knowledge (actual or constructive) of the original creditor.[2]

4.92 We wish to consider at this point, however, whether the interpretation offered in para. 4.91 above of the apparent position in law of the successor in title achieves an equitable balance between the defender, who thus avoids being subjected to a period of indefinite liability in circumstances over which he has no control, and the successor in title as potential claimant, who may consider that he is deprived of, or faced with a reduced period in which to submit his claim for damages.

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[1] Para. 4.21.

[2] On the other hand in the Law Society's Supplementary Report the view was expressed that "the creditor" within the context of successors in title to damaged property could mean that each proprietor has five years from the date of his acquisition of the property to institute court proceedings. There is accordingly room for doubt as to the correct interpretation of section 11(3) in its application to successors in title.

4.93 If damage to property becomes discoverable, although not necessarily discovered, during the occupation of the building by the first owner the starting point for the five year prescriptive period is fixed at that time. If the first owner then sells the property four years later the purchaser has only one year in which to discover the damage, and if thought appropriate, to submit a claim for damages against the builder. If the sale takes place more than five years after the damage becomes discoverable the purchaser is deprived of this right altogether.

4.94 Does this position prejudice the purchaser to such an extent that the balance of interests between the defender and potential claimant is weighted unfairly in favour of the defender?

4.95 In our view the balance of interests is not so weighted. The starting point is not fixed until the damage sustained is reasonably discoverable. Accordingly a purchaser, exercising a normal degree of caution in inspecting, or arranging for the inspection of the property before acquisition, should be able to discover the existence of the damage and reflect this discovery in the price offered.

4.96 One can of course envisage less straightforward situations where it might be argued that the position of the purchaser appears, on the face of it, to be less satisfactory. For example, minor settlement cracks developing in a new building may be discovered by the first owner, who is unaware however that the cracks are evidence of defective foundations

which will result in more serious structural damage in the future. More than five years after the initial cracks have been discovered, and presumably repaired, the property is sold. Whereas the purchaser's surveyor may have noted the repaired cracks, he may have failed, (not unreasonably) to appreciate that the real cause of the initial damage arose from inherent defects in the foundations of the building. Some time afterwards serious cracks develop. In these circumstances as the five year prescriptive period has elapsed the purchaser has no remedy against the builder unless he can establish that the current damage arose from a different cause of action than that attributable to the initial minor cracks. This situation, however,illustrates a problem which does not relate exclusively to successors in title. The problem is equally relevant to the owner of damaged property who does not sell his property.

4.97 As discussed above we have endeavoured to overcome this problem by recommending an extended discoverability formula for the start of the prescriptive period. If this recommendation is adopted the starting point in the above example will not be fixed at the point when the minor cracks occur but on the appearance of the more serious defects and when the cause of the damage (and the identity of the person liable) becomes known.

4.98 Up to this point in our consideration of this issue it would seem that the apparent position under existing legislation of the successor in title to damaged property achieves a more equitable balance between the interests of the defender and the potential claimant than that which would be attained under the Eames decision. We find further support for this view

from the fact that implementation of the Eames decision would provide the potential claimant with the means of unfairly extending the defender's period of risk. This could be achieved by the potential claimant effecting a nominal transfer of the damaged property to his wife, or some other nominee, shortly before the expiry of the five year prescriptive period, thus providing for himself, through his nominee, an additional five years in which to submit his claim.

4.99 We have not so far considered, however, whether this balance would continue to be achieved where one or more of a succession of owners of damaged property are under a legal disability.[1] We have deferred examination of this issue until a later section[2] in this Consultative Memorandum where we discuss the appropriateness of the present law which provides for suspension of prescription during the legal disability of the original creditor.

4.100 Consultees are invited to respond to the following provisional proposals.

Provisional proposals

9.(a) In a situation involving successors in title to damaged property the starting point for the five year prescriptive period in respect of any claims for loss arising from the damaged property will be fixed for all potential claimants (none of whom are subject to a

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[1] Section 6(4) of the 1973 Act provides that the running of prescription is suspended during the period in which the original creditor is under a legal disability.

[2] See Part VI(1).

legal disability) at the time the relevant facts relating to the damage become discoverable.

(b) For the avoidance of doubt section 11(3) of the 1973 Act should be clarified to reflect the above provisional proposal.

(6) Extension of the prescriptive period through fraud, or error

4.101 As indicated above, in terms of section 6(4) of the 1973 Act there is excluded from the calculation of the prescriptive period, any time during which the creditor is induced to refrain from making a relevant claim because of the debtor's fraud or through error induced by the debtor's words or conduct. We do not propose an amendment to this provision.

4.102 This section provides one qualification, however, to the above provision, namely, that any time elapsing after the creditor could with reasonable diligence have discovered the fraud or error will be included in the computation of the prescriptive period. In other words as soon as the creditor has actual or constructive knowledge of the fraud or error prescription will start to run against him.

4.103 This approach is similar to that adopted in section 11(3) of that Act where the starting point for the prescriptive period is based on the creditor's actual or constructive knowledge of the relevant facts relating to the damage. In imputing knowledge of the relevant facts to the creditor under that section we have provisionally proposed that subject to the aftermentioned exception, the test to be applied should be

what facts it would have been reasonable for the creditor to have discovered taking into account his or her particular characteristics and circumstances. The exception referred to concerns the creditor who is under a legal disability and has a tutor, curator, or curator bonis, as the case may be, to protect his interests. In these circumstances we have proposed that any knowledge of the relevant facts which it would be reasonable for the tutor, curator or curator bonis to have acquired, taking into account his or her particular characteristics and circumstances, will be imputed to the creditor, unless the claim is directed against that tutor, curator or curator bonis.[1]

4.104 In our view a similar test should be used in imputing knowledge to the creditor of the debtor's fraud or the error induced by the debtor under section 6(4) of the 1973 Act. Arguably this provision already reflects this test where the creditor is not under a legal disability.

4.105 Consultees are invited to respond to the following provisional proposals.

Provisional proposals

10.(a) For the avoidance of doubt section 6(4) of the 1973 Act should be amended to provide more specifically that in imputing knowledge to the creditor of the debtor's fraud or the error induced by the debtor, which persuades the creditor from making a relevant claim against him, the test to be applied, subject to the exception referred to in (b) below, should be what

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[1] Provisional Proposal No. 5(c) (para.4.46).

it would have been reasonable for the creditor to have known taking into account his or her particular characteristics and circumstances.

(b) Where the creditor is under a legal disability and has a tutor, curator or curator bonis, as the case may be, who is not the debtor against whom the creditor has a claim, any knowledge of the debtor's fraud, or error induced by the debtor, which it would be reasonable for the tutor, curator or curator bonis to have acquired, taking into account his or her particular characteristics and circumstances, will be imputed to the creditor.

PART V - CONSIDERATION OF THE STATUTORY PROVISIONS RELATING TO THE LONG NEGATIVE PRESCRIPTION WITHIN THE CONTEXT OF LATENT DAMAGE (NOT INVOLVING PERSONAL INJURY)

5.1 The benefit of the long negative prescription is that it provides a cut off point after which the obligation, if not enforced, is extinguished.[1] This creates a degree of certainty for the defender in the conduct of his affairs, reduces the likelihood of stale claims, and in all probability facilitates the availability of insurance cover for the period during which the defender is at risk. On the other hand in claims involving latent damage the obligation to make reparation may be extinguished before the damage is discoverable and the short negative prescriptive period has started to run. For example, the situation could arise in which, as a result of a solicitor's negligence, the client acquires a faulty title to his house which is not discovered until he attempts to sell the property more than twenty years later. If a testator survives the making of his will by more than twenty years, defects in that will may not be discoverable within the period of the long negative prescription. Inherent defects in a bridge may not manifest themselves for more than twenty years after the bridge's construction is completed. The possibility that damage is only discoverable after the obligation to make reparation is extinguished may seem unfair to the pursuer.

5.2 The problem, therefore, is to achieve once again the right balance between the interests of the pursuer and the defender recognising, however, two important factors - firstly

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[1] This general rule however, will not apply where the prescriptive period has been interrupted by a "relevant claim" or "relevant acknowledgment". See paras. 6.86 to 6.89 below for further consideration of this point within the context of obligations prescribable under the short negative prescription.

that whatever attempts are made to protect the interests of both parties there will inevitably be some hard cases which elude this protection; and secondly that the long negative prescription is primarily for the defender's benefit. The solution may lie in consideration of the following issues.

(a) **Do we need a long negative prescription?**

5.3 We considered this question in relation to personal injury claims, particularly within the context of a progressive illness which does not become apparent until many years after it has been contracted (pneumoconiosis, brain tumour, asbestos poisoning). In our Report No. 74 we recommended that, in the interests of the pursuer whose illness manifests itself at a very late stage and possibly outwith the twenty year long negative prescriptive period, the long negative prescriptive period should no longer apply to personal injury claims.[1]

> "The possibility cannot altogether be excluded, however, that the continued application of the prescription may cause injustice, especially where an injury is initially of a latent character, such as a respiratory disease. At the time of the onset of the disease a person may be quite unaware of his condition, and its true extent and cause may become apparent only after the prescription has run its course. A person who is contracting an industrial disease may cease to work altogether, may be transferred to a different post where he is no longer exposed to dust, or may commence work for a different employer. In all these circumstances the prescription may begin to run against him long before his condition is diagnosed. We know of no personal injury case in Scotland since the passing of the 1954 Act where a defender has successfully pleaded the prescription in such circumstances, but such a case could conceivably

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[1] Personal injuries actions and private international law questions. See paras. 2.1-2.8. This proposal was implemented by Schedule 1, para. 2, to the 1984 Act, which provided the appropriate amendment to s. 7(2) of the 1973 Act.

arise. We believe this result would be unacceptable if the triennium (which contains principles favourable to the pursuer) had not itself expired."

5.4 As indicated above the long negative precriptive period could operate in relation to other claims involving latent damage in the same manner depriving the pursuer of his right to reparation before the damage is discoverable. Accordingly the arguments put forward by us for dispensing with the long negative prescription in personal injury claims would appear initially to apply equally to such other claims.

5.5 We doubt, however, whether it would be appropriate to dispense with the long negative prescription in relation to such other claims, thus abandoning the benefits achieved of certainty and the avoidance of stale claims. It is arguable that the advantages of these benefits outweigh the disadvantages which arise in the few hard cases where damage is not discoverable during the prescriptive period. Possibly one can justify a different approach in latent damage claims not involving personal injury on the basis that in personal injury cases a greater emphasis is placed upon the injured party in attempting to balance the interests of the pursuer and defender.[1]

5.6 Further support for the retention of a cut off period in claims involving latent damage other than personal injury can be found in the Law Reform Committee's Twenty fourth

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[1] The Lord Chancellor's Law Reform Committee in their Twenty Fourth Report also concluded that a different balance is drawn between plaintiffs and defendants in personal injury claims. See para. 4.19 of the Report and also para.4.86 above.

Report and in the Product Liability Directive and Consumer Protection Act 1987. In the Report the Committee recommended the introduction for the first time in English law of a long stop provision (a 15 year limitation period) - "a point beyond which a plaintiff in a negligence case involving latent defect or damage should no longer be able to commence proceedings"[1], and this recommendation has been implemented by the 1986 Act.[2] In the latter a ten year long negative prescription is adopted in relation to claims for defective products.[3]

5.7 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

11. **The long negative prescription should be retained in respect of claims involving latent damage (other than personal injury claims).**

(b) Judicial discretion

5.8 If there is some reluctance to retain the long negative prescription, in view of the hard cases which will inevitably arise, a compromise might be achieved in this respect by retaining a cut off point but at the same time by providing the court with a statutory discretion to permit a pursuer to raise his action outwith the twenty year period, notwithstanding

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[1] Para. 4.10.

[2] New section 14B of the Limitation Act 1980 as provided by section 1 of the 1986 Act.

[3] Article 11 of the Product Liability Directive, and paragraph 10 (in the new section 22A of the 1973 Act) of Part II of Schedule 1 to the Consumer Protection Act 1987.

the reservations earlier expressed that such a discretion operates more appropriately where legislation provides for limitation of action rather than extinction of obligation.[1]

5.9 A statutory discretion will inevitably give rise to greater uncertainty as to the defender's period of risk, and consequently to increased difficulties in obtaining adequate insurance cover for such risks. Notwithstanding that the degree of uncertainty would be less than that likely to arise if the long negative prescription is abandoned, we do not favour the introduction of a judicial discretion.

5.10 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

12. A judicial discretion should not be conferred upon the courts to permit a potential claimant to raise his action outwith the long negative prescriptive period.

(c) Length of long negative prescription

5.11 The period of the long negative prescription was initially forty years, and was reduced to twenty years by section 17 of the Conveyancing (Scotland) Act 1924. The Committee on Registration of Title to Land in Scotland (the Reid Committee)[2] suggested that the twenty year period should be reduced to ten years, but the Halliday Committee[3] found this proposal to be unacceptable and recommended that the twenty year period should remain unchanged. In their view reduction of this period could operate to the prejudice of the

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[1] See para. 4.83 above.

[2] Cmnd. 2032 July 1963.

[3] Conveyancing Legislation and Practice (Cmnd. 3118, 1966).

pupil creditor.[1]

5.12 In discussing the length of the new long stop provision in their Twenty fourth Report, the Lord Chancellor's Law Reform Committee gave consideration to periods of twelve years, fifteen years and twenty years. It was thought that the twelve year period would probably work satisfactorily in most cases, but could bar some worthwhile claims. The twenty year period was rejected on the basis that it "might permit some very stale claims and expose many defendants to the risk of litigation for an unreasonable length of time". The fifteen year period was selected as striking "the right balance between justice for plaintiffs and certainty for defendants".[2] The Product Liability Directive and Consumer Protection Act 1987 provide for a ten year prescriptive period.

5.13 As some pursuers may be prejudiced by a statutory scheme which retains the long negative prescription but rejects the introduction of a judicial discretion it is for consideration whether the hard cases can be reduced by extending the period of the long negative prescription. The problem would be to decide what longer period to select, and indeed whether any reasonable extension of the present twenty year period could avoid hardship for some pursuers. In addition, in making this selection it would be necessary to keep in mind the increased

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[1] Para. 60, "... the age of majority is 21 and, if the period of the negative prescription were reduced to less than 20 years, a pupil creditor might lose his right before he was of an age to take effective action."

[2] Para. 4.13.

likelihood of stale claims and the consequent prejudice to the defender.

5.14 By accepting that there will be some hard cases whatever period is selected some may favour uniformity with English law in this respect to deter litigants from attempting to establish jurisdiction in Scotland so as to promote claims which would be time barred in an English court - a practice generally referred to as "forum shopping". Complete uniformity in this respect could not of course be achieved unless the starting point for the prescriptive period, which we discuss below, were the same as that adopted under English law for the limitation period.[1]

5.15 In our view to achieve uniformity with the English provisions could create more problems than they resolve. The position of the potential claimant whose minority extends beyond the fifteen year period would need to be considered, possibly by suspending the running of prescription during

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[1] It is perhaps appropriate to point out at this juncture that there would appear to be a further difference between the English "long stop" provision and our long negative prescription. Whereas our long negative prescription may act as an effective cut off point under section 7 of the 1973 Act twenty years after an obligation has become enforceable, it will not operate in this manner where the prescriptive period has been interrupted by the making of "relevant claim(s)" or "relevant acknowledgement(s)" (see paras. 6.86-6.89 for a further discussion on this point within the context of obligations prescribable under the five year negative prescription). The English "long stop" however appears to act as an effective cut off point 15 years after the occurrence of the breach of duty which gives rise to the damage.

minority.[1] The purpose of the long negative prescription, however, is to establish a cut off point which is easily ascertainable so as to provide the defender with a degree of certainty as to the period of his potential liability. This certainty would be forfeited if the running of prescription was suspended during the potential claimant's minority. It was for this reason that we did not favour the Reid Committee's recommendation to reduce the prescriptive period to ten years.[2]

5.16 Adoption of a fifteen year prescriptive period in respect of latent damage claims (other than those relating to personal injury) would result in the operation of two long negative prescriptive periods - the new fifteen year period in respect of latent damage claims not involving personal injury, and the existing twenty year period for all other obligations, and rights affecting property, prescribable under sections 6, 7 and 8 of the 1973 Act. We suggest that in this particular instance there is insufficient justification for sacrificing consistency

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[1] But see paras. 6.13-6.20 below when we query the need in any circumstances to suspend prescription during the claimant's legal disability. It is also worth noting that we have under consideration in another context a proposal to permit young people to raise civil proceedings (without the need for the concurrence of a curator) at the age of 16. See our Consultative Memorandum No.65 on the Legal Capacity and Responsibility of Minors and Pupils (June 1985) para.5.128.

[2] Scot. Law Com. No. 15, paras. 28-30.

within our own legal system for uniformity with the position under English law in latent damage cases.

5.17 In the circumstances we propose retention of the twenty year long negative prescription for latent damage claims (other than those arising from personal injury).

5.18 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

13. The period of the long negative prescription should be retained at twenty years.

(d) The starting point for the long negative prescriptive period

5.19 As already indicated the long negative prescription is primarily for the benefit of the defender. Accordingly if one accepts as inevitable that this cut off period will result in hardship for some pursuers in latent damage cases then, in assessing whether our statutory provisions are satisfactory, the prime consideration must be whether they achieve an element of certainty for the defender, and the avoidance of stale claims.

(i) The date when damage or material damage occurs

5.20 To minimise uncertainty it is important that the starting point is easily ascertainable. Under our existing law the period of prescription starts running against the pursuer when the obligation to make reparation becomes enforceable i.e. when the damage resulting from the legal wrong has occurred, whether discoverable or not at that time.[1]

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[1] Sections 7 and 11(4) of the 1973 Act.

5.21 It is questionable, however, whether the present starting point can be easily identified. If damage is not discoverable for some time after it has occurred, as in the Pirelli case, there may be evidential problems in establishing to the court's satisfaction the actual date when it arose. We anticipate that such problems may be experienced more frequently in relation to claims involving structural damage to buildings and other constructions, than in the field of professional negligence in other matters. Furthermore selection of this starting point could lead to stale claims, particularly where the damage takes place some time after the occurrence of the act, neglect or default. As the Lord Chancellor's Law Reform Committee observed in their Twenty Fourth Report, when they rejected a starting point fixed at the date of the damage - "Although [such a starting point] would accord with legal principle it would provide no certainty and might well permit many stale claims".[1]

5.22 A starting point which is fixed at the date when damage occurs of sufficient severity to justify a court action if discovered might be identified more easily in relation to reparation claims in the building and construction industry, but if anything, it would increase the likelihood of stale claims.

(ii) <u>The date of the act, neglect or default (the legal wrong)</u>

5.23 The Lord Chancellor's Law Reform Committee recommended in their Twenty fourth Report, (which as already indicated was concerned only with negligence cases involving latent defects (other than latent disease or injury of the

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[1] Para. 4.12.

person)), that the fifteen year long stop should run from the date of the defendant's breach of duty,[1] - a date which in their view is normally ascertainable without much difficulty by the parties. This recommendation has been implemented by the 1986 Act.[2] The Committee admitted that there might be problems in theory in identifying this starting point where there has been "a course of dealing between plaintiff and defendant or a series of breaches of duty". There may also be a problem where the breach of duty consists of an omission to do something. At what point in time does the breach occur - at the time when it can be established that the defender has delayed unreasonably in fulfilling his obligation, or when the duty is no longer capable of performance? The Committee considered that the latter point in time is now regarded as settled law in England as a consequence of the decision reached in the Midland Bank Trust Company Limited v. Hett Stubbs and Kemp[3] ("the Midland Bank case").

5.24 If the date of breach of duty, or within the context of this exercise, the date of the occurrence of the act, neglect or default, is adopted, the prescriptive period could of course start to run against the pursuer, and could even expire, before he has a right of action. The pursuer has no right of action until he has sustained loss, injury or damage as a result of the act, neglect or default, i.e. until there has been concurrence between the legal wrong and the damage. It is therefore for consideration whether it is appropriate to select a starting point which could give rise to the commencement, and possibly

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[1] Para. 4.12.

[2] New section 14B to the Limitation Act 1980 as incorporated by section 1 of the 1986 Act.

[3] [1979] Ch. 384.

also the termination, of the prescriptive period before the potential pursuer has a right of action.

5.25 On the other hand selection of this date as the starting point appears to offer fewer evidential problems than those likely to arise where the starting point is fixed at the date when damage occurs, thus achieving an element of certainty for the defender. It also helps to reduce the possibility of stale claims.

(iii) The date of completion

5.26 It has been suggested by some in the construction industry that the starting point should be the date of completion of the work - being a date in their view which would be fairly easy to identify.

5.27 The Lord Chancellor's Law Reform Committee in their Twenty Fourth Report considered the possibility of adopting the completion date for the starting point of the fifteen year long stop provision. The possibility was rejected on the basis that they could foresee formidable problems in adopting the concept of completion to all types of circumstances where latent damage might arise.[1] Even within the construction and building industry difficulties can be envisaged in identifying the completion date. The most obvious selection would be the date when the building/construction was completed and a Certificate of Completion issued by the local authority, but if the completion date is associated with that part of the project in respect of which the act, neglect or default arises, it could mean the date of completion of the soil mechanics survey or

[1] Para. 4.12. Although the date of completion was rejected by the Law Reform Committee it was put forward again, albeit unsuccessfully, during the Committee stage of the debate in the House of Lords - Hansard (H.L.) vol. 473 (8th April 1986) cols. 111-118.

the architect's design plans; the completion of a sub-contract; or the completion of part of a building as evidenced by the issue of an architect's certificate to this effect. Completion could mean the date upon which the purchaser of the new property hands over the price and takes entry. Furthermore as the Lord Chancellor's Law Reform Committee pointed out there could be difficulties in ascribing the concept of completion to areas outside the building industry, particularly in relation to other professional negligence claims. At what stage would one suggest that a solicitor's advisory service to a client is completed?

5.28 Generally, in the reported cases involving latent damage, the damage has arisen after the date of completion (however that date may be defined). Accordingly if this date is adopted as the starting point the prescriptive period could start to run against the pursuer, and possibly come to an end, before he has a right of action. As already pointed out[1] this result, of course, could also arise in relation to a starting point based upon the date of occurrence of the act, neglect or default.

(iv) Conclusion

5.29 During the progress of the Latent Damage Bill through both Houses of Parliament some support was given for selecting the completion date as the starting point in relation to claims arising in the building and construction industries. This proposal implied the adoption of one starting point for building claims and another for all other latent damage claims not involving personal injury. In our view such an arrangement would be unsatisfactory and lead to unnecessary complications in this area of the law.

[1] See para. 5.24 above.

5.30 In view of the difficulties envisaged in adopting the date of completion as the starting point, particularly for claims arising outwith the building and construction industry, we would not favour selection of this date.

5.31 The date of damage (unqualified) establishes a starting point which cannot precede the date upon which the potential pursuer has a right of action against the defender. It gives rise, however, to a greater degree of uncertainty and will result in stale claims.

5.32 Adoption of the date of material damage would possibly achieve a clearer starting point, but as it is closely linked with the discoverability of damage we consider that it would be unfavourable to the defender,. extending his period of risk and increasing further the incidence of stale claims.

5.33 On the basis that the long negative prescription is essentially a protection for the defender we would support the selection of the date of occurrence of the act, neglect or default as the starting point. This date would appear to be the easiest to identify. If adopted it would offer to the defender a greater degree of certainty, and hopefully a diminution in the incidence of stale claims. To ensure, however, that this degree of certainty can be achieved, we would suggest, for the avoidance of doubt, that the decision reached in the Midland Bank case should be given legislative effect in Scotland so that where the legal wrong consists of a failure to carry out a particular act the starting point will not be fixed until the required act is no longer capable of performance.

5.34 The evidential problems of identifying with accuracy the existing starting point for the long negative prescription in its application to latent damage claims do not arise in respect of claims for reparation where the damage is discovered as soon as it has occurred. Nevertheless for the sake of consistency, and to avoid confusion, we would suggest that for all reparation claims (within the meaning of section 11 of the 1973 Act) the starting point for the long negative prescription should be fixed at the time the act, neglect or default takes place.

5.35 Consultees are invited to respond to the following provisional proposals and alternative options.

Provisional proposals

14.(a) **There should be only one starting point for the long negative prescription in its application to claims involving latent damage (other than personal injury).**

(b) **The starting point referred to in (a) above should be fixed at the date upon which the act, neglect or default (the legal wrong) which gives rise to the subsequent loss, injury or damage (damage), takes place.**

(c) **For the avoidance of doubt the decision reached in the Midland Bank case should be given legislative effect in Scotland so that where the legal wrong consists of a failure to carry out a particular act the starting point will not be fixed until the required act is no longer capable of performance.**

(d) For the sake of consistency and to avoid confusion the starting point defined in (b) above should be adopted in the application of the long negative prescription to other claims for reparation not involving latent damage.

Alternative options

(e) If consultees do not accept provisional proposal 14(a) should one starting point operate for all claims involving latent damage to property, and a different starting point for other latent damage claims (other than personal injury)?

(f) If consultees favour making a distinction between claims involving latent damage to property and other latent damage claims, which of the undernoted dates should be selected for the starting point of the prescriptive period:

(i) in respect of claims involving latent damage to property;

(ii) in respect of other latent damage claims;

the date when damage occurs; or

the date when material damage occurs; or

the date of occurrence of the act, neglect or default; or

the date of completion.

(g) If consultees accept the provisional proposal 14(a) but do not accept provisional proposal 14(b);

(i) which of the following dates should be selected for the starting point?

the date when damage occurs; or

the date when material damage occurs; or

the date of completion.

(ii) should whichever date is selected be adopted in the application of the long negative prescription to other claims for reparation not involving latent damage?

(e) Extension of the prescriptive period through fraud, error and legal disability

5.36 The long negative prescription does not admit of extension on the grounds of fraud, error or legal disability.[1] This position seems consonant with the view that the purpose of this prescription is to achieve a reasonable degree of certainty for the defender, and the avoidance of stale claims.

5.37 Consultees are invited to respond to the following provisional proposal.

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[1] Sections 7 and 14 of the 1973 Act.

Provisional proposal

15. Subject to retaining a long negative prescription of twenty years' duration there should be no alteration in the present law which does not recognise the extension of the long negative prescription on the grounds of fraud, error or legal disability.

PART VI - MISCELLANEOUS ISSUES

(1) The effect of legal disability on the operation of the prescriptive/limitation periods

(i) Introduction

In relation to claims prescribable under the five year short negative prescription

6.1 In proposing the replacement of the old "short" prescriptions by a new short negative prescription of five years in our Consultative Memorandum on Prescription and Limitation of Actions,[1] we considered whether the new short prescription should be suspended during the creditor's legal disability.

6.2 The law at that time did not reflect any consistent policy in relation to the legal disability of the creditor, in that minority affected the running of the quinquennial and sexennial prescriptions,[2] but did not affect the triennial and septennial prescriptions.[3]

6.3 We put forward the provisional proposal in our Memorandum that, in accordance with English practice, a creditor's pupillarity, minority or legal disability should suspend the running of the new short negative prescription. Notwithstanding the reservations of several consultees, who

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[1] Memorandum No. 9.

[2] The quinquennial prescription is based on the Prescription Act 1669 (c.14) and the sexennial prescription of bills of exchange and promissory notes is based on the Bills of Exchange (Scotland) Act 1772 s.37.

[3] The triennial prescription is based on the Prescription Act 1579 (c.21) and the septennial prescription of cautionary obligations is based on the Cautioners Act 1695 (c.7).

considered such a proposal a retrograde step, we recommended this proposal in our subsequent Report on the Reform of the Law Relating to Prescription and Limitation of Actions,[1] justifying this recommendation on the basis 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 ...".[2]

6.4 Our recommendation was implemented by section 6(4) of the 1973 Act which provides that the running of the five year prescriptive period will be suspended for any period during which the original creditor is under a legal disability. Legal disability is defined in section 15 of that Act as meaning legal disability by reason of nonage or unsoundness of mind.

In relation to personal injury claims subject to a three year limitation period

6.5 Prior to the passing of the 1973 Act time did not start to run in respect of a personal injury claim if the claimant was under a legal disability, and was not in the custody of a parent ("custody of a parent rule").[3] If, however, the disability was evidenced by mental illness, which did not become apparent until after the start of the limitation period, the disability did not operate to suspend the running of that period. Section 17(2) of the 1973 Act substantially re-enacted this position.

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1 Scot. Law Com. No. 15.

2 Para. 90 of the Report.

3 See the Law Reform (Limitation of Actions etc.) Act 1954 s.6. "Parent" was defined in section 6(2) of the 1954 Act as including "a step parent and a grand-parent and in deducing any relationship an illegitimate person and a person adopted in pursuance of any entitlement shall be treated as the legitimate child of his mother, or, as the case may be, of his adopter."

6.6 Subsequently, in our Report on Personal Injuries Actions and Private International Law Questions,[1] we reviewed in some detail the statutory provisions governing legal disability in personal injury claims.[2] . In particular we expressed dissatisfaction with the "custody of a parent rule", which, on the one hand, failed, by the limited statutory definition given to the word "parent", to include all those who might act on behalf of an incapax, and which, on the other hand, might, if the rule was maintained or extended, discriminate against a child whose parent or guardian has a contrary interest, or whose parent is himself under a disability or who dies during the three year limitation period, or against any incapax whose affairs are not being properly looked after.[3]

6.7 We concluded our consideration of this issue by recommending that "the principles relating to legal disability contained in Part I of the Prescription and Limitation (Scotland) Act 1973 should be extended to actions for personal injury, with the result that time would not run against a person, such as a child, for as long as he was under legal disability."[4] In addition we recommended that disability, which occurred after the start of the limitation period, should suspend the running of that period. These recommendations were implemented by sections 17(3) and 18(3) of the 1973 Act (as substituted by section 2 of the 1984 Act).

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[1] Scot. Law Com. No. 74.

[2] Paras. 3.35-3.42.

[3] Paras. 3.35-3.42.

[4] Para. 3.42.

(ii) Legal disability within the context of successors-in-title to damaged property

6.8 During the course of this current exercise we had occasion to reconsider the policy thinking behind our recommendation that legal disability should suspend the running of prescription when we were examining the problems of the successor in title to damaged property, where one or more of the owners of such property are under a legal disability.

6.9 Within this context, if damage to property becomes discoverable, (although not necessarily discovered), during the occupation of the first owner, who is under a legal disability during his period of ownership, in terms of section 6(4) prescription will not start to run against him for any claim he might have against the builder. If the first owner then sells the property, and the purchaser is not under a legal disability, we took the view that the starting point for the running of the prescriptive period against the second owner should be fixed at the date of discoverability of the damage on the basis that the purchaser is in no different a position from the purchaser who acquires the damaged property from a seller who is not under any legal disability.[1]

6.10 We considered, however, whether a different approach should be adopted if the purchaser in the above example is also subject to a legal disability. If the prescriptive period does not start to run against the first owner who is subject to a legal disability might it be argued that it should not run

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[1] See our discussion of the successor in title problem in paras. 4.89-4.100 above.

against the purchaser either? The end result of such a proposition, however, could be to considerably extend the period of the defender's potential liability for damages.[1]

6.11 Current legislation may have foreseen this difficulty, although the relevant statutory provisions are not altogether clear on this point. Section 6(4) applies only to "the original creditor", who, within the context of successors in title, is arguably the owner of the property at the time the damage is discoverable. In the example given above "the original creditor" would be the first owner of the property but not the subsequent purchaser. Accordingly, the purchaser's legal disability would be disregarded in the computation of the prescriptive period, the starting point for any claim he might have against the builder being fixed at the date of discoverability of the damage.

6.12 On the basis that, in normal circumstances, there is someone responsible in law to protect the interests of a potential claimant who is under a legal disability, in our view this approach offered a satisfactory solution to the problem of confining the defender's period of risk, without at the same time unduly prejudicing the position of the potential claimant.

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[1] Where damaged property does not change hands the period of a defender's potential liability can still be extensive, if, for example, the owner of that property is subject to a mental illness from which he does not recover.

(iii) As a general principle should legal disability suspend the operation of the prescriptive/limitation period?

6.13 It occurred to us, however, in reaching this conclusion, that there is a lack of logic in taking into consideration the first owner's legal disability but in disregarding the legal disability of the second owner,[1] even if one argues that the justification for so doing is to minimise the defender's period of risk. This lack of logic led us on to reconsider whether, as a general principle, legal disability should, in any circumstances, suspend the running of the short negative prescription, and for that matter the three year limitation period.

6.14 From the defender's point of view suspension of the prescriptive/limitation period extends his period of risk, and where the legal disability involves mental illness, creates uncertainty as to its duration. In these circumstances it is questionable whether the present protection given to the legally disabled potential claimant is equitable. As already indicated we think that it is fairly accurate to say that in the majority of cases there is someone responsible in law to protect and represent the interests of a person who is under a legal disability.

6.15 Generally a pupil[2] can only act through his tutor. The tutor manages the pupil's affairs and enters into legal

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[1] But see section 28(3) of the Limitation Act 1980 (applicable to England and Wales) which provides that "when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person."

[2] A child under the age of 12 (in the case of girls) or 14 (in the case of boys).

transactions on his behalf. A minor[1] has a limited capacity to act on his own behalf, but if he has a curator, he must obtain his consent to most transactions.[2] A child's tutors or curators are usually his parents, although in certain cases where, for example, the child has no parents, a special guardian can be appointed. The interests of a person suffering from unsoundness of mind may be protected by the appointment of a curator bonis.

6.16 Accordingly, although there could be some instances where a minor has no curator, or a curator bonis has not been appointed to protect the interests of a person suffering from mental illness, normally there is someone responsible in law to pursue on behalf of the legally disabled, any claim for damages arising from some act, neglect or default. In these circumstances we are inclined to revise our earlier policy thinking on what should be the effect of the claimant's legal disability on the operation of the prescriptive/limitation periods, and to favour the view that legal disability should not suspend the running of these periods.

6.17 One might argue that if the present rule of suspending the prescriptive/limitation period during legal disability is to be abandoned as a general principle, the rule should at least be retained for the few legally disabled who have no one to

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[1] A minor, in the case of a girl, is a young person between the ages of 12 and 18, and in the case of a boy, between the ages of 14 and 18.

[2] For further examination of the present law on the capacity of minors and pupils see Parts II and III of our Consultative Memorandum No. 65 - "Legal Capacity and Responsibility of Minors and Pupils".

represent their interests. For the reasons referred to briefly in para. 6.6 above, we would not favour a return to the rule that legal disability would only suspend the running of these periods where the claimant was not in the custody of a parent (however defined) - "the custody of a parent rule". The legally disabled who has no one to represent his interests, will be protected nevertheless under our provisional proposals 5(b) and (c), (para. 4.46) above, (in relation to claims prescribable under the short negative prescription)[1] in that in imputing knowledge of the relevant facts to that claimant, and thus fixing the start of the prescriptive period, the circumstances of his legal disability and his lack of representation, will be taken into consideration.

6.18 There are, of course, other options available for consideration. We could recommend that a potential claimant's legal disability should, in all circumstances, suspend the running of the prescriptive/limitation period, notwithstanding that within the context of successors in title to damaged property, such a recommendation could expose the defender to an extension of his period of risk. Alternatively in order to accommodate the defender in such circumstances, we could suggest one exception to the rule that legal disability suspends the prescriptive period. That exception would arise where the damage becomes discoverable (although not necessarily discovered) during the possession of the property by the first owner, who may or may not be under a legal disability, and the second owner is under a legal disability. The second owner's legal disability would not suspend the running of prescription. Our inclination is to disregard the last possible option, and to confine our attention to the options which, in calculating the prescriptive/limitation period, either

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[1] See paras.6.125-6.131 below for similar proposals regarding personal injury claims.

take into consideration or ignore, without qualification, the potential claimant's legal disability

6.19 Although, as already indicated, our preference is to recommend that legal disability should always be disregarded in calculating such periods we would be interested to ascertain the views of consultees on the above two options.

6.20 Consultees are invited to respond to the following question.

Question for consultees

16. In deciding what effect the potential claimant's legal disability should have upon the running of the prescriptive/limitation period which of the two following options should be selected?

First Option - The legal disability of the potential claimant will not, under any circumstances, suspend the running of the prescriptive/limitation period.

Second Option - The legal disability of the potential claimant will, in all circumstances, suspend the running of the prescriptive/ limitation period.

(2) Provisional Damages

6.21 In para. 2.15 above reference was made to the difficulties occasionally experienced in quantifying damage within the prescriptive period in view of the common law principle laid down in Stevenson v. Pontifex and Wood[1] that all claims for damages arising out of a single delict or breach of contract must be litigated in the same action.

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[1] 1887 15 R. 125.

6.22 This problem is particularly apparent under existing law in cases where physical damage to property progressively develops over a period of years - the building erected on faulty foundations which initially develops minor settlement cracks, and after the lapse of some years, serious structural defects.[1] At the time the property owner becomes aware of the minor cracks he may not be able to anticipate and quantify the ultimate damage likely to be sustained.

6.23 As it would appear that under our present law the starting point is fixed at the time he becomes aware of the minor cracks, it is possible in these circumstances that the five year period will have elapsed before he can accurately quantify his loss. On the other hand, if we adopt a discoverability formula in which the prescriptive period does not start to run until the pursuer is aware of damage sufficiently material to justify instituting court proceedings, and the cause of that damage, the problem of quantifying his loss within the prescriptive period may be less apparent.

6.24 However, even physical damage to property which is sufficiently serious to justify court proceedings, can still progress over a period of time with unexpected results. In Watt v. Jamieson[2] the defender installed in the basement of 4 Moray Place a gas water storage heater, the flue of which he connected to the vent in the common gable between 3 and 4 Moray Place. Gradually alarming symptoms of damage made their appearance in number 3 in the vicinity of this flue or vent - dampness to the interior walls, discoloration and

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[1] Dennis v. Charnwood Borough Council [1983] Q.B. 409.

[2] 1954 S.C. 56.

disintigration of the stonework, crumbling of brickwork and plaster, and eventually after some time dry rot developed. At that point although no fresh damage appeared "the consequences of the damage already caused continued and became aggravated by natural causes".

6.25 Difficulties of quantifying loss within the prescriptive period can arise in situations where the damage is not related to physical damage to property. As already indicated above in Dunlop v. McGowan[1] the damage involved the loss of a landlord's legal right to obtain vacant possession of his property owing to his solicitor's failure to serve a notice to quit timeously upon the tenant. The prescriptive period started to run from the date upon which the pursuer should have taken entry to his property. The pursuer assessed that he had sustained financial losses consequent to the damage for more than five years thereafter, which had included hidden costs as a result of inflation, and which only became apparent when he was finally in a position to take possession of, and subsequently undertake development to, his property. In the view of the court, however, the pursuer's problems of quantifying loss were not dissimilar to those of the injured person who has to calculate loss of future wages or prospects, or solatium for future injuries likely to arise from the initial accident. "The pursuer has to endeavour to quantify such future losses".

6.26 The problems of quantifying uncertain future loss in personal injury claims however were considered in the Law Commission's Report on "Personal Injury Litigation - Assessment of Damages",[2] and in the Pearson Report on Civil

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[1] 1979 S.C. 22 and 1980 S.C. (H.L.) 73.

[2] Law Com. No. 56 - see in particular the section on Provisional Damages - paras. 231-244.

Liability and Compensation for Personal Injury.[1]

6.27 In analysing the defects inherent in a legal system which awards damages only on the basis of a single lump sum, the Law Commission referred to "the chance case" and "the forecast case" where events arising subsequent to the lump sum award might reveal the inadequacy of the judicial settlement for the injury sustained.

6.28 The Law Commission pointed out that in "the chance case" an injury apparent at the time of the trial might be exacerbated thereafter by some catastrophe such as epilepsy or cancer. "In this sort of case medical prognosis cannot say whether the catastrophe will or will not occur; all it can do is try to make an estimate, in terms of percentages, as to the probability that it will occur".[2] The Law Commission came to the conclusion that in this type of case it is unlikely, in practice, that a lump sum award will ensure justice between the parties.

6.29 The "forecast case" is illustrated by the Law Commission with the example of the injured party who has damaged a joint, and medical evidence predicts with reasonable certainty that arthritis, accompanied by a certain degree of disability, will develop within a specified period of the accident. In their view in such a situation the chances of securing a just lump sum award are greater than in 'the chance case' but hard cases can still arise.

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[1] Cmnd. 7054 - see in particular Declaratory Judgments paras. 584-585.

[2] Para. 232.

6.30 The Law Commission concluded that a provisional damage scheme should be introduced to resolve the problems of "the chance case" and in some exceptional instances "the forecast case". They foresaw however that the consequence of such a proposal was to extend the period during which the defender's liability remained uncertain. Accordingly one of the recommendations which they put forward was that an award of provisional damages should not be made against a defendant unless it was a public authority or was insured in respect of the plaintiff's claim. The Pearson Committee subsequently observed that in practice the insurance qualification would exclude from the scope of the provisional damages scheme only a small number of tort claims, "since few claims are made against uninsured individuals."[1]

6.31 A provisional damages scheme for personal injury claims was introduced for England and Wales by section 6[2] of the Administration of Justice Act 1982 and for Scotland by section 12 of that Act.

> "12.-(1) This section applies to an action for damages for personal injuries in which--
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> (a) there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of the action, develop some serious disease or suffer some serious deterioration in his physical or mental condition; and

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[1] Para. 585.

[2] In England and Wales the recommendation put forward by the Law Commission and the Pearson Report that such a scheme should only operate where the defender was a public corporation or insured was not adopted.

(b) the responsible person was, at the time of the act or omission giving rise to the cause of the action,

(i) a public authority or public corporation; or

(ii) insured or otherwise indemnified in respect of the claim.

(2) In any case to which this section applies, the court may, on the application of the injured person, order--

(a) that the damages referred to in subsection (4)(a) below be awarded to the injured person; and

(b) that the injured person may apply for the further award of damages referred to in subsection (4)(b) below,

and the court may, if it considers it appropriate, order that an application under paragraph (b) above may be made only within a specified period.

(3) Where an injured person in respect of whom an award has been made under subsection (2)(a) above applies to the court for an award under subsection (2)(b) above, the court may award to the injured person the further damages referred to in subsection (4)(b) below.

(4) The damages referred to in subsections (2) and (3) above are--

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages if he develops the disease or suffers the deterioration."

6.32 Is there a need to extend the provisional damage scheme to all claims involving damages? We wonder whether there is the same degree of difficulty in accurately quantifying

loss in claims for damages not involving personal injury. Can "the chance case" be illustrated within the context of damage to property or pure economic loss? If we accept that quantification of loss in circumstances similar to those described in Dunlop v. McGowan can be achieved with reasonable accuracy, and if the extended discoverability formula in latent damage cases is adopted, so that the prescriptive period will not start to run until the pursuer has knowledge of material damage and its cause, it may be that an extension of the provisional damage scheme to all claims for damages is not necessary.

6.33 We are anxious in this respect to obtain the guidance of consultees who have first hand knowledge of the difficulties which can be experienced in quantifying loss both in regard to physical damage to property and pure economic loss claims.

6.34 Consultees are invited to respond to the following questions.

Questions for consultees

17.(a) If the discoverability formula for fixing the starting point of the short negative prescriptive period is extended to cover actual or constructive knowledge of material damage, the cause of that damage, and the identity of the person liable, do consultees consider that the adoption of a provisional damages scheme, for claims not involving personal injury, is required?

(b) If consultees favour the adoption of a provisional damages scheme we shall be grateful if they will

provide in their answer to this question practical examples to illustrate the kind of damage (e.g. physical damage to property; pecuniary loss arising from professional negligence) which would not be easily quantifiable even with an extended discoverability formula.

6.35 If consultees support the adoption of a provisional damages scheme which extends to claims not involving personal injury there are two issues arising from such an adoption which we would like to consider with consultees.

6.36 The first issue concerns the imposition of a time limit for the lodging in court of an application for the second award of damages. The Law Commission observed in their Report that a provisional damages scheme gives rise to an extended period of uncertainty for the defender (or at least for the defender's insurer). An attempt to minimise this uncertainty is reflected in section 12(2)(b) of the Administration of Justice Act 1982 which confers upon the court a discretion to require submission of the second application for damages within a specified period.

6.37 If one accepts that uncertainty in this context is to be minimised, and we seek consultees views below on this proposal, does section 12(2)(b) achieve this? There are other possible ways of securing greater certainty - either by providing a fixed statutory time limit applicable to all second claims, or alternatively by providing a maximum period for lodging a second claim subject to the court's discretion to select a shorter period in any particular case.

6.38 Consultees are invited to respond to the following questions.

Questions for consultees

17.(c) If a provisional damages scheme is adopted should legislation provide:

(i) that the second claim should be lodged within a fixed period; or

(ii) that the second claim should be lodged within a fixed period subject to the court's discretion to select a shorter period; or

(iii) that the court is given discretion to stipulate for a fixed period in any particular case; or

(iv) that the pursuer should not be obliged to lodge his second claim within a fixed period?

6.39 The second issue concerns the present limitations of the scheme operated under section 12 of the 1982 Act, which provides that an award of provisional damages can only be made against a public authority, a public corporation, or such other persons, for example an incorporated company, a partnership, an unincorporated association, or an individual,[1] who are insured or otherwise indemnified in respect of the claim. The issue which we think must be considered as a

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[1] In Schedule 1 to the Interpretation Act 1978 "person" is defined as including a body of persons corporate or unincorporate.

consequence of this restriction is whether the exclusion from this scheme of the uninsured person, particularly one who is well able financially to meet any claim made, is justified?

6.40 We foresee a problem in including the uninsured defender who is an individual, as opposed to an incorporated company. If that defender dies prior to the submission of an application for a second award, his estate will become burdened with a contingent liability for additional damages, which will create difficulties in the winding up and distribution of the assets to the deceased's beneficiaries.

6.41 Consultees are invited to respond to the following questions.

Questions for consultees

17.(d) **We would be interested to ascertain consultees' views on whether any provisional damages scheme should be extended to the defender (whether an incorporated company, a partnership, an unincorporated association or an individual) who is not insured, or otherwise indemnified.**

(e) **If consultees favour the adoption of a provisional damages scheme for claims not involving personal injury, which varies from that applicable to personal injury claims under section 12 of the 1982 Act, do they consider that the variation(s) proposed should also apply to the provisional damages scheme for personal injury?**

(3) Interruption of the five year short negative prescription and the twenty year long negative prescription by "relevant claim" or "relevant acknowledgement"

(i) General Introduction

6.42 The making of a "relevant claim" by or on behalf of the creditor for implement or part implement of an obligation, or the "relevant acknowledgement" of the obligation made by or on behalf of the debtor, both serve to interrupt the running of either of the two negative prescriptions.[1]

6.43 A "relevant claim" is defined by section 9 of the 1973 Act.[2] Briefly it covers a claim made in any competent court proceedings, (except proceedings in the Court of Session initiated by a summons which is not subsequently called), in an arbitration in Scotland, or in another country providing the arbitral award is enforceable in Scotland, by the presentation of or the concurring in a petition, for sequestration or liquidation; by lodgment with a trustee appointed by the court in sequestration proceedings or by the debtor under a voluntary trust deed for creditors,[3] or with a liquidator; and by executing diligence directed to the enforcement of the obligation.

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[1] Section 6(1)(a) and (b) of the 1973 Act with regard to the five year short negative prescription; section 7(1)(a) and (b) of the 1973 Act with regard to the twenty year long negative prescription.

[2] As amended by the Prescription (Scotland) Act 1987.

[3] The trust deed for creditors is defined in section 5(2)(c) of the Bankruptcy (Scotland) Act 1985.

6.44 A "relevant acknowledgement" is defined by section 10 of the 1973 Act. Acknowledgement of the obligation may be implied by such actings of the debtor, (or his agent), towards implement of the obligation as clearly indicate that the obligation still subsists. It can also be established by an "unequivocal written admission" given by the debtor or on his behalf to the creditor or his agent.

6.45 As the long negative prescription also applies to obligations prescribable under the short negative prescription one of the consequences of the above provisions is to prevent the long negative prescription, in some instances, from acting as an effective cut off point under section 7 of the 1973 Act twenty years after an obligation, prescribable under section 6 thereof, has become enforceable.[1]

6.46 Two issues arise for consideration from these provisions. The first issue concerns the result achieved by the interruption of the prescriptive periods by a "relevant claim" or a "relevant acknowledgement".

6.47 In our Report on the Law Relating to Prescription and Limitation of Actions[2] we indicated that the effect of the interruption "would be that the prescription would commence anew as from the date of the interruption". The Second Division of the Court of Session, however, in British Railways Board v. Strathclyde Regional Council[3] have raised doubts as to the possible effect of interruption.

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[1] This situation could arise where the five year short negative prescriptive period has been interrupted on one or more occasions by the making of a "relevant claim", or the giving of a "relevant acknowledgment".

[2] Scot. Law Com. No. 15, para.99.

[3] 1982 S.L.T. (Reports) 55.

6.48 Briefly the facts in that case were as follows. On 29 July 1972 the West Street tunnel in Glasgow which belonged to British Railways Board collapsed. One day before the expiry of the five year prescriptive period the Board raised an action in Glasgow Sheriff Court for damages incurred as a result of the accident against Strathclyde Regional Council and others. That action was subsequently sisted and the Board proceeded to raise a second action against the same defenders in the Court of Session on 27 February 1978 abandoning the sheriff court action in March 1980.

6.49 One of the defenders' arguments was that even if the raising of the sheriff court action was held to be a "relevant claim" in that action within the meaning of sections 6(1)(a) and 9 of the 1973 Act it did not protect the pursuer against a plea of prescription in the Court of Session case. The pursuer argued on the other hand that the termination of the sheriff court action had the effect of starting a new five-year prescriptive period.

6.50 The Lord Justice Clerk held that "the appropriate date" within the meaning of section 6 of the 1973 Act was 29 July 1972; that there was no continuous period of five years thereafter without a relevant claim being made in relation to the obligation; and accordingly the obligation was not extinguished. "During the currency of the sheriff court action that relevant claim persisted, and there was no continuous period of five years running for the purpose of extinguishing the obligation. Accordingly when this action was raised there was a subsisting obligation, against which a plea of prescription could not prevail."

6.51 In his view it did not matter in that case whether the intervention of the sheriff court action resulted in an interruption of a continuous period of five years from 29 July 1972, or the commencement of a new five year period from the dismissal of the sheriff court action.

6.52 This approach was followed by Lord Kissen and Lord Robertson. Lord Kissen observed that "the question when a further prescriptive period would begin - whether at the abandonment of the sheriff court action or five years after the raising of the sheriff court action or five years after the raising of this action - does not arise."

6.53 The fact however that the court made these obiter observations on the possible effect of the interruption of prescription by a relevant claim suggests that there may be some doubt as to the correct interpretation of the relevant statutory provisions.

6.54 In the circumstances it may be appropriate to take this opportunity to consider as a matter of policy what effect interruption of the prescriptive periods by "a relevant claim" or "relevant acknowledgement" should achieve.

(ii) Interruption of prescription by "a relevant claim"

6.55 There would appear to be five possible options available in respect of "a relevant claim".

The First Option

6.56 Under the first option the effect of interruption would be to terminate permanently the running of prescription against the potential claimant in respect of that particular claim.

6.57 We would suggest that the first option is unacceptable, and contrary to the policy intention behind the current statutory provisions. As the defender's counsel remarked in the British Railways Board v. Strathclyde Regional Council "... Parliament could not have intended ... that an obligation to make reparation could be kept alive indefinitely simply because a 'relevant claim' had been made during the first quinquennium". The result, in his view, with which we agree, would be contrary to the basic principles of prescription, particularly that of the long negative prescription.

The Second Option

6.58 Under this option the effect of interruption would be to terminate the running of that particular prescriptive period and immediately start the commencement of a new prescriptive period as from the date of the interruption. Accordingly if, for example, the prescriptive period has been running for one year, and the claimant then institutes court proceedings against the person liable for the damage sustained, that prescriptive period is interrupted and brought to an end and the starting point for a new prescriptive period is fixed at the date of the raising of the court action.

6.59 The defenders in George A Hood and Co. v. Dumbarton District Council[1] submitted that this option represented a correct interpretation of section 6 of the 1973 Act. In that case the pursuers carried out certain refuse collection services for the defenders during the period 16 May 1972 to 15 May 1973. On 13 May 1975 the pursuers raised an action in the sheriff court at Dumbarton claiming payment for these services, but abandoned that claim on 27 April 1976. On 29 July 1981 the pursuers raised a further action for payment of the balance then outstanding. The defenders, although admitting that the raising of the sheriff court action had been a "relevant claim", argued that the obligation to discharge sums due for the services rendered had been extinguished, as it had subsisted uninterrupted from 13 May 1975, which represented a period in excess of five years before the raising of the second action. The defenders' argument, as summarised by Lord Kincraig in his judgment, was as follows:

> "... on a proper construction of s.6 it is the occurrence of a single event which operates as an interruption of the period, and not a state of affairs; only the date of the raising of an action is to be considered in deciding whether there has been a continuous period of five years without a relevant claim having been made."

Lord Kincraig disagreed with the defenders' interpretation of section 6.

> "If the argument for the defenders was correct it would mean that if an action taken to enforce the obligation was not concluded until over five years after it was initiated the obligation would be extinguished. I cannot believe that Parliament by this subsection intended to complete the expeditious determination of disputed obligations, with the penalty of extinction if a decision

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[1] 1983 S.L.T. 238.

was not reached within five years of being presented for decision."

6.60 Accordingly if this second option were to be adopted it would be necessary, in our view, to ensure by legislation that where a "relevant claim" is the institution of court, arbitration, or sequestration/liquidation proceedings, the obligation would not prescribe during the course of those proceedings notwithstanding that such proceedings are not concluded within five years.[1]

6.61 We anticipate a further problem arising from the adoption of this option. Although we envisage that the scheme would operate satisfactorily where the relevant claim is made by the execution of diligence, we have doubts about its merits for the unsecured creditor who has lodged a claim with the trustee in sequestration proceedings or the company's liquidator, and the insolvency proceedings last longer than five years,[2] and are abandoned or recalled after the expiry of that period.[3] In this situation his rights would prescribe at the same time as the insolvency proceedings were abandoned or

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[1] We have referred here only to the short negative prescription as we do not anticipate that this problem will arise where the period involved is twenty years.

[2] We have referred here only to the short negative prescription as we do not anticipate that this problem will arise where the period involved is twenty years.

[3] Unlike the position of the parties to a court action or arbitration the unsecured creditor is more vulnerable. He may have little effective control over the outcome of the sequestration/liquidation proceedings. On the other hand the possible prescription of claims in the event of a sequestration/liquidation being recalled will presumably be regarded by the court as a relevant consideration in deciding whether or not to grant a petition for recall.

recalled. A problem might also arise where the claim has been lodged with a trustee appointed under a voluntary trust deed, and the trust lapses (for example on the death of the trustee) more than five years after the claim has been lodged.

The Third Option

6.62 Under the third option interruption by a "relevant claim" would have the effect of terminating the prescriptive period then in existence, and, when the period of interruption had ceased, of bringing about the commencement of a new prescriptive period if the obligation still subsisted at that time.

6.63 We envisage that this third option would operate in the following manner. As already indicated a "relevant claim" is established by a variety of procedures - by the making of a claim in court or arbitration proceedings; by the execution of diligence; by the presenting of, or concurring in, a petition for sequestration/liquidation; by the lodging of a claim with a trustee acting in sequestration proceedings or under a voluntary trust deed, or with a liquidator. Under this option the "relevant claim" will subsist for as long as the particular procedure is in operation so that a new prescriptive period would only commence on the termination of such procedure.

6.64 Accordingly where the "relevant claim" is evidenced by court or arbitration proceedings the starting point for the new prescriptive period, in respect of an obligation still outstanding, would be the date upon which the proceedings are determined by a final judgment in judicial proceedings, or by arbitration, or are abandoned, and additionally in the case of an arbitration where the arbiter is removed for misconduct[1] or when the

[1] Dundee Corporation v. Guthrie 1969 S.L.T. 93.

arbitration prescribes.[1] The presentation of a petition for sequestration or liquidation, or the lodgment of a claim in a sequestration, liquidation or under a voluntary trust deed, would in practice achieve permanent interruption of the prescriptive period unless the sequestration or liquidation is recalled or abandoned, the claim is rejected, or the trust lapses, when prescription would start to run once again against the creditor. Where diligence has been executed the period of prescription would be interrupted for as long as the diligence is in effect.

6.65 A further "relevant claim" might be made during a period of interruption. Such a situation could arise, for example, in circumstances similar to those described in British Railways Board v. Strathclyde Regional Council.[2] In that case, as indicated above,[3] the Board raised an action against the Council in Glasgow Sheriff Court; sisted that action; proceeded to raise a further action against the same defenders in the Court of Session; and subsequently abandoned the Sheriff Court action. The first "relevant claim" was made in the Sheriff Court action and under the Third Option would have had the effect of terminating the prescriptive period then in existence

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[1] The submission will often provide for a period of time within which the arbiter must give his decision. Where there is no reference to any time-limit in the deed of submission relating to the arbitration the arbitration prescribes under the twenty year prescriptive period. See Hill v. Dundee and Perth and Aberdeen Railway Junction Company (1852) 14 D. 1034 and section 17 of the Conveyancing (Scotland) Act 1924.

[2] 1982 S.L.T. (Reports) 55.

[3] See para.6.48 above.

and of delaying the start of a new prescriptive period until the Sheriff Court proceedings came to an end. The second "relevant claim" was made in the Court of Session action during this period of interruption. We would propose, in circumstances similar to those described above, that the period of interruption should not come to an end on the abandonment of the Sheriff Court action but only where the Court of Session proceedings are determined by a final judgment or are abandoned.[1]

The Fourth Option

6.66 The Fourth Option would operate in a manner similar to that described under the Third Option, but with this difference, that the period of interruption would merely suspend, but not bring to an end, the running of the prescriptive period. Accordingly if interruption took effect four years after the start of the prescriptive period, once the period of interruption had come to an end, the claimant would have only one year in which to enforce his claim. If, however, we consider the extreme case of interruption taking place just before the expiry of the prescriptive period, in practice the claimant will be obliged to obtain satisfaction of his claim during the period of interruption. This Option in these circumstances, would achieve a result similar to that arising under the Second Option where, for example, a court action lasts for longer than five years.

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[1] Another example of a "relevant claim" being made during a period of interruption is where a voluntary trust deed is superseded by the petition of a non-acceding creditor for sequestration of the debtor's estates.

6.67 The Fourth Option could create a problem for the unsecured creditor, similar to that identified in respect of the Second Option referred to above,[1] where his claim is lodged with a trustee appointed in sequestration proceedings or under a voluntary trust deed, or with a company's liquidator, just before the expiry of the prescriptive period, and the insolvency proceedings are subsequently abandoned or recalled or the trust lapses. Furthermore another problem could arise where interruption is effected at that late stage by the execution of diligence, and that diligence does not result in full satisfaction of the claim.[2]

6.68 On the other hand the Fourth Option, does offer an attractive solution to the problem of the potential claimant who has been dilatory in pursuing his claim, and, in order to avoid his right prescribing, hastily and inadequately prepares a case against the potential defender which is subsequently dismissed by the court on the grounds that the pleadings are irrelevant, and lacking in specification. In our view it would be inequitable in these circumstances if the dismissed court action could nevertheless secure for the pursuer, another five/twenty years calculated either from the date the action is instituted, as under the Second Option, or from the date of its dismissal, as under the Third Option.

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[1] See para. 6.61.

[2] On the basis that the execution of diligence in satisfaction of a claim proceeds upon an extract decree this problem would not arise if the proposal put forward in Section (6) below ("Enforcement of a decree") that the right to enforce a decree should be imprescribable, is adopted. For the purposes of this section, however, the proposal put forward in Section (6) below is disregarded.

The Fifth Option

6.69 The Consumer Protection Act 1987 offers a further option for consideration. In dealing with the prescription of an obligation to make reparation for damage caused by a defective product the 1987 Act adopts a different approach in working out the effects of the making of a "relevant claim"[1] within the ten year negative prescriptive period - the effect being to extend, in certain circumstances, rather than to interrupt, the running of that period.

6.70 Section 22A of the 1973 Act (incorporated by paragraph 10 of Schedule 1 to the 1987 Act) provides that, subject to the following exception, such an obligation shall be extinguished on the expiry of a period of 10 years from the relevant time as defined in section 4(2) of the 1987 Act. If, however, a "relevant claim" has been made during, but has not been disposed of finally by the end of, the ten year period, the obligation to which the claim relates will not be extinguished until final disposal of the claim is made.[2]

6.71 This option, if adopted in respect of the five and twenty year prescriptive periods would create a problem for the unsecured creditor, who has lodged his claim in insolvency proceedings, similar to that identified in respect of the Second and Fourth Options referred to above,[3] and for the diligence

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[1] The definition of "relevant claim" in the Consumer Protection Act 1987 is similar to that provided in section 9 of the 1973 Act (as amended) subject to the omission from the definition of any form of diligence directed to the enforcement of the obligation.

[2] For definition of final disposal of the claim see section 22A(3).

[3] See paras. 6.61 and 6.67.

holder who executes diligence shortly before the end of the prescriptive period and that diligence does not result in full satisfaction of the claim.[1] On the other hand it effectively penalises the dilatory claimant who brings to court near the end of the prescriptive period an inadequately prepared case which is subsequently dismissed.[2]

Conclusion

6.72 The problem is to select the option which will achieve the fairest balance between the interests of the pursuer, who seeks to enforce his claim, and who wishes to have a reasonable time in which to do so, and those of the defender who wishes to restrict his period of risk.

6.73 We have already suggested that adoption of the First Option is unacceptable. The Third Option provides the potential claimant with the longest period in which to satisfy his claim and, in the circumstances, may be thought, as a consequence, to extend unreasonably the defender's period of risk.

6.74 We can see some attractions in the Fifth Option, including the fact that its adoption would mean that the 1973 Act would not take two different statutory approaches to what is virtually the same problem.[3] However, in general the Fifth Option offers the potential claimant the shortest time in which to satisfy his claim and may be thought, therefore, to restrict unreasonably the period during which he may pursue his claim. As already indicated this option can give rise to problems for

[1] See para. 6.67.

[2] See para. 6.68.

[3] The approach adopted by the new section 22A of the 1973 Act in respect of the 10 year prescriptive period (relative to defective products) and the approach to be adopted in the 1973 Act in respect of the 5 and 20 year prescriptive periods.

the unsecured creditor and diligence holder,[1] and where a claimant raises an action just before the expiry of the twenty year period[2] against the wrong defender he may have no opportunity to rectify the position after his action is dismissed.[3] The effect of making a relevant claim under this option fits uneasily with the current procedure adopted of interrupting a prescriptive period by the giving of a "relevant acknowledgment" - a procedure which we consider below,[4] and which we suggest should remain unaltered.

6.75 This leaves for consideration the Second and Fourth Options both of which, on the one hand, offer a more realistic period for satisfaction of a claim, but which, on the other hand, could prejudice the creditor, in the limited circumstances described above, where the abandonment or recall of the sequestration/liquidation or the lapse of a voluntary trust deed brings to an end the running of the prescriptive period. In addition the Fourth Option attracts the further problems of the creditor whose diligence, executed shortly before the expiry of the prescriptive period, does not fully satisfy his claim.

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1 See para. 6.71.

2 We refer here only to the 20 year long negative prescription on the assumption that identity of the defender may form part of the discoverability formula which fixes the starting point of the 5 year negative prescription.

3 This situation could also arise under the Fourth Option if the action was raised at the very end of the 20 year prescriptive period. If, however, it was raised shortly before then the institution of proceedings under the Fourth Option would suspend the running of prescription until the action was dismissed and consquently such suspension might give the pursuer sufficient time to rectify the position by raising his action again against the correct defender.

4 See paras.6.81-6.85.

6.76 The Fourth Option, however, has one advantage over the Second Option in that it, rightly in our view, penalises the claimant who seeks to prevent the prescription of his claim by serving upon the defender at the eleventh hour an inadequately prepared writ, and whose subsequent court action is dismissed by the court on the ground that the pleadings are irrelevant or lacking in specification.

6.77 Delay in the institution of court proceedings, and inadequate pleadings, may be understandable in some reparation claims under current law, involving latent damage, where the starting point for the five year short negative prescription is fixed at the date damage, however minimal, becomes discoverable. If, however, our extended discoverability formula for fixing the start of this prescriptive period is adopted, future delays and inadequate pleadings in respect of such claims should not be justifiable.

6.78 Accordingly if some means could be found of protecting those creditors, referred to in paragraph 6.75 above, who may be prejudiced by the operation of the Fourth Option, our inclination would be to favour adoption of this Option in interpreting the effect of interruption of a prescriptive period by a "relevant claim".

6.79 We suggest that the following two refinements to the operation of the Fourth Option, may provide the necessary protection for such creditors.

(1) Where diligence, executed at any time during the last year (or some other agreed statutory period) of the prescriptive period, has not resulted in full satisfaction of the creditor's claim, the prescriptive period in respect of that claim will be automatically extended for a period of one year (or for some other agreed statutory period) as from the date the period of interruption comes to an end. This proposal would enable the creditor to carry out additional diligence as required, and to secure, where necessary, further yearly extensions of the prescriptive period.

(2) Similarly where a claim is lodged in a sequestration/liquidation or under a voluntary trust deed at any time during the last year, (or some other agreed statutory period), of the prescriptive period, and that sequestration/liquidation is subsequently recalled or abandoned or the trust lapses before the creditor receives any settlement of his claim, the prescriptive period in respect of that claim will be automatically extended for a period of one year (or for some other agreed statutory period) as from the date the period of interruption comes to an end, to enable the creditor to find other means, if practical, of enforcing his claim.

6.80 Consultees are invited to respond to the following provisional proposals.

Provisional proposals

18.(a) Subject to paragraph (b) below interruption of a prescriptive period by a "relevant claim" will have the effect of suspending the running of prescription during the period of interruption. (The "Fourth Option" referred to in para. 6.66 above.)

(b) Where a further "relevant claim" is made during the period of interruption referred to in (a) above, the running of prescription will be suspended for as long as the procedure involved in establishing any "relevant claim" is in operation.

(c) Where the "relevant claim" is evidenced by diligence, executed at any time during the last year of the prescriptive period, and that diligence does not result in full satisfaction of the creditor's claim, the prescriptive period in respect of that claim will be automatically extended for a period of one year as from the date the period of interruption comes to an end. (The first refinement to the Fourth Option referred to in para. 6.79(1) above.).

(d) Where a claim is lodged in a sequestration/ liquidation or under a voluntary trust deed at any time during the last year of the prescriptive period, and that sequestration/ liquidation is subsequently recalled or abandoned or the trust lapses before the creditor receives any settlement of his claim, the prescriptive period in respect of that claim will be automatically

extended for a period of one year as from the date the period of interruption comes to an end. (The second refinement to the Fourth Option referred to in para. 6.79(2) above.).

(iii) Interruption of prescription by a "relevant acknowledgment"

6.81 The effect of interruption of the prescriptive periods by "a relevant acknowledgment" does not appear to give rise to the same problems of interpretation as those considered in relation to interruption by a "relevant claim".

6.82 Where interruption is effected by an "unequivocal written admission" clearly acknowledging that the obligation still subsists,[1] it is thought that the prescriptive period then in existence comes to an end, and a new prescriptive period starts to run from the date the creditor or his agent is in receipt of the admission.

6.83 Where interruption is evidenced by an act of the debtor, or his agent, towards implement of an obligation which again clearly indicates that the obligation still subsists,[2] (for example by the payment of interest on a particular debt), or, where the nature of the obligation so requires, by the debtor refraining from doing something or by permitting or suffering something to be done or maintained,[3] (for example by observing the terms of a restrictive covenant which prohibits him from trading in a particular area), it is thought that the starting point for the new prescriptive period will be fixed at the time the act is performed, or the debtor no longer refrains from doing something, or ceases to permit or suffer something to be done or maintained.

[1] Section 10(1)(b) of the 1973 Act.

[2] Section 10(1)(a) of the 1973 Act.

[3] Section 10(1)(a) and (4) of the 1973 Act.

6.84 In our view the interruption of prescription in this manner by a "relevant acknowledgment" does not unfairly prejudice the debtor's position. On the one hand the debtor cannot plead that interruption has extended his period of risk in circumstances which are beyond his control, or that he is in danger of being faced with a stale claim. On the other hand, the "relevant acknowledgment" may have persuaded the claimant to delay enforcement of his claim, in anticipation, possibly erroneously, that the debtor intends voluntarily to fully discharge his obligation. Consequently, in these circumstances, an extension of the period in which the claimant is entitled to enforce his claim is not unjustifiable.

6.85 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

19. **Where the subsistence of an obligation has been relevantly acknowledged by the debtor or his agent, within the meaning of section 10 of the 1973 Act, the prescriptive period in existence at the time of acknowledgment should be terminated, and a new prescriptive period should commence to run.**

(iv) The effect of interruption on the function of the long negative prescription as a cut off provision in respect of claims prescribable under the short negative prescription

6.86 The second issue concerns the intended operation of the long negative prescription as a cut off provision which under section 7 of the 1973 Act extinguishes the defender's liability

twenty years after the obligation becomes enforceable (which for the purposes of section 7 is when the damage occurs or is deemed to have occurred).[1]

6.87 As we have mentioned earlier in this section, in some circumstances the long negative prescription will not operate in this manner where, for example, an obligation prescribable under section 6 of the 1973 Act has been kept alive for more than twenty years by the making of relevant claim(s) or relevant acknowledgement(s).[2] It is for consideration whether this is a desirable consequence of the statutory provisions.

6.88 The policy underlying the use of the long negative prescription as a cut off point is to protect the defender against a stale claim and to minimise uncertainty. As indicated above an obligation prescribable under section 6 can only be enforceable after twenty years if during that period the five year prescription has been interrupted on at least one, if not on several, occasions by a "relevant claim" or "relevant acknowledgment". In these circumstances it can be argued that the defender cannot plead the prejudice of being faced with a stale claim, in that he has either recognised the validity of such a claim by making a "relevant acknowledgment", or the making of a "relevant claim" has given him the opportunity during the twenty year period to

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[1] See section 11 of the 1973 Act.

[2] On the other hand where an obligation prescribable under section 6 of the 1973 Act only becomes discoverable 18 years, for example, after the damage has occurred, and no "relevant claim" or "relevant acknowledgment" is made within the subsequent two year period, the long negative prescription will operate as a cut off provision and extinguish the obligation.

investigate its merits. Furthermore the making of a "relevant claim" reduces the element of uncertainty for the defender. In these circumstances we do not think that the policy behind the use of the long negative prescription as a cut off point is defeated by allowing an obligation prescribable under the short negative prescription to continue to be enforceable after twenty years through interruption of that period by the making of relevant claim(s) or relevant acknowledgment(s).

6.89 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

20. Where an obligation prescribable under section 6 of the 1973 Act is still enforceable twenty years after the start of the long negative prescriptive period, by the making of "relevant claim(s)" or" relevant acknowledgment(s)" during that period, the long negative prescription should not act in these circumstances as a cut off provision extinguishing the obligant's liability.

(4) Prescription of obligations arising under probative and non-probative contracts

6.90 Paragraph 1 of Schedule 1 to the 1973 Act provides that any obligation arising from, or by reason of any breach of, a contract prescribes under the short negative prescription.[1] This provision is qualified, however, in paragraph 2 of the Schedule in that with the exceptions therein mentioned, obligations arising under a probative contract prescribe under the long negative prescription.[2]

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[1] Subparagraph (g).

[2] Subparagraph (c).

6.91 This distinction made between the prescription of obligations arising under probative and non-probative contracts is also found under the English law of limitation of actions, in that a statutory limitation period of six years applies to actions founded on simple contract, but where the action is upon a speciality - for example, arising out of a contract under seal - it may be brought within the longer period of twelve years.[1]

6.92 It has been brought to our attention that some difficulties have been experienced in identifying which obligations, arising under a probative contract, prescribe in twenty years. One view held is that, under a probative building contract, for example, it is only the primary obligation to build the property which prescribes under the long negative prescription, all other obligations arising from breach of contract consequential to the primary obligation prescribing under the short negative prescription. An alternative view is that obligations arising from any breach of the probative contract prescribe in twenty years. To add to this apparent confusion if the claimant elects to sue the builder in delict rather than in contract he has only five years from the date the obligation becomes enforceable to commence proceedings irrespective of whether the contract is probative or non-probative.

6.93 We understand that this distinction made between the prescription of obligations arising under probative and non-probative contracts indirectly provides a means of enabling

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[1] Section 8 of the Limitation Act 1980.

parties to contract out of the five year prescriptive period by ensuring that the obligation is created in a formal probative writing.[1]

6.94 It is for consideration whether the distinction made between probative and non-probative deeds for the purposes of prescription should be retained or removed, and if retained, whether the present statutory provision should be clarified so as to overcome the problems of interpretation explained above.

6.95 As we are already examining, and propose to put forward recommendations in respect of, this issue in our Report on the Constitution and Proof of Voluntary Obligations and the Authentication of Writings, which we hope to publish in the near future, we do not intend to put forward proposals for consideration in this current exercise.

(5) Contracting out

6.96 Section 13 of the 1973 Act prohibits parties from contracting out of the statutory prescriptions. Accordingly parties cannot enter into an agreement to extend the length of either period of prescription in respect of an obligation prescribable under sections 6 or 7 of the 1973 Act or to provide that a right prescribable under section 8, which has not been exercised or enforced for a period of twenty years, will not be extinguished on the expiry of the twenty year period.

6.97 On the other hand existing legislation does not prohibit parties from agreeing to a reduction in the period of

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[1] See paragraph 6.97 below for further reference to this point.

prescription - a practice with which we do not propose to interfere. Furthermore, as we indicated in paragraph 6.93 above the present distinction made between the prescription of obligations arising under probative and non probative contracts can be used indirectly to provide a device for contracting out of the five year prescriptive period. In our exercise on the Constitution and Proof of Voluntary Obligations and the Authentication of Writings, however, we are examining the whole question of probativity, and it is conceivable that, as a result of this examination, and should the ultimate proposals put forward in our Report be adopted by Parliament, this contracting out device may no longer be available.

6.98 The Law Society Report expressed the view that the parties should be entitled to agree to an extension of either prescriptive period.

> "It is to be remembered that some construction works such as churches or bridges have a design life of very much longer than either of these periods e.g. 100 years. Consequently, although it is less likely that defects will appear in them as time passes, they can continue to do so at any time outwith 20 years from completion. It may be unnecessarily restrictive in such cases not to permit parties to conclude a bargain for a period outwith either of the two prescriptive periods, laid down by the Act if they so desire."

6.99 In our view, if parties are to be entitled to contract out of a prescriptive period they should hold equal bargaining positions at the time such an arrangement is made so as to avoid the situation arising in which the more vulnerable party is obliged to agree that obligations undertaken by him to the other party will either not prescribe or will remain enforceable for a period longer than the statutory period of prescription.

The difficulty, however, is to be able to identify when parties can be safely regarded as being in an equal bargaining position. We would be interested to ascertain consultees views on this issue.

6.100 Consultees are invited to respond to the following question.

Question for consultees

21. Should parties be permitted to contract out of the statutory provisions by agreeing to extend the length of, or to dispense with, the prescriptive periods in respect of any particular obligation prescribable under sections 6 and 7 of the 1973 Act or in respect of a right prescribable under section 8 of that Act?

(6) Enforcement of a decree

6.101 In terms of section 7 and Schedule 1, paragraph 2(a) of the 1973 Act the right to enforce a decree of court (or the obligation to observe the terms of a decree) is extinguished under the long negative prescription on the expiry of the twenty year period without any interruption of that prescription by a "relevant claim" or "relevant acknowledgment".

6.102 There are various categories of decree of court which may require to be enforced by the pursuer - for example, a decree for payment; a decree for performance of an act or implement of an obligation; a decree of removing; or a decree interdicting the defender from pursuing a certain course of action.

6.103 There is also another form of decree which is not specifically granted by a court, and which is referred to by Professor W A Wilson in his textbook "The Law of Scotland Relating to Debt" as a "constructive decree".[1] Graham Stewart in his Treatise on "The Law of Diligence" describes such a decree as one which is "summarily obtained, in terms of a consent to that effect by the debtor actually or by force of statute embodied in the document of debt".[2]

6.104 Examples of a constructive decree include an extract of a probative document of debt,[3] which has been registered for execution in the Books of Council and Session, or in the Books of a Sheriff Court,[4] and an extract of a Protest of a Bill of Exchange or Promissory Note, which on dishonour of the Bill or Note, has been registered in either of those Books.[5]

6.105 It is doubtful whether the "decree of court", referred to in Schedule 1, paragraph 2(a) of the 1973 Act would also cover a constructive decree. Nevertheless the rights under a duly registered probative document of debt or a Bill or Note are still prescribable. Rights under the former prescribe in twenty years,[6] and under the latter in five years.[7]

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1 P.238.

2 P.368.

3 Carnoway and Ewing (1611) Mor. 14988.

4 Titles to Land Consolidation (Scotland) Act 1868 s.138.

5 Bills of Exchange Act 1681 (c.20), the Inland Bills Act 1696 (c.36), and 12 Geo. III, c.72, ss.42, 43.

6 Section 7 and Schedule 1, Para. 2(c) of the 1973 Act.

7 Section 6 and Schedule 1, Para. 1(e) of the 1973 Act.

6.106 It has been suggested to us that prescription can operate unfairly in the situation where a defender, against whom, for example, a decree for payment has been granted, disappears, possibly abroad, for the duration of the prescriptive period - so that the pursuer is unable to enforce his decree -, and is then traced at a time when the right to seek payment under that decree has been extinguished. It is also questionable whether a decree interdicting the defender from pursuing a certain course of conduct should become ineffective after twenty years.

6.107 These problems could be avoided if legislation provided that the right to enforce a decree should be categorised without qualification as an imprescribable right under Schedule 3 of the 1973 Act.

6.108 We offer this solution in respect of decrees for payment or for implement of a non-monetary obligation with a little hesitation however, as such a provision would extend the defender's period of potential liability indefinitely, and unfairly benefit the dilatory pursuer who has failed to pursue actively enforcement of his decree.

6.109 An alternative to the solution for such decrees referred to in paragraph 6.107 above might be to provide the pursuer with the right to apply to the court before the end of the prescriptive period for an extension of that period. We emphasise the need to submit the application before the right under the decree has prescribed so as to avoid the conceptual difficulties discussed in para. 4.83 above, in relation to a

court's judicial discretion to permit a claimant to raise an action outwith the prescriptive period. To be successful in such an application it would be necessary for the pursuer to establish that he has endeavoured, albeit unsuccessfully, to enforce his decree, throughout the prescriptive period, and that he reasonably anticipates that enforcement may become a practical possibility some time in the foreseeable future. It may be, for example, that the pursuer is aware that the defender stands to inherit a substantial sum from an elderly relative who is in ill-health and is not expected to recover.

6.110 We have not reached a concluded view on these proposals, although we envisage that the proposal to make the right to enforce a decree for payment or for implement of a non-monetary obligation imprescribable, could be regarded as a retrograde step at a time when the aim is to introduce into the law of prescription and limitation of actions greater certainty for the defender as to his period of risk. We would be interested, however, to ascertain consultees' views on the possible solutions outlined above.

6.111 Consultees are invited to respond to the following questions.

Questions for consultees

22. Should legislation provide

(a) that the right to enforce any decree of court or any constructive decree is an imprescribable right under Schedule 3 to the 1973 Act or

(b) that only the right to enforce some categories of decree should be imprescribable or

(c) that the right to enforce any decree of court or any constructive decree should prescribe under the long negative prescription?

If consultees favour option (b) please identify the categories of decree which should be regarded as imprescribable.

(d) If consultees consider that the right to enforce some decrees should be prescribable, should legislation provide that if a pursuer has endeavoured to enforce such a decree of court or a constructive decree, without success, during the prescriptive period, but reasonably anticipates that enforcement will become a practical possibility in the foreseeable future, but after his right to do so has prescribed, he shall be entitled to apply to the court before the right is extinguished for an appropriate extension of the period of prescription?

(7) Positive prescription - Public rights of way and positive servitudes constituted by actual possession for the prescriptive period

6.112 Section 25(2)(b) of the 1973 Act provided that Part I would come into operation on 25 July 1976 - three years after the date upon which the Act was passed. The Lord Justice-Clerk in Dunlop v. McGowans[1] remarked, within the context

[1] 1979 S.C. 22 at p.33.

of the new five year short negative prescription introduced by that Act, that - "If [Part I] of the Act had come into effect immediately on the passing of the Act, people who up to that point had 20 years in which to prosecute a claim under an obligation would have found themselves overnight covered only by a 5 year period, and if that latter period had already run the obligation would have been automatically extinguished. By postponing for 3 years the coming into operation of that part of the Act people who had rights in an existing obligation were given the opportunity of considering their position and taking such action as they thought fit before the Act started to bite".

6.113 The provisions of Part I were made retrospective to a limited extent by section 14(1)(a) which provides that "time occurring before the commencement of this Part of this Act shall be reckonable towards the prescriptive period[1] in like manner as time occurring thereafter, but subject to the restriction that any time reckoned under this paragraph shall be less than the prescriptive period".

6.114 Notwithstanding the above provisions it cannot have been intended, in our view, that a public right of way or positive servitude right constituted, (although not followed by a judicial declarator), prior to the coming into effect of the 1973 Act, by continuous possession for the prescriptive period then in operation, could subsequently be defeated by the provisions of that Act. However the decision reached in a recent (1985) sheriff court case (unreported) - the Scottish Rights of Way

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[1] "Prescriptive period" is defined by section 15(1) of the 1973 Act as a period required for the operation of sections 1, 2, 3, 6, 7 or 8 of that Act.

Society Ltd. v. Ritchie and the Earl of Morton - which concerned an action for declarator of the existence of a public right of way -, points in a different direction.

6.115 In order to establish a public right of way under the law in force prior to the 1973 Act it was necessary to prove that members of the public had continuously used a particular route from time immemorial or for a period of at least 40 years. There is some doubt as to whether this right is a statutory right arising from the Prescription Act 1617 c.12, or derives from the common law. The 1617 Act, which provides a prescriptive period of 40 years for establishing rights in land, makes no reference to rights of way, but after that Act came into effect the courts judicially construed immemorial possession as a period of 40 years duration.[1]

6.116 Schedule 5 of the 1973 Act repealed the 1617 Act, and in accordance with section 3(3) a public right of way can now be established by positive prescription by continuous possession or use for a period of twenty years.

6.117 In the sheriff court case referred to above the pursuers indicated in their pleadings that they proposed to establish a public right of way by leading evidence at the proof that from time immemorial, or at least for a continuous period of forty years prior to 1960, a particular track had been used by members of the public.

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[1] Davidson and Others v. Earl of Fife and Others (1863) 1 M. 874.

6.118 The defenders submitted a plea to the relevancy of the pursuer's pleadings and put forward the following arguments in support of this plea:

(1) As the 1617 Act had been repealed by the 1973 Act any judicial declaration of a public right of way given after 25 July 1976 (the date upon which the 1973 Act came into operation) could only be founded on the provisions of section 3(3) of that Act.

(2) In the computation of the requisite prescriptive period of twenty years under section 3(3), only a period of less than twenty years, occurring before 26 July 1976, could be taken into account in accordance with the provisions of section 14(1)(a) of the 1973 Act.

(3) Consequently in establishing a public right of way the pursuers could only lead evidence of the continuous use of the particular track in question from 26 July 1956 at the earliest, their pleadings based on use prior to that date being irrelevant.

6.119 The pursuers endeavoured to counter the defenders' arguments by submitting that there was nothing in the 1973 Act which could take away from the pre-existing rights of the public, and that if they were able to establish that, prior to the operation of that Act, there had existed a public right of way by use of the requisite character by the public over a forty year period, (which right had not prescribed under the long negative prescription through subsequent lack of use), then

this should be sufficient to enable the court to grant the declarator craved.

6.120 The sheriff accepted the defenders' arguments, taking the view that as the 1617 Act had been repealed only the 1973 Act was relevant in establishing this right of way. In those circumstances he held that the pursuers' averments of public use of the track prior to mid 1956 were of doubtful relevance except possibly to establish the state of mind of the users of the path in 1956 or thereafter.

6.121 A proof before answer was granted subject to the pursuers' evidence of use being restricted to the relevant twenty year period elapsing after 1956 with the qualification referred to above.

6.122 As we have already indicated, it cannot have been intended that the 1973 Act should defeat a pre-existing public right of way. Nevertheless the Sheriff's interpretation of the effect of these statutory provisions could conceivably produce this result in relation to some public rights of way and positive servitudes established by use for the prescriptive period in operation prior to the 1973 Act.[1]

6.123 We consider that this difficulty could be overcome if a savings provision is incorporated in the 1973 Act which will safeguard pre-existing public rights of way and positive servitudes constituted by possession or use for the forty year

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[1] Prior to 1973 Act continuous use of a servitude right for a period of 40 years was required. In terms of section 3(2) the 40 year period was reduced to 20 years.

prescriptive period prevailing prior to the coming into operation of the 1973 Act.[1]

6.124 Consultees are invited to respond to the following provisional proposal.

Provisional proposal

23. A provision for the avoidance of doubt should be incorporated in the 1973 Act by which pre-existing public rights of way and positive servitudes, constituted by continuous possession or use for the prescriptive period prevailing prior to the coming into operation of that Act, will be safeguarded.

(8) Constructive knowledge in personal injury claims

6.125 Section 17(2)(b) of the 1973 Act provides that an action in respect of personal injuries must be raised within a period of three years after "the date ... on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him [our emphasis] in all the circumstances to become, aware ..." of the relevant facts.

6.126 Accordingly in imputing knowledge to the pursuer of the relevant facts in a personal injury claim so as to fix the start of the limitation period, current legislation adopts a subjective approach taking account of the circumstances of the particular claimant, and applies the test of reasonableness within these circumstances.

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[1] This presupposes that the public right of way or positive servitude so established has not been subsequently extinguished under the long negative prescriptive period.

6.127 Subsection (3) of section 17 enacts that anytime during which the pursuer is under a legal disability (by reason of nonage or unsoundness of mind) is to be disregarded in calculating the three year limitation period.

6.128 We have already considered in this memorandum[1] the effect of legal disability on the operation of the five year prescriptive and the three year limitation periods, and one of the possible options which we put forward in this respect for the views of consultees[2] is that legal disability should not suspend the running of either period ("the First Option"). We justify this approach on the basis that in the majority of cases there is someone responsible in law to protect and represent the interests of a person who is under a legal disability.[3] We also point out, within the context of a claim prescribable under the five year prescriptive period, that the legally disabled who has no one to represent his interests will be protected nevertheless under our provisional proposals 5(b) and (c) in that in imputing knowledge of the relevant facts to such a claimant his lack of representation will be a relevant consideration.

6.129 If we were to recommend the adoption of the First Option in respect of personal injury claims the repeal of section 17(3) might not, in itself, be sufficient to achieve this objective. It would also be necessary to consider whether any consequential amendments would be required to section 17(2)(b). As we have already indicated, in imputing knowledge of the relevant facts under this last subsection, the pursuer's personal

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[1] In Part VI, Section (1), paras. 6.1-6.20.

[2] First Option - para. 6.20.

[3] Paras. 6.14 and 6.16.

circumstances will be taken into account, and arguably a claimant's legal disability would be regarded as a relevant factor. It seems to us, however, that, if we decide to recommend that legal disability should not suspend the running of the limitation period, it would be inconsistent with this recommendation to take this disability into account in imputing knowledge to the pursuer, unless in the limited circumstances where the pursuer has no one to represent his interests.

6.130 Accordingly to overcome this inconsistency we would propose that if the principle is adopted that legal disability should not suspend the running of the limitation period our provisional proposals 5(b) and 5(c) should be extended so as to apply to personal injury claims, and section 17 amended on this basis.

6.131 Consultees are accordingly invited to respond to the following provisional proposals.

Provisional proposals

24. On the basis that the legal disability of a potential claimant will not, under any circumstances, suspend the running of the period of limitation:

(a) Subject to paragraph (b) below in imputing knowledge to the claimant of the relevant facts the test to be applied should be what it would have been reasonable for the claimant to have discovered taking into account his or her particular characteristics and circumstances.

(b) Where the claimant is under a legal disability and has a tutor, curator or curator bonis, as the case may be, to protect his interests, any knowledge of the relevant facts which it would be reasonable for the tutor, curator or curator bonis to have acquired, taking into account his or her particular characteristics and circumstances, will be imputed to the claimant, unless the claim is directed against that tutor, curator or curator bonis.

PART VII - SUMMARY OF PROVISIONAL PROPOSALS, ALTERNATIVE OPTIONS AND QUESTIONS FOR CONSULTEES

Note. Attention is drawn to the notice at the front of the memorandum concerning confidentiality of comments. If no request for confidentiality is made, we shall assume that comments submitted in response to this memorandum may be referred to or attributed in our subsequent report.

PART IV: Identification of possible problems arising from the statutory provisions relating to the five year short negative prescription in its application to claims involving latent damage other than personal injuries

The discoverability formula for fixing the starting point for the short negative prescriptive period

Knowledge of damage

Provisional proposal

1.(a) The discoverability formula should provide that the damage within the pursuer's actual or constructive knowledge must be sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action is brought does not dispute liability and is able to satisfy a decree.

Alternative Option

(b) If consultees do not favour the formula put forward in this provisional proposal for defining the degree of damage which requires to be within the pursuer's knowledge before time starts to run against him, their views on an alternative formula are invited.

(Para. 4.14).

Knowledge of the cause of the damage

Provisional proposal

2. Knowledge of the cause of the loss injury or damage sustained as a consequence of the act, neglect or default should be included in the discoverability formula.

(Para. 4.18).

Knowledge of the identity of a person liable for the damage sustained

Provisional proposals

3.(a) Knowledge of the identity of a person liable for the damage sustained should be included in the discoverability formula.

(Para. 4.23).

(b) Where the potential claimant has discovered material damage and its cause, prescription will start to run in favour of each person liable at the time his or her identity becomes known to the potential claimant.

Question for consultees

(c) Should provisional proposal 3(b) be subject to the exception that where the potential claimant identifies a person liable for damage sustained ('the first person') and subsequently discovers that another is vicariously liable for the first person's wrongful actions ('the second person'), prescription will start to run in favour of the first and second persons at the time the second

person is identified?
(Para. 4.26).

Knowledge of fault or liability

Provisional proposal

4. For the avoidance of doubt, the discoverability formula provided in section 11 of the 1973 Act should incorporate a proviso to the effect that knowledge that any act, neglect or default (or act or omission if one prefers to avoid any suggestion of legal fault or liability) is or is not, as a matter of law, actionable, is irrelevant.

(Para. 4.36).

Actual and constructive knowledge of the relevant facts

Provisional proposals

5.(a) The discoverability formula should not define knowledge only in terms of what the claimant actually knows.

(Para. 4.41).

(b) Subject to paragraph (c) below, in imputing knowledge to the claimant of the relevant facts the test to be applied should be what it would have been reasonable for the claimant to have discovered taking into account his or her particular characteristics and circumstances.

(c) Where the claimant is under a legal disability and has a tutor, curator, or curator bonis as the case may be, to protect his interests, any knowledge of the relevant

facts which it would be reasonable for the tutor, curator or curator bonis to have acquired, taking into account his or her particular characteristics and circumstances, will be imputed to the claimant unless the claim is directed against that tutor, curator, or curator bonis.

(Para. 4.46).

(d) No specific reference to seeking the advice of experts should be made in that part of the discoverability formula which concerns constructive knowledge, reliance being placed upon the courts to decide in particular cases what knowledge can be reasonably imputed to the claimant.

(Para. 4.55).

Discoverability of a defect

Questions for consultees

6.(a) Should any attempt be made to adjust the operation of the current rules of prescription to clarify the start of the prescriptive period in respect of a claim arising in circumstances similar to the following:-

> A builder is commissioned to construct a dwellinghouse for a customer but owing to his negligence the foundations of the house are defective. As a result of this defect serious physical damage occurs to the structure of the building some years later. After taking entry to the property, on completion, the owner discovers that the foundations are faulty, notwithstanding that no physical damage has occurred at that time.

(b) If consultees answer question 6(a) in the affirmative should a rule be adopted along the following lines:-

> For the avoidance of doubt where actionable damage, including economic loss, is sustained through the breach of a duty, the prescriptive period in relation to an obligation to make reparation in respect of that and all consequential damage caused by that breach of duty, other than personal injuries, should commence from the date that damage was discoverable (i.e. from the date when the pursuer first had actual or constructive knowledge of material damage, its cause, and the identity of the person liable).

or, alternatively, if consultees do not favour such a rule what provision should be recommended to clarify the start of the prescriptive period?

(Para.4.75)

Duration of short negative prescriptive period

Provisional proposal

7. If the discoverability formula for fixing the starting point of the short negative prescriptive period in respect of claims involving latent damage (other than personal injuries) is extended to cover actual or constructive knowledge of material damage, the cause of that damage, and the identity of the person liable, the short negative prescriptive period applicable to such claims should be retained at five years.

(Para. 4.81).

Judicial discretion to extend the prescriptive period

Provisional proposal

8. A judicial discretion should not be conferred upon the courts to permit a potential claimant to raise his

action outwith the short negative prescriptive period. (Para. 4.88).

Successors in title to damaged property

Provisional proposals

9.(a) In a situation involving successors in title to damaged property the starting point for the five year prescriptive period in respect of any claims for loss arising from the damaged property will be fixed for all potential claimants, (none of whom are subject to a legal disability), at the time the relevant facts relating to the damage become discoverable.

(b) For the avoidance of doubt section 11(3) of the 1973 Act should be clarified to reflect the above provisional proposal.

(Para. 4.100).

Extension of the prescriptive period through fraud or error induced by the defender

Provisional proposals

10.(a) For the avoidance of doubt section 6(4) of the 1973 Act should be amended to provide more specifically that in imputing knowledge to the creditor of the debtor's fraud or the error induced by the debtor, which persuades the creditor from making a relevant claim against him, the test to be applied, subject to the exception referred to in (b) below, should be what it would have been reasonable for the creditor to have known taking into account his or her particular characteristics and circumstances.

(b) Where the creditor is under a legal disability and has a tutor, curator or curator bonis, as the case may be, who is not the debtor against whom the creditor has a claim, any knowledge of the debtor's fraud, or error induced by the debtor, which it would be reasonable for the tutor, curator or curator bonis to have acquired, taking into account his or her particular characteristics and circumstances, will be imputed to the creditor.

(Para. 4.105).

PART V: Consideration of Statutory provisions relating to the long negative prescription within the context of latent damage (not involving personal injury)

Do we need a long negative prescription?

Provisional proposal

11. The long negative prescription should be retained in respect of claims involving latent damage (other than personal injury claims).

(Para. 5.7).

Judicial Discretion

Provisional proposal

12. A judicial discretion should not be conferred upon the courts to permit a potential claimant to raise his action outwith the long negative prescriptive period.

(Para. 5.10).

Length of long negative prescription

Provisional proposal

13. The period of the long negative prescription should be retained at twenty years.

(Para. 5.18).

The starting point of the long negative prescription

Provisional proposals

14.(a) There should be only one starting point for the long negative prescription in its application to claims involving latent damage (other than personal injury).

(b) The starting point referred to in (a) above should be fixed at the date upon which the act, neglect or default (the legal wrong) which gives rise to the subsequent loss, injury or damage (damage), takes place.

(c) For the avoidance of doubt the decision reached in the Midland Bank case should be given legislative effect in Scotland so that where the legal wrong consists of a failure to carry out a particular act the starting point will not be fixed until the required act is no longer capable of performance.

(d) For the sake of consistency and to avoid confusion the starting point defined in (b) above should be adopted in the application of the long negative prescription to other claims for reparation not involving latent damage.

Alternative options in fixing the starting point of the long negative prescription

(e) If consultees do not accept provisional proposal 14(a) should one starting point operate for all claims involving latent damage to property, and a different starting point for other latent damage claims (other than personal injury)?

(f) If consultees favour making a distinction between claims involving latent damage to property and other latent damage claims, which of the undernoted dates should be selected for the starting point of the prescriptive period:

(i) in respect of claims involving latent damage to property;

(ii) in respect of other latent damage claims;

the date when damage occurs; or

the date when material damage occurs; or

the date of occurrence of the act, neglect or default; or

the date of completion.

(g) If consultees accept provisional proposal 14(a) but do not accept provisional proposal 14(b):

(i) which of the following dates should be selected for the starting point?

the date when damage occurs; or

the date when material damage occurs; or

the date of completion.

(ii) should whichever date is selected be adopted in the application of the long negative prescription to other claims for reparation not involving latent damage?

(Para. 5.35).

Extension of the prescriptive period through fraud, error and legal disability

Provisional proposal

15. Subject to retaining a long negative prescription of twenty years' duration there should be no alteration in the present law, which does not recognise the extension of the long negative prescription on the grounds of fraud, error or legal disability.

(Para. 5.37).

PART VI: Miscellaneous Issues

The effect of the potential claimant's legal disability on the operation of the prescriptive/limitation periods

Questions for consultees

16. In deciding what effect the potential claimant's legal disability should have upon the running of the prescriptive/limitation period which of the two following options should be selected?

> **First Option** - The legal disability of the potential claimant will not, under any circumstances, suspend the running of the prescriptive/limitation period.
>
> **Second Option** - The legal disability of the potential claimant will, in all circumstances, suspend the running of the prescriptive/limitation period.

(Para. 6.20).

Provisional damages

Questions for consultees

17.(a) If the discoverability formula for fixing the starting point of the short negative prescriptive period is extended to cover actual or constructive knowledge of material damage, the cause of that damage, and the identity of the person liable, do consultees consider that the adoption of a provisional damages scheme, for claims not involving personal injury, is required?

(b) If consultees favour the adoption of a provisional damages scheme we shall be grateful if they will provide in their answer to this question practical

examples to illustrate the kind of damage (e.g. physical damage to property; pecuniary loss arising from professional negligence) which would not be easily quantifiable even with an extended discoverability formula.

(Para. 6.34).

(c) If a provisional damages scheme is adopted should legislation provide:

(i) that the second claim should be lodged within a fixed period; or

(ii) that the second claim should be lodged within a fixed period subject to the court's discretion to select a shorter period; or

(iii) that the court is given discretion to stipulate for a fixed period in any particular case; or

(iv) that the pursuer should not be obliged to lodge his second claim within a fixed period?

(Para. 6.38).

(d) We would be interested to ascertain consultees views on whether any provisional damages scheme should be extended to the defender (whether an incorporated company, a partnership, an unincorporated association or an individual) who is not insured, or otherwise indemnified.

(Para. 6.41).

(e) If consultees favour the adoption of a provisional damages scheme for claims not involving personal injury which varies from that applicable to personal injury claims under section 12 of the 1982 Act, do they consider that the variation(s) proposed should also apply to the provisional damages scheme for personal injury? (Para. 6.41).

Interruption of the five year short negative prescription and the twenty year long negative prescription by:

1. "relevant claim"

Provisional proposals

18.(a) Subject to paragraph (b) below interruption of a prescriptive period by a "relevant claim" will have the effect of suspending the running of prescription during the period of interruption. (The "Fourth Option" referred to in para. 6.66 above).

(b) Where a further "relevant claim" is made during the period of interruption referred to in (a) above, the running of prescription will be suspended for as long as the procedure involved in establishing any "relevant claim" is in operation.

(c) Where the "relevant claim" is evidenced by diligence, executed at any time during the last year of the prescriptive period, and that diligence does not result in full satisfaction of the creditor's claim, the prescriptive period in respect of that claim will be automatically extended for a period of one year as from the date the period of interruption comes to an end. (The first

refinement to the Fourth Option referred to in para. 6.79(1) above.)

(d) Where a claim is lodged in a sequestration/ liquidation or under a voluntary trust deed at any time during the last year of the prescriptive period, and that sequestration/ liquidation is subsequently recalled or abandoned or the trust lapses before the creditor receives any settlement of his claim, the prescriptive period in respect of that claim will be automatically extended for a period of one year as from the date the period of interruption comes to an end. (The second refinement to the Fourth Option referred to in para. 6.79(2) above.)

(Para. 6.80).

2. **"Relevant acknowledgment"**

Provisional proposal

19. Where the subsistence of an obligation has been relevantly acknowledged by the debtor or his agent, within the meaning of section 10 of the 1973 Act, the prescriptive period in existence at the time of acknowledgment should be terminated, and a new prescriptive period should commence to run.

(Para. 6.85).

The effect of interruption on the function of the long negative prescription as a cut off provision in respect of claims prescribable under the short negative prescription

Provisional proposal

20. Where an obligation prescribable under section 6 of the 1973 Act is still enforceable twenty years after the start of the long negative prescriptive period, by the making of "relevant claim(s)" or" relevant acknowledgment(s)" during that period, the long negative prescription should not act in these circumstances as a cut off provision extinguishing the obligant's liability.

(Para. 6.89).

Contracting out

Question for consultees

21. Should parties be permitted to contract out of the statutory provisions by agreeing to extend the length of or to dispense with, the prescriptive periods in respect of any particular obligation prescribable under sections 6 and 7 of the 1973 Act or in respect of a right prescribable under section 8 of that Act?

(Para. 6.100).

Enforcement of a decree

Questions for consultees

22. Should legislation provide

(a) that the right to enforce any decree of court or any constructive decree is an imprescribable right under Schedule 3 to the 1973 Act. or

(b) that only the right to enforce some categories of decree should be imprescribable, or

(c) that the right to enforce any decree of court or any constructive decree should prescribe under the long negative prescription?

If consultees favour option (b) please identify the categories of decree which should be regarded as imprescribable.

(d) If consultees consider that the right to enforce some decrees should be prescribable, should legislation provide that if a pursuer has endeavoured to enforce such a decree of court or a constructive decree, without success, during the prescriptive period, but reasonably anticipates that enforcement will become a practical possibility in the foreseeable future, but after his right to do so has prescribed, he shall be entitled to apply to the court before the right is extinguished for an appropriate extension of the period of prescription?

(Para. 6.111).

Positive prescription - Public rights of way and positive servitudes constituted by actual possession for the prescriptive period

Provisional proposal

23. A provision for the avoidance of doubt should be incorporated in the 1973 Act by which pre-existing public rights of way and positive servitudes, constituted by continuous possession or use for the prescriptive period prevailing prior to the coming into operation of that Act, will be safeguarded.

(Para. 6.124).

Constructive knowledge in personal injury claims

Provisional proposals

24. On the basis that the legal disability of a potential claimant will not, under any circumstances, suspend the running of the period of limitation:

(a) Subject to paragraph (b) below in imputing knowledge to the claimant of the relevant facts the test to be applied should be what it would have been reasonable for the claimant to have discovered taking into account his or her particular characteristics and circumstances.

(b) Where the claimant is under a legal disability and has a tutor, curator or curator bonis, as the case may be, to protect his interests, any knowledge of the relevant facts which it would be reasonable for the tutor, curator or curator

bonis to have acquired, taking into account his or her particular characteristics and circumstances, will be imputed to the claimant, unless the claim is directed against that tutor, curator or curator bonis.

(Para. 6.131).

APPENDIX

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Prescription and Limitation (Scotland) Act 1973

(1973 c. 52)

An Act to replace the Prescription Acts of 1469, 1474 and 1617 and make new provision in the law of Scotland with respect to the establishment and definition by positive prescription of title to interests in land and of positive servitudes and public rights of way, and with respect to the extinction of rights and obligations by negative prescription; to repeal certain enactments relating to limitation of proof; to re-enact with modifications certain enactments relating to the time-limits for bringing legal proceedings where damages are claimed which consist of or include damages or solatium in respect of personal injuries or in respect of a person's death and the time-limit for claiming contribution between wrongdoers; and for purposes connected with the matters aforesaid. [25th July 1973]

PART I

PRESCRIPTION

Positive prescription

Interests in land: general

1.—(1) If in the case of an interest in particular land, being an interest to which this section applies,—

(*a*) the interest has been possessed by any person, or by any person and his successors, for a continuous period of ten years openly, peaceably and without any judicial interruption, and

(*b*) the possession was founded on, and followed (i) the recording of a deed which is sufficient in respect of its terms to constitute in favour of that person a title to that interest in the particular land, or in land of a description habile to include the particular land, or (ii) registration of that interest in favour of that person in the Land Register of Scotland, subject to an exclusion of indemnity under section 12 (2) of the Land Registration (Scotland) Act 1979,

then, as from the expiration of the said period, the validity of the title so far as relating to the said interest in the particular land shall be exempt from challenge.

(1A) Subsection (1) above shall not apply where—

(*a*) possession was founded on the recording of a deed which is invalid *ex facie* or was forged; or

(*b*) possession was founded on registration in respect of an interest in land in the Land Register of Scotland proceeding on a forged deed and the person appearing from the Register to be entitled to the interest was aware of the forgery at the time of registration in his favour.

(2) This section applies to any interest in land the title to which can competently be recorded or which is registrable in the Land Register of Scotland.

(3) In the computation of a prescriptive period for the purposes of this section in a case where the deed in question is a decree of adjudication for debt, any period before the expiry of the legal shall be disregarded.

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1 The 1973 Act has been recently amended by the Consumer Protection Act 1987. These amendments are not reflected in this reproduction.

(4) Where in any question involving an interest in any foreshore or in any salmon fishings this section is pled against the Crown as owner of the regalia, subsection (1) above shall have effect as if for the words " ten years " there were substituted the words " twenty years."

(5) This section is without prejudice to the operation of section 2 of this Act.

NOTE

[1] As amended by the Land Registration (Scotland) Act 1979, s. 10.

Interests in land: special cases

[1] **2.**—(1) If in the case of an interest in particular land, being an interest to which this section applies,—

(*a*) the interest has been possessed by any person, or by any person and his successors, for a continuous period of twenty years openly, peaceably and without any judicial interruption, and

(*b*) the possession was founded on, and followed the execution of, a deed (whether recorded or not) which is sufficient in respect of its terms to constitute in favour of that person a title to that interest in the particular land, or in land of a description habile to include the particular land,

then, as from the expiration of the said period, the validity of the title so far as relating to the said interest in the particular land shall be exempt from challenge except on the ground that the deed is invalid *ex facie* or was forged.

(2) This section applies—

(*a*) to the interest in land of the lessee under a lease;

(*b*) to any interest in allodial land;

(*c*) to any other interest in land the title to which is of a kind which, under the law in force immediately before the commencement of this Part of this Act, was sufficient to form a foundation for positive prescription without the deed constituting the title having been recorded.

(3) This section is without prejudice to the operation of section 1 of this Act.

NOTE

[1] See the Registration of Leases (Scotland) Act 1857, s. 16 (2), and the Land Tenure Reform (Scotland) Act 1974, s. 18 and Sched. 6, para. 3.

Positive servitudes and public rights of way

3.—(1) If in the case of a positive servitude over land—

(*a*) the servitude has been possessed for a continuous period of twenty years openly, peaceably and without any judicial interruption, and

(*b*) the possession was founded on, and followed the execution of, a deed which is sufficient in respect of its terms (whether expressly or by implication) to constitute the servitude,

then, as from the expiration of the said period, the validity of the servitude as so constituted, shall be exempt from challenge except on the ground that the deed is invalid *ex facie* or was forged.

(2) If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge.

(3) If a public right of way over land has been possessed by the public for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the right of way as so possessed shall be exempt from challenge.

(4) References in subsections (1) and (2) of this section to possession of a servitude are references to possession of the servitude by any person in possession of the relative dominant tenement.

(5) This section is without prejudice to the operation of section 7 of this Act.

Judicial interruption of periods of possession for purposes of sections 1, 2 and 3

4.—(1) In sections 1, 2 and 3 of this Act references to a judicial interruption, in relation to possession, are references to the making in appropriate proceedings, by any person having a proper interest to do so, of a claim which challenges the possession in question.

(2) In this section "appropriate proceedings" means—

(*a*) any proceedings in a court of competent jurisdiction in Scotland or elsewhere, except proceedings in the Court of Session initiated by a summons which is not subsequently called;

(*b*) any arbitration in Scotland;

(*c*) any arbitration in a country other than Scotland, being an arbitration an award in which would be enforceable in Scotland.

(3) The date of a judicial interruption shall be taken to be—

(*a*) where the claim has been made in an arbitration and the nature of the claim has been stated in a preliminary notice relating to that arbitration, the date when the preliminary notice was served;

(*b*) in any other case, the date when the claim was made.

(4) In the foregoing subsection "preliminary notice" in relation to an arbitration means a notice served by one party to the arbitration on the other party or parties requiring him or them to appoint an arbiter or to agree to the appointment of an arbiter, or, where the arbitration agreement or any relevant enactment provides that the reference shall be to a person therein named or designated, a notice requiring him or them to submit the dispute to the person so named or designated.

Further provisions supplementary to sections 1, 2 and 3

5.—(1) In sections 1, 2 and 3 of this Act "deed" includes a judicial decree; and for the purposes of the said sections any of the following, namely an instrument of sasine, a notarial instrument and a notice of title, which narrates or declares that a person has a title to an interest in land shall be treated as a deed sufficient to constitute that title in favour of that person.

(2) Where a deed has been at any time *ex facie* invalid by reason of an informality of execution within the meaning of section 39 of the Conveyancing (Scotland) Act 1874, but the appropriate court has subsequently declared, in pursuance of that section, that it was subscribed by the grantor or maker and the witnesses, the deed shall be deemed for the purposes of the said sections 1. 2 and 3 not to be, and not at any time to have been, *ex facie* invalid by reason of any such informality of execution.

Extinction of obligations by prescriptive periods of five years

6.—(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—

(*a*) without any relevant claim having been made in relation to the obligation, and

(*b*) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished:

Provided that in its application to an obligation under a bill of exchange or a promissory note this subsection shall have effect as if paragraph (*b*) thereof were omitted.

(2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.

(3) In subsection (1) above the reference to the appropriate date, in relation to an obligation of any kind specified in Schedule 2 to this Act is a reference to the date specified in that Schedule in relation to obligations of that kind, and in relation to an obligation of any other kind is a reference to the date when the obligation became enforceable.

[1] (4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—

(*a*) any period during which by reason of—

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor was induced to refrain from making a relevant claim in relation to the obligation, and

(*b*) any period during which the original creditor (while he is the creditor) was under legal disability,

shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (*a*) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.

(5) Any period such as is mentioned in paragraph (*a*) or (*b*) of subsection (4) of this section shall not be regarded as separating the time immediately before it from the time immediately after it.

NOTE

[1] Applied by the Merchant Shipping (Liner Conferences) Act 1982, s. 8(3).

Extinction of obligations by prescriptive periods of twenty years

7.—(1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years—

(*a*) without any relevant claim having been made in relation to the obligation, and

(*b*) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished:

Provided that in its application to an obligation under a bill of exchange or a promissory note this subsection shall have effect as if paragraph (*b*) thereof were omitted.

[1] (2) This section applies to an obligation of any kind (including an obligation to which section 6 of this Act applies), not being an obligation specified in Schedule 3 to this Act as an imprescriptible obligation or an obligation to make reparation in respect of personal injuries within the meaning of Part II of this Act or in respect of the death of any person as a result of such injuries.

NOTE

[1] As amended by the Prescription and Limitation (Scotland) Act 1984. Sched. 1, para. 2, as regards any obligation not extinguished before 26th September 1984: *ibid.* s. 5(3).

Extinction of other rights relating to property by prescriptive periods of twenty years

8.—(1) If, after the date when any right to which this section applies has become exercisable or enforceable, the right has subsisted for a continuous period of twenty years unexercised or unenforced, and without any relevant claim in relation to it having been made, then as from the expiration of that period the right shall be extinguished.

(2) This section applies to any right relating to property, whether heritable or moveable, not being a right specified in Schedule 3 to this Act as an imprescriptible right or falling within section 6 or 7 of this Act as being a right correlative to an obligation to which either of those sections applies.

Extinction of obligations to make contributions between wrongdoers

[1] **8A.**—(1) If any obligation to make a contribution by virtue of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 in respect of any damages or expenses has subsisted for a continuous period of two years after the date on which the right to recover the contribution became enforceable by the creditor in the obligation—

(*a*) without any relevant claim having been made in relation to the obligation; and

(*b*) without the subsistence of the obligation having been relevantly acknowledged;

then as from the expiration of that period the obligation shall be extinguished.

(2) Subsections (4) and (5) of section 6 of this Act shall apply for the purposes of this section as they apply for the purposes of that section.

NOTE

[1] Inserted by the Prescription and Limitation (Scotland) Act 1984, s. 1.

Definition of "relevant claim" for purposes of sections 6, 7 and 8

[1] **9.**—[2] (1) In sections 6, 7 and 8A of this Act the expression "relevant claim," in relation to an obligation, means a claim made by or on behalf of the creditor for implement or part-implement of the obligation, being a claim made—

(*a*) in appropriate proceedings; or

(*b*) by the presentation of, or the concurring in, a petition for sequestration or by the submission of a claim under section 22 or 48 of the Bankruptcy (Scotland) Act 1985 (or those sections as applied by section 613 of the Companies Act 1985); or

(*c*) by a creditor to the trustee acting under a trust deed as defined in section 5(2)(*c*) of the Bankruptcy (Scotland) Act 1985;

and for the purposes of the said sections 6, 7 and 8A the execution by or on behalf of the creditor in an obligation of any form of diligence directed to the inforcement of the obligation shall be deemed to be a relevant claim in relation to the obligation.

(2) In section 8 of this Act the expression "relevant claim," in relation to a right, means a claim made in appropriate proceedings by or on behalf of the creditor to establish the right or to contest any claim to a right inconsistent therewith.

(3) Where a claim which, in accordance with the foregoing provisions of this section, is a relevant claim for the purposes of section 6, 7, 8 or 8A of this Act is made in an arbitration, and the nature of the claim has been stated in a preliminary notice relating to that arbitration, the date when the notice was served shall be taken for those purposes to be the date of the making of the claim.

(4) In this section the expression "appropriate proceedings" and, in relation to an arbitration, the expression "preliminary notice" have the same meanings as in section 4 of this Act.

NOTES

[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 1, para. 3.

[2] As amended by the Bankruptcy (Scotland) Act 1985, Sched. 7, para. 11, with effect from 1st April 1986.

Relevant acknowledgment for purposes of sections 6, 7 and 8A

[1] **10.**—(1) The subsistence of an obligation shall be regarded for the purposes of sections 6, 7 and 8A of this Act as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely—

(*a*) that there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists;

(*b*) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists.

(2) Subject to subsection (3) below, where two or more persons are bound jointly by an obligation so that each is liable for the whole, and the subsistence of the obligation has been relevantly acknowledged by or on behalf of one of those persons then—

(*a*) if the acknowledgment is made in the manner specified in paragraph (*a*) of the foregoing subsection it shall have effect for the purposes of the said sections 6, 7 and 8A as respects the liability of each of those persons, and

(*b*) if it is made in the manner specified in paragraph (*b*) of that subsection it shall have effect for those purposes only as respects the liability of the person who makes it.

(3) Where the subsistence of an obligation affecting a trust estate has been relevantly acknowledged by or on behalf of one of two or more co-trustees in the manner specified in paragraph (*a*) or (*b*) of subsection (1) of this section, the acknowledgment shall have effect for the purposes of the said sections 6, 7 and 8A as respects the liability of the trust estate and any liability of each of the trustees.

(4) In this section references to performance in relation to an obligation include, where the nature of the obligation so requires, references to refraining from doing something and to permitting or suffering something to be done or maintained.

NOTE

[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 1, para. 4.

Obligations to make reparation

11.—(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.

[1] (4) Subsections (1) and (2) above (with the omission of any reference therein to subsection (3) above) shall have effect for the purposes of section 7 of this Act as they have effect for the purposes of section 6 of this Act.

NOTE

[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 2.

Savings

12.—(1) Where by virtue of any enactment passed or made before the passing of this Act a claim to establish a right or enforce implement of an

obligation may be made only within a period of limitation specified in or determined under the enactment, and, by the expiration of a prescriptive period determined under section 6, 7 or 8 of this Act the right or obligation would, apart from this subsection, be extinguished before the expiration of the period of limitation, the said section shall have effect as if the relevant prescriptive period were extended so that it expires—

(*a*) on the date when the period of limitation expires, or

(*b*) if on that date any such claim made within that period has not been finally disposed of, on the date when the claim is so disposed of.

(2) Nothing in section 6, 7 or 8 of this Act shall be construed so as to exempt any deed from challenge at any time on the ground that it is invalid *ex facie* or was forged.

Prohibition of contracting out

[1] **13.** Any provision in any agreement purporting to provide in relation to any right or obligation that section 6, 7, 8 or 8A of this Act shall not have effect shall be null.

NOTE

[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 1, para. 5.

General

Computation of prescriptive periods

14.—(1) In the computation of a prescriptive period for the purposes of any provision of this Part of this Act—

(*a*) time occurring before the commencement of this Part of this Act shall be reckonable towards the prescriptive period in like manner as time occurring thereafter, but subject to the restriction that any time reckoned under this paragraph shall be less than the prescriptive period;

[1] (*b*) any time during which any person against whom the provision is pled was under legal disability shall (except so far as otherwise provided by subsection (4) of section 6 of this Act including that subsection as applied by section 8A of this Act) be reckoned as if the person were free from that disability;

(*c*) if the commencement of the prescriptive period would, apart from this paragraph, fall at a time in any day other than the beginning of the day, the period shall be deemed to have commenced at the beginning of the next following day;

(*d*) if the last day of the prescriptive period would, apart from this paragraph, be a holiday, the period shall, notwithstanding anything in the said provision, be extended to include any immediately succeeding day which is a holiday, any further immediately succeeding days which are holidays, and the next succeeding day which is not a holiday;

(*e*) save as otherwise provided in this Part of this Act regard shall be had to the like principles as immediately before the commencement of this Part of this Act were applicable to the computation of periods of prescription for the purposes of the Prescription Act 1617.

(2) In this section "holiday" means a day of any of the following descriptions, namely, a Saturday, a Sunday and a day which, in Scotland, is a bank holiday under the Banking and Financial Dealings Act 1971.

NOTE

[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 1, para. 6.

Interpretation of Part I

15.—(1) In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, namely—

"bill of exchange" has the same meaning as it has for the purposes of the Bills of Exchange Act 1882;

"date of execution," in relation to a deed executed on several dates, means the last of those dates;

"enactment" includes an order, regulation, rule or other instrument having effect by virtue of an Act;

"holiday" has the meaning assigned to it by section 14 of this Act;

"interest in land" does not include a servitude;

"land" includes heritable property of any description;

"lease" includes a sub-lease;

"legal disability" means legal disability by reason of nonage or unsoundness of mind;

"possession" includes civil possession, and "possessed" shall be construed accordingly;

[1] "prescriptive period" means a period required for the operation of section 1, 2, 3, 6, 7, 8 or 8A of this Act;

"promissory note" has the same meaning as it has for the purposes of the Bills of Exchange Act 1882;

"trustee" includes any person holding property in a fiduciary capacity for another and, without prejudice to that generality, includes a trustee within the meaning of the Trusts (Scotland) Act 1921; and "trust" shall be construed accordingly;

and references to the recording of a deed are references to the recording thereof in the General Register of Sasines.

(2) In this Part of this Act, unless the context otherwise requires, any reference to an obligation or to a right includes a reference to the right or, as the case may be, to the obligation (if any), correlative thereto.

(3) In this Part of this Act any reference to an enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended or extended, and as including a reference thereto as applied, by or under any other enactment.

NOTE

[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 1, para. 7.

Amendments and repeals related to Part I

16.—(1) The enactment specified in Part I of Schedule 4 to this Act shall have effect subject to the amendment there specified, being an amendment related to this Part of this Act.

(2) Subject to the next following subsection, the enactments specified in Part I of Schedule 5 to this Act (which includes certain enactments relating to the limitation of proof) are hereby repealed to the extent specified in column 3 of that Schedule.

[1] (3) Where by virtue of any Act repealed by this section the subsistence of an obligation in force at the date of the commencement of this Part of this Act was immediately before that date, by reason of the passage of time, provable only by the writ or oath of the debtor the subsistence of the obligation shall (notwithstanding anything in sections 16(1) and 17(2)(*a*) of the Interpretation Act 1978, which relates to the effect of repeals) as from that date be provable as if the said repealed Act had not passed.

NOTE

[1] As amended by the Interpretation Act 1978, s.25(2).

[1] PART II

LIMITATION OF ACTIONS

NOTE
[1] Saved by the Administration of Justice Act 1982, s. 73(5).

Actions in respect of personal injuries not resulting in death

[1] **17.**—(1) This section applies to an action of damages where the damages claimed consist of or include damages in respect of personal injuries, being an action (other than an action to which section 18 of this Act applies) brought by the person who sustained the injuries or any other person.

(2) Subject to subsection (3) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of three years after—

(*a*) the date on which the injuries were sustained or, where the act or omission to which the injuries were attributable was a continuing one, that date or the date on which the act or omission ceased, whichever is the later; or

(*b*) the date (if later than any date mentioned in paragraph (*a*) above) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of all the following facts—

(i) that the injuries in question were sufficiently serious to justify his bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree;

(ii) that the injuries were attributable in whole or in part to an act or omission; and

(iii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

(3) In the computation of the period specified in subsection (2) above there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind.

NOTE
[1] Substituted by the Prescription and Limitation (Scotland) Act 1984, s. 2, as regards rights of action accruing both before and after the commencement of that Act: *ibid.* s. 5(1).

Actions where death has resulted from personal injuries

[1] **18.**—(1) This section applies to any action in which, following the death of any person from personal injuries, damages are claimed in respect of the injuries or the death.

(2) Subject to subsections (3) and (4) below and section 19A of this Act, no action to which this section applies shall be brought unless it is commenced within a period of three years after—

(*a*) the date of death of the deceased; or

(*b*) the date (if later than the date of death) on which the pursuer in the action became, or on which, in the opinion of the court, it would have been reasonably practicable for him in all the circumstances to become, aware of both of the following facts—

(i) that the injuries of the deceased were attributable in whole or in part to an act or omission; and

(ii) that the defender was a person to whose act or omission the injuries were attributable in whole or in part or the employer or principal of such a person.

(3) Where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the period specified in subsection (2) above any time during which the relative was under legal disability by reason of nonage or unsoundness of mind.

(4) Subject to section 19A of this Act, where an action of damages has not been brought by or on behalf of a person who has sustained personal injuries within the period specified in section 17(2) of this Act and that person subsequently dies in consequence of those injuries, no action to which this section applies shall be brought in respect of those injuries or the death from those injuries.

(5) In this section "relative" has the same meaning as in Schedule 1 to the Damages (Scotland) Act 1976.

NOTE

[1] Substituted by the Prescription and Limitation (Scotland) Act 1984, s. 2, as regards rights of action accruing both before and after the commencement of that Act: *ibid.* s. 5(1).

Limitation of defamation and other actions

[1] **18A**—(1) Subject to subsections (2) and (3) below and section 19A of this Act, no action for defamation shall be brought unless it is commenced within a period of three years after the date when the right of action accrued.

(2) In the computation of the period specified in subsection (1) above there shall be disregarded any time during which the person alleged to have been defamed was under legal disability by reason of nonage or unsoundness of mind.

(3) Nothing in this section shall affect any right of action which accrued before the commencement of this section.

(4) In this section—

(*a*) "defamation" includes *convicium* and malicious falsehood, and "defamed" shall be construed accordingly; and

(*b*) references to the date when a right of action accrued shall be construed as references to the date when the publication or communication in respect of which the action for defamation is to be brought first came to the notice of the pursuer.

NOTE

[1] Inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 12(2), with effect from 30th December 1985.

19. [Repealed by the Prescription and Limitation (Scotland) Act 1984, s. 2.]

Power of court to override time-limits, etc.

[1] **19A.**—[2] (1) Where a person would be entitled, but for any of the provisions of section 17 or section 18 and 18A of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision.

(2) The provisions of subsection (1) above shall have effect not only as regards rights of action accruing after the commencement of this section but also as regards those, in respect of which a final judgment has not been pronounced, accruing before such commencement.

(3) In subsection (2) above, the expression "final judgment" means an interlocutor of a court of first instance which, by itself, or taken along with previous interlocutors, disposes of the subject matter of a cause notwithstanding that judgment may not have been pronounced on every question raised or that the expenses found due may not have been modified, taxed or decerned for; but the expression does not include an interlocutor dismissing a cause by reason only of a provision mentioned in subsection (1) above.

[3] (4) An action which could not be entertained but for this section shall not be tried by jury.

NOTES
[1] Inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 23(*a*).
[2] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 1, para. 8(*a*) and by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 12(3), with effect from 30th December 1985.
[3] Added by the Prescription and Limitation (Scotland) Act 1984, Sched. 1, para. 8(*b*).

20, 21. [Repealed by the Prescription and Limitation (Scotland) Act 1984, Sched. 2.]

Interpretation of Part II and supplementary provisions

[1] **22.**—(1) In this Part of this Act—
"the court" means the Court of Session or the sheriff court; and
"personal injuries" includes any disease and any impairment of a person's physical or mental condition.

[2] (2) Where the pursuer in an action to which section 17, 18 or 18A of this Act applies is pursuing the action by virtue of the assignation of a right of action, the reference in subsection (2)(*b*) of the said section 17 or of the said section 18 or, as the case may be, subsection (4)(*b*) of the said section 18A to the pursuer in the action shall be construed as a reference to the assignor of the right of action.

(3) For the purposes of the said subsection (2)(*b*) knowledge that any act or omission was or was not, as a matter of law, actionable, is irrelevant.

(4) An action which would not be entertained but for the said subsection (2)(*b*) shall not be tried by jury.

NOTES
[1] Substituted by the Prescription and Limitation (Scotland) Act 1984, s. 3.
[2] As amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 12(4), with effect from 30th December 1985.

Amendments and repeals related to Part II

23.—(1) The enactments specified in Part II of Schedule 4 to this Act shall have effect subject to the amendments specified in that Schedule, being amendments consequential upon the provisions of this Part of this Act.

(2) The enactments specified in Part II of Schedule 5 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

[1] PART III

SUPPLEMENTAL

NOTE
[1] Saved by the Administration of Justice Act 1982, s. 73(5).

Private international law application

[1] **23A.**—(1) Where the substantive law of a country other than Scotland falls to be applied by a Scottish court as the law governing an obligation, the court shall apply any relevant rules of law of that country relating to the extinction of the obligation or the limitation of time within which proceedings may be brought to enforce the obligation to the exclusion of any corresponding rule of Scots law.

(2) This section shall not apply where it appears to the court that the application of the relevant foreign rule of law would be incompatible with the principles of public policy applied by the court.

(3) This section shall not apply in any case where the application of the corresponding rule of Scots law has extinguished the obligation, or barred the bringing of proceedings prior to the coming into force of the Prescription and Limitation (Scotland) Act 1984.

NOTE

[1] Inserted by the Prescription and Limitation (Scotland) Act 1984, s. 4, as regards proceedings commenced on or after 26th September 1984: *ibid.* s. 5(2).

The Crown

24. This Act binds the Crown.

Short title, commencement and extent

25.—(1) This Act may be cited as the Prescription and Limitation (Scotland) Act 1973.

[1] (2) This Act shall come into operation, as follows:—

(*a*) Parts II and III of this Act, Part II of Schedule 4 to this Act and Part II of Schedule 5 to this Act shall come into operation on the date on which this Act is passed;

(*b*) except as aforesaid this Act shall come into operation on the expiration of three years from the said date.

(3) [Repealed by the Prescription and Limitation (Scotland) Act 1984, Sched. 2.]

(4) This Act extends to Scotland only.

NOTE

[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 2.

SCHEDULES

SCHEDULE 1

OBLIGATIONS AFFECTED BY PRESCRIPTIVE PERIODS OF FIVE YEARS UNDER SECTION 6

1. Subject to paragraph 2 below, section 6 of this Act applies—

(*a*) to any obligation to pay a sum of money due in respect of a particular period—

(i) by way of interest;

(ii) by way of an instalment of an annuity;

(iii) by way of feuduty or other periodical payment under a feu grant;

(iv) by way of ground annual or other periodical payment under a contract of ground annual;

(v) by way of rent or other periodical payment under a lease;

(vi) by way of a periodical payment in respect of the occupancy or use of land, not being an obligation falling within any other provision of this sub-paragraph;

(vii) by way of a periodical payment under a land obligation, not being an obligation falling within any other provision of this sub-paragraph;

(*b*) to any obligation based on redress of unjustified enrichment, including without prejudice to that generality any obligation of restitution, repetition or recompense;

(*c*) to any obligation arising from *negotiorum gestio*;

(*d*) to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation;

(*e*) to any obligation under a bill of exchange or a promissory note;

(*f*) to any obligation of accounting, other than accounting for trust funds;

(*g*) to any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph.

2. Notwithstanding anything in the foregoing paragraph, section 6 of this Act does not apply—

(*a*) to any obligation to recognise or obtemper a decree of court, an arbitration award or an order of a tribunal or authority exercising jurisdiction under any enactment;

(*b*) to any obligation arising from the issue of a bank note;

(*c*) to any obligation constituted or evidenced by a probative writ, not being cautionary obligation nor being an obligation falling within paragraph 1(*a*) of this Schedule:

(*d*) to any obligation under a contract of partnership or of agency, not being an obligation remaining, or becoming, prestable on or after the termination of the relationship between the parties under the contract;

(*e*) except as provided in paragraph 1(*a*) of this Schedule, to any obligation relating to land (including an obligation to recognise a servitude);

(*f*) to any obligation to satisfy any claim to terce, courtesy, legitim, *jus relicti* or *jus relictae*, or to any prior right of a surviving spouse under section 8 or 9 of the Succession (Scotland) Act 1964;

(*g*) to any obligation to make reparation in respect of personal injuries within the meaning of Part II of this Act or in respect of the death of any person as a result of such injuries;

[1] (*gg*) to any obligation to make reparation or otherwise make good in respect of defamation within the meaning of section 18A of this Act;

(*h*) to any obligation specified in Schedule 3 to this Act as an imprescriptible obligation.

NOTE

[1] Inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 12(5), with effect from 30th December 1985.

3.—(1) Subject to sub-paragraph (2) below, where by virtue of a probative writ two or more persons (in this paragraph referred to as "the co-obligants") are bound jointly and severally by an obligation to pay money to another party the obligation shall, as respects the liability of each of the co-obligants, be regarded for the purposes of sub-paragraph (*c*) of the last foregoing paragraph as if it were a cautionary obligation.

(2) Nothing in the foregoing sub-paragraph shall affect any such obligation as respects the liability of any of the co-obligants with respect to whom the creditor establishes—

(*a*) that that co-obligant is truly a principal debtor, or

(*b*) if that co-obligant is not truly a principal debtor, that the original creditor was not aware of that fact at the time when the writ was delivered to him.

4. In this Schedule—

(*a*) "land obligation" has the same meaning as it has for the purposes of the Conveyancing and Feudal Reform (Scotland) Act 1970;

(*b*) "probative writ" means a writ which is authenticated by attestation or in any such other manner as, in relation to writs of the particular class in question, may be provided by or under any enactment as having an effect equivalent to attestation.

SCHEDULE 2

APPROPRIATE DATES FOR CERTAIN OBLIGATIONS FOR PURPOSES OF SECTION 6

1.—(1) This paragraph applies to any obligation, not being part of a banking transaction, to pay money in respect of—

(*a*) goods supplied on sale or hire, or

(*b*) services rendered,

in a series of transactions between the same parties (whether under a single contract or under several contracts) and charged on continuing account.

(2) In the foregoing sub-paragraph—

(*a*) any reference to the supply of goods on sale includes a reference to the supply of goods under a hire-purchase agreement, a credit-sale agreement or a conditional sale agreement as defined (in each case) by section 1 of the Hire-Purchase (Scotland) Act 1965; and

(*b*) any reference to services rendered does not include the work of keeping the account in question.

(3) Where there is a series of transactions between a partnership and another party, the series shall be regarded for the purposes of this paragraph as terminated (without prejudice to any other mode of termination) if the partnership or any partner therein becomes bankrupt; but, subject to that, if the partnership (in the further provisions of this sub-paragraph referred to as "the old partnership") is dissolved and is replaced by a single new partnership having among its partners any person who was a partner in the old partnership, then, for the purposes of this paragraph, the new partnership shall be regarded as if it were identical with the old partnership.

(4) The appropriate date in relation to an obligation to which this paragraph applies is the date on which payment for the goods last supplied, or, as the case may be, the services last rendered, became due.

2.—(1) This paragraph applies to any obligation to repay the whole, or any part of, a sum of money lent to, or deposited with, the debtor under a contract of loan or, as the case may be, deposit.

(2) The appropriate date in relation to an obligation to which this paragraph applies is—

(*a*) if the contract contains a stipulation which makes provision with respect to the date on or before which repayment of the sum or, as the case may be, the part thereof is to be made, the date on or before which, in terms of that stipulation, the sum or part thereof is to be repaid; and

(*b*) if the contract contains no such stipulation, but a written demand for repayment of the sum, or, as the case may be, the part thereof, is made by or on behalf of the creditor to the debtor, the date when such demand is made or first made.

3.—(1) This paragraph applies to any obligation under a contract of partnership or of agency, being an obligation remaining, or becoming, prestable on or after the termination of the relationship between the parties under the contract.

(2) The appropriate date in relation to an obligation to which this paragraph applies is—

(*a*) if the contract contains a stipulation which makes provision with respect to the date on or before which performance of the obligation is to be due, the date on or before which, in terms of that stipulation, the obligation is to be performed; and

(*b*) in any other case the date when the said relationship terminated.

4.—(1) This paragraph applies to any obligation—

(*a*) to pay an instalment of a sum of money payable by instalments, or

(*b*) to execute any instalment of work due to be executed by instalments,

not being an obligation to which any of the foregoing paragraphs applies.

(2) The appropriate date in relation to an obligation to which this paragraph applies is the date on which the last of the instalments is due to be paid or, as the case may be, to be executed.

SCHEDULE 3

RIGHTS AND OBLIGATIONS WHICH ARE IMPRESCRIPTIBLE FOR THE PURPOSES OF SECTIONS 7 AND 8 AND SCHEDULE 1

The following are imprescriptible rights and obligations for the purposes of sections 7(2) and 8(2) of, and paragraph 2(*h*) of Schedule 1 to, this Act, namely—

(*a*) any real right of ownership in land;

(*b*) the right in land of the lessee under a recorded lease;
(*c*) any right exercisable as a *res merae facultatis*;
(*d*) any right to recover property *extra commercium*;
(*e*) any obligation of a trustee—
  (i) to produce accounts of the trustee's intromissions with any property of the trust;
  (ii) to make reparation or restitution in respect of any fraudulent breach of trust to which the trustee was a party or was privy;
  (iii) to make furthcoming to any person entitled thereto any trust property, or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use;
(*f*) any obligation of a third party to make furthcoming to any person entitled thereto any trust property received by the third party otherwise than in good faith and in his possession;
(*g*) any right to recover stolen property from the person by whom it was stolen or from any person privy to the stealing thereof;
(*h*) any right to be served as heir to an ancestor or to take any steps necessary for making up or completing title to any interest in land.

SCHEDULE 4

ENACTMENTS AMENDED

PART I

AMENDMENT TAKING EFFECT ON EXPIRATION OF THREE YEARS FROM PASSING OF THIS ACT

The Limitation (Enemies and War Prisoners) Act 1945

In subsection (1) of section 1, as substituted for Scotland by paragraph (*a*) of section 4, in the list of enactments appended to the subsection for the entries relating to the Acts of the Parliament of Scotland 1579 cap. 21, 1669 cap. 14 and 1695 cap. 7, and to section 37 of the Bills of Exchange (Scotland) Act 1772, there shall be substituted the words "section 6 of the Prescription and Limitation (Scotland) Act 1973".

[1] PART II

AMENDMENTS TAKING EFFECT ON PASSING OF THIS ACT

NOTE
[1] As amended by the Prescription and Limitation (Scotland) Act 1984, Sched. 2.

The Carriage by Air Act 1961

In section 11(*c*), for the words "section six of the Law Reform (Limitation of Actions, &c.) Act 1954" there shall be substituted the words "section 17 of the Prescription and Limitation (Scotland) Act 1973".

The Law Reform (Miscellaneous Provisions) Act 1971

In section 4(2), for the words "section 6 of the Law Reform (Limitation of Actions, &c.) Act 1954" there shall be substituted the words "section 22(1) of the Prescription and Limitation (Scotland) Act 1973".

SCHEDULE 5

REPEALS

PART I

REPEALS COMING INTO FORCE ON EXPIRATION OF THREE YEARS FROM PASSING OF THIS ACT

Chapter	Short Title	Extent of Repeal
1469 c. 4.	The Prescription Act 1469.	The whole Act.
1474 c. 9.	The Prescription Act 1474.	The whole Act.
1579 c. 19.	The Prescription (Ejections) Act 1579.	The whole Act.
1579 c. 21.	The Prescription Act 1579.	The whole Act.
1594 c. 24.	The Prescription Act 1594.	The whole Act.
1617 c. 12.	The Prescription Act 1617.	The whole Act.
1617 c. 13.	The Reduction Act 1617.	The whole Act.
1669 c. 14.	The Prescription Act 1669.	The whole Act.
1669 c. 15.	The Interruptions Act 1669.	The whole Act.
1685 c. 14.	The Prescriptions Act 1685.	The whole Act.
1695 c. 7.	The Cautioners Act 1695.	The whole Act.
1696 c. 9.	The Prescription Act 1696.	The whole Act.
1696 c. 19.	The Interruptions Act 1696.	The whole Act.
12 Geo. 3. c. 72.	The Bills of Exchange (Scotland) Act 1772.	Sections 37, 39, 40.
31 & 32 Vict. c. 64.	The Land Writs Registration (Scotland) Act 1868.	Section 15.
45 & 46 Vict. c. 61.	The Bills of Exchange Act 1882.	In section 100, the words from "this section shall not apply" to the end of the section.
14 & 15 Geo. 5. c. 27.	The Conveyancing (Scotland) Act 1924.	Sections 16, 17.
1 & 2 Geo. 6. c. 24.	The Conveyancing Amendment (Scotland) Act 1938.	Section 4.
1969 c. 39.	The Age of Majority (Scotland) Act 1969.	In Schedule 1, the entry relating to the Prescription Act 1617.
1970 c. 35.	The Conveyancing and Feudal Reform (Scotland) Act 1970.	Section 8.

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