LAW COMMISSION OF INDIA
EIGHTY-NINTH REPORT
ON
THE LIMITATION ACT, 1963

GOVERNMENT OF INDIA
Ministry of Law, Justice and Company Affairs

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CONTENTS

K. K. MATHEW

D.O. No. F.2(6)/82-LC
Shastri Bhavan,
New Delhi-110001.
February 28, 1983.

My dear Minister,

I send herewith the Eighty-ninth Report of the Law Commission recommending certain amendments to the Limitation Act, 1963.

2. Revision of the Limitation Act has been taken up by the Law Commission *suo moto* in view of the importance of the subject as branch of adjective law. The present Act was enacted about 20 years ago. The Act is an enactment of general application and importance. It is, therefore, proper that such an important enactment is reviewed from time to time.

3. During the last 20 years extensive developments have taken place both in law and in society. It is proper that those developments should be taken note of in a comprehensive manner.

4. The Commission wishes to express its appreciation to Shri P. M. Bakshi, Part-time Member of the Commission, for the finalisation of the Report. We also acknowledge the assistance rendered by Shri V. V. Vaze, ex-Member-Secretary in preparing the initial draft of the Report.

With regards,

Yours sincerely,
Sd/-
(K. K. MATHEW)

Shri Jagannath Kaushal,
Minister of Law, Justice & Company Affairs,
Shastri Bhavan,
New Delhi.

LAW COMMISSION OF INDIA EIGHTY-NINTH REPORT ON THE LIMITATION ACT, 1963

CHAPTER 1

INTRODUCTORY

Revision of the Limitation Act.

1.1. Revision of the Limitation Act, 1963 has been taken up by the Law Commission of India *suo motu,* in view of the importance of the subject as a branch of adjective law. The Act is an enactment of general application and importance; its provisions come up before the course daily for interpretation. An unjust or unsatisfactory rule of limitation that bars the institution of legal proceedings means that the remedy contemplated by the law for the enforcement of a legal right becomes futile, or—if the injustice or unsatisfactory character of the rule consists in its allowing an unduly long time for the pursuit of a legal remedy—then the interests of justice are defeated, because stale demands would thereby be encouraged. It is therefore proper that such an important enactment is reviewed from time to time. The present Act was enacted about twenty years ago. During this period, extensive developments have taken place, both in law and in society. It is proper that those developments should be taken note of in a comprehensive manner.

The present Act was passed after the Law Commission reported on the earlier Act of 1908 and largely implements the recommendations made by the Commission.[1] It is therefore particularly appropriate that a review of the law may be undertaken by the Commission again.

History.

1.2. The statutory law of limitation has a long and interesting history in India, which takes us at least to 1859. Before that year, there was no uniform law of limitation. Various Regulations, applicable to the Company's Courts dealing with certain topics falling within the law of limitation, were in force in the Mofussil of the three Presidencies. For the Courts established by the Royal Charter in the Presidency towns, the English law was taken as applicable. To introduce uniformity in law, the limitation Act (14 of 1859) was passed. The Act came into force in 1862, but covered only suits, and, moreover, did not contain any provision relating to prescription. The Limitation Act, 1871 (9 of 1871), which replaced the Act of 1859, added certain provisions in the nature of law of prescription also, and introduced, for the first time, the arrangement which one finds in the present Act—namely, the general principles relating to computation and exclusion of time find a place in the body of the Act, while the actual time—limits for various kinds of proceedings are placed in a tabular statement, forming a Schedule to the Act. It may also be mentioned that the Act of 1871 introduced a period of sixty years applicable to a suit of any kind brought by the Government. This Act was replaced by the Limitation Act, 1877 (15 of 1877). Besides making certain minor changes in regard to the classes of suits expressly covered and the time limit or the starting point of limitation for various suits, the Act of 1877 extended the operation of the law of prescription, by making two additions to it. In the first place, while the Act of 1871 had provided that the right to land or to a hereditary office could be extinguished by lapse of time, the Act of 1877 extended this principle to

[1]Law Commission of India, 3rd Report (Limitation Act, 1908) (July, 1956).

any property, whether movable or immovable. Secondly, while the Act of 1871 provided for the acquisition of easements absolutely by open and uninterrupted enjoyment for twenty years, the Act of 1877 extended this provision to what are known as *profits a prendre*.

The Limitation Act 1908 (9 of 1908) made certain changes in matters of detail, without radically altering the substance or the arrangement of the provisions. In the meantime, the Indian Easements Act dealing with easements, had been passed, which too provided for the acquisition and extinction of easements by prescription. The Limitation Act of 1908 therefore expressly provided that its provisions concerning easements shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 may, for the time being, extend. The Limitation Act of 1963 (the present Act) has made a few changes of substance in the Act—particularly, in certain time limits and also in regard to the scheme relating to applications for execution. At the same time, it has not disturbed the basic structure of the Act of 1908. As already mentioned,[1] the present Act largely implemented the recommendations made by the Law Commission in its Report on that Act.

Principles for revision.

1.3. It would be convenient to mention at this stage some of the general principles adopted by us in revising the Act. In the first place, we have examined the case law on the Act in some detail, addressing ourselves especially to conflict of decisions on important points. In a law of day-to-day use, this aspect is of practical importance. Secondly, some of the provisions of the Act appeared to require review in the light of a few juristic trends that have emerged in recent times. By way of example, we may mention the more liberal attitude of the law in regard to mistake of law as a basis for granting relief against strict application of rules of limitation. Thirdly, certain commercial and other transactions have gained popularity in recent times and it is proper that the law should take note of them. We may cite, by way of example, the practice of placing money in fixed deposits. For the recovery of money so placed, the Act has no specific article at present— a matter certainly requiring attention. Fourthly, apart from conflict of views, judicial decisions have brought out a few lacunae in the Act—for example, the difficulty caused by the draftsmanship of section 29 in regard to suits for dower. Fifthly, some of the provisions of the Act are unduly restricted in their scope, and it has been considered worth examination whether the principle on which they are based should not be given its full scope by making the provision more ample than at present. Section 11 furnishes one example. That section (dealing with certain aspects of conflict of laws) is unnecessarily restricted to certain kinds of causes of action. These have been some of the important aspects that have been kept in view in reviewing the Act.

Need for having another look.

1.4. A query may perhaps be raised as to the need for having another look at the Act within twenty years or so. It is enough to answer it by quoting what the Chairman of the Law Commission for England and Wales said about the process of law reform:[2]

> "In every society, law reform in changing times is a process which is as endlessly necessary as cleaning the streets, maintaining buildings, pruning trees and disposing of refuse. It has to be done; either systematically and continuously, or drastically from time to time."

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[1]Para 1.1, *supra*.

[2]Mr. Jutice Kerr, "Law Reform in Canging Times", 96 Law Quarterly Review 515.

Policies underlying the law of limitation.

1.5. The policies underlying the law of limitation are ultimately based on justice and convenience. An individual should not live under the threat of a possible action for an indeterminate period, since it would be unjust. Again, the defendant should be saved the task of defending stale causes of action, as it is often inconvenient. Further, vigilance in the pursuit of rightful claims should be encouraged so that these are the ethical or rational justifications for the law of limitation. All that has been said on the subject can be summarised by stating that the law of limitation rests upon three main foundations—justice, convenience and the need to encourage diligence.

Hardship occasionally caused.

1.6. However, it is obvious that while these considerations are laudable in themselves, their translation into practical legislation is not a matter of ease. An over-emphasis on these propositions at the risk of disregarding some other weighty counter-balancing consideration might cause serious injustice. The law of limitation attracts adverse comments when a person is thrown out of court on the plea of limitation for no possible fault of his. A recent English case[1] on the point is of one Mr. Liff. He had suffered serious personal injuries in a car accident, but, on account of *wrong advice given by his solicitors,* the two insurance companies with whom the concerned car owners had insured themselves got away on the *technical plea of limitation.* An academic writer[2] compares that luckless passenger to the plight of Winnie the Pooh.[3] "Pathetic", he said, "that's what it is, Pathetic". Reference is made by the same writer in this context.

Thus, the law of limitation has to strike a balance between the policy considerations mentioned above (on the one hand) and the risk of injustice (on the other hand).

Scheme of the Act: The sections.

1.7. So much as regards the importance of having a law of limitation that is reasonably fair in its substance and reasonably certain in its form. The scheme of the present Act may be briefly described at this stage. The Act (like its predecessors) is divided into sections and articles. The operative provisions and the principles as to computation of the period of limitation, as also provisions in the nature of prescription, are to be found in the sections of the Act. The periods of limitation applicable to various classes of suits, appeals and applications, and the time from which the period begins to run in each case, are matters dealt with in a tabular form in the articles placed in the Schedule to the Act.

1.8. One of the principal objects of the law of limitation is the discouragement of stale demands[4], particularly for the reason that where the raising of controversy is unduly delayed, evidence tends to disappear and opportunity may arise for the filling of claims which are either dishonest or mistaken in point of facts. Since this difficulty would not survive where the party against whom the claim is made has himself furnished reliable evidence of the debt or liability, the Act in sections 18 to 20, provides for counting a fresh starting point of limitation where the person sought to be charged in respect of any property or right has made a written acknowledgement of liability, as also where payment on account of a debt or an interest on a legacy has been made by such person (coupled with a written record). Of course, such acknowledgement or payment must have been made before the claim has already become time-barred.

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[1] *Liff* v. *Peasley,* (1980) 1 All E.R. 623.
[2] Berelt Morgan, "Fault in the System" (30 Oct. 1980) 130 New L.J. 1002.
[3] A Milner, Winnie The Pooh, Chapter 6.
[4] cf. para 1.5 *supra.*

1.9. The case of substitution or addition of parties during the course of litigation is dealt with in section 21.

Continuing breaches of contracts and torts are taken care of by section 22, while in respect of suits for compensation for acts which are not actionable without special damage, section 23 makes a suitable provision. Section 24 provides that for the purposes of the Act all instruments shall be deemed to be made with reference to the Gregorian calendar.

1.10. Next follow provisions in the nature of prescription concerned with the acquisition of easements by prescription (sections 25 and 26) and the extinguishment of right to property at the determination of the period of limitation for instituting a suit for possession of any property (section 27). The body of the Act ends with miscellaneous provisions concerned with the amendment of certain other Acts, savings, transitional provisions and repeal (sections 28 to 32).

Coming to the body of the Act, sections 1 and 2 deal with preliminary matters, including definitions. The most important provisions of the Act relating to the bar of limitation occurs immediately thereafter, in section 3. Dismissal of a suit, appeal or application filed after the prescribed period is mandatory. Section 4 deals with the situation of expiry of the prescribed period at a time when the court is closed. Under section 5, in the case of appeals and certain applications, the court has power, for sufficient cause, to extend the prescribed period. Here one has an example of legislative anxiety to maintain a balance between ensuring vigilance and avoiding hardship. As regards persons under legal disability, appropriate provisions are made in sections 6 to 8. Subject to these special provisions, the general principle laid down in section 9 is that once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. By way of an exceptional provision, section 10 provides that certain suits against trustees and their representatives are not barred by "any length of time". The section takes within its fold Hindu, Muslim and Buddhist religions and charitable endowments as well—a provision which constitutes a first rate example of the legislature stepping in to correct an anomaly brought to light by judicial decisions. Section 11 deals with a topic belonging to conflict of laws, namely, suits on contracts entered into outside the territories to which the Act extends. Such suits are governed by the Indian law of limitation, whatever be the locus of the cause of action.

Elaborate provisions as to the computation of the period of limitation next follow. Thus, time taken in certain preliminaries that are requisite for pursuing legal proceedings of special categories (appeals and certain applications) is the subject matter of section 12,—provision based on necessity. That section also enacts the general rule that the day from which the period of limitation for any suit, appeal or application is to be reckoned must be excluded in computing the period of limitation. Sections 13 and 14 provide for the exclusion of time actually taken in certain infructuous legal proceedings—in regard to the *special* case of an application for permission to sue as a pauper (if ultimately the application is not granted), and in regard *to the more general case of legal* proceedings which become infructuous because the court, from defect of jurisdiction or other cause of like nature, is unable to entertain them. Certain cases where the institution of legal proceedings has to be postponed by reasons of necessity, judicial orders (such as, injunctions or stay orders) or statutory provisions as to the giving of a notice as a condition precedent to

the institution of a legal proceeding, and the like, are dealt with in section 15. The absence of the defendant from India is, in computing the period of limitation for a suit, excluded under section 15(5).

A cause of action arising on death or a cause of action whose accrual does not take place until after the death of the person concerned needs special treatment, and section 16 attends to such causes of action in the context of limitation.

While these provisions of the Act are mostly concerned with difficulties arising from certain circumstances which are not dependent on the conduct of an individual, justice requires that provision should also be made to relax the law of limitation in case of fraud or mistake—these two being situations in which a person is prevented from instituting legal proceedings within time, either because of the misconduct of the opposite party or because of his own having laboured under a misconception. These two situations are taken care of by section 17.

Scheme of the Act: the Articles in the Schedule.

1.11. The Schedule to the Act contains 137 articles, laying down periods of limitation for various kinds of proceedings. Of these, articles 1 to 113 relate to suits; articles 114 to 117 relate to appeals and articles 118 to 137 relate to applications. The general scheme adopted in the Schedule is that, in each category, specific types of proceedings are covered by specific articles dealing with a particular cause of action or head of relief. This is followed in each category by a residuary article, which is intended to take care of a suit, an appeal or an application (as the case may be), not covered by a specific article. The periods of limitation prescribed for various categories of suits, appeals and applications vary.

1.12. Coming more particularly to suits, it may be stated that the periods prescribed by the relevant articles vary from one year to thirty years; for all suits instituted by the Government, the uniform period (under article 112) is thirty years, except a suit before the Supreme Court in the exercise of its original jurisdiction. In general, it can be stated that most suits for money or monetary claims (excepting claims in tort) enjoy a period of three years, and most suits relating to tort are governed by periods of one year, two years or three years. Suits for the recovery of immovable property (and on allied causes of action) enjoy a period of twelve years, with certain exceptions; the most important exception in this context is the period of thirty years, allowed for a suit for redemption or foreclosure of a mortgage under articles 61(a) and 63(a), respectively. The residuary article for suits (article 113) allows a period of three years for suits not otherwise specifically provided for.

1.13. The starting point of limitation (subject to certain exceptions) as regards suits, is in general, the date of accrual of the cause of action. However, this concept has not been expressed in any general terms—such as "accrual of the cause of action"; rather, it has been translated into a date linked up with some specific and concrete act or event which is appropriate for the particular type of cause of action to which the suit relates. In some exceptional cases, the date selected as the starting point is not one corresponding to the accrual of the cause of action, but some other date which is more appropriate for the particular type of claim. For example, in a suit relating to accounts, being a claim for the balance due on what is described as a "mutual, open and current account", where there have been reciprocal demands between the parties, the starting point under article 1 is the close of the year when the last item ad-

mitted or proved is entered in the account. Similarly, for a suit for the wages of a seaman, the starting point under article 6 is the end of the voyage during which the wages are earned. Again, under articles 73 and 74, which are concerned with compensation for false imprisonment and compensation for malicious prosecution respectively, the starting point is termination of the false imprisonment or of the malicious prosecution, as the case may be. Then, under article 81, a suit by executors etc. under the Legal Representatives Suits Act, 1855 can be filed within one year of the date of the death of the person wronged. Finally, in several cases, the knowledge of the plaintiff as to the accrual of the cause of action is material for determining the starting point. Examples of such an approach are furnished by articles 4, 56, 57, 59, 61(b), 68, 71, 84, 92 to 95 and 102.

1.14. In regard to appeals, the period of limitation various from 30 days to 90 days, depending principally on the nature of the order appealed from and the forum to which the appeal is to be taken. There is no residuary article for appeals.

1.15. As regards applications, the prescribed periods vary from 10 days (article 118) to 12 years (article 136, which is the general article for an application for the execution of any decree or order of any civil court). The residuary article for applications (article 137) allows a period of 3 years.

CHAPTER 2

SECTIONS 1 AND 2: PRELIMINARY

Section 1—Short title, extent and commencement.

2.1. Beginning a consideration of the Act sectionwise, Section 1 deals with the short title, extent and commencement of the Act. By a notification of the Central Government issued under Section 1(3), the Act came into force[1] on the 1st January, 1964. Under Section 1(2), the Act extends to the whole of India except the State of Jammu and Kashmir. Some uncertainty seems to exist as to how far the Act has repealed corresponding laws of the previous French and Portuguese possessions which now form part of the territories of India. The point will be adverted to[2] while discussing section 20, which seeks to preserve "special and local" laws.

Section 2—Definitions.

2.2. Section 2 contains a number of definitions, being definitions of the following words and expressions:—

(a) "applicant";

(b) "application";

(c) "bill of exchange";

(d) "bond";

(e) "defendant";

(f) "easement";

(g) "foreign country";

(h) "good faith";

(i) "plaintiff";

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[1]Notification. No S.O. 3118, dated 29th October, 1963.
[2]See discussion on relating to section 29, infra.

(Chapter 2—Section 1 and 2: Preliminary, Chapter 3 Section 3: The Bar of Limitation, Chapter 4 Section 4: Expiry of prescribed period when Court is closed)

(j) "period of limitation"
and "prescribed";

(k) "promissory note";

(l) "suit";

(m) "tort" and

(n) "trustee".

We have no changes to recommend in the definitions, since they have not created any serious controversies that may necessitate a change in the law. Provisions by way of interpretation or explanation also occur in a few substantive provisions of the Act. Their relevance is primarily confined to those particular provisions, and can be best dealt with while considering those provisions.

CHAPTER 3

SECTION 3: THE BAR OF LIMITATION

Section 3-The bar of limitation.

3.1. The operative provisions of the Limitation Act may be said to begin with Section 3. Sub-Section (1) of this section —which constitutes the most important operative provision,—enacts that, subject to the provisions contained in sections 4 to 24, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Thus, in the first place, the dismissal of a time-barred proceeding is made mandatory by this provisions; secondly, this is so even if the defendant does not set up limitation as a defence.

Sub-section (2) of section 3 explains, in some detail, in three clauses—(a), (b) and (c),—how the proposition laid down in sub-section (1) is to be applied, clause (a) of the sub-section explains when a suit is "instituted" generally, as well as in the case of a claim by a pauper or a claim against a company which is being wound up by the Court. Clause (b) deals with set off and counter-claims, while clause (c) deals with an application by notice of motion in a High Court.

Recommendation to amend Section 3(2) (a) (ii).

3.2. While no changes of substance are recommended in section 3, we have one recommendation to make for a verbal change in section 3(2) (a) (ii), in which the expression "a pauper" (occurring at two places) needs to be replaced by the expression "an indigent person", in view of the changed phraseology adopted in the Code of Civil Procedure, 1908 as amended in 1976. We recommend accordingly.

CHAPTER 4

SECTION 4 : EXPIRY OF PRESCRIBED PERIOD WHEN COURT IS CLOSED

Bar of limitation.

4.1. Section 4 provides that where the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit etc. may be instituted on the day when the Court re-opens. The Explanation to the section provides that a Court is deemed to be closed on any day if, during any part of its normal working hours, it remains closed on that day.

(Chapter 4 Section 4: Expiry of prescribed period when Court is closed, Chapter 5—Section 5: Extension of the prescribed period for sufficient cause)

Principle.

4.2. Obviously, section 4 is based on the principle that the law does not compel a man to do the impossible—*lex non cogit ad impossibilia*—and that the act of court should harm no one.[1]

Changes needed in section 4 in view of section 14.

4.3. While the section, standing by itself, has created no problems, some difficulties have arisen in connection with the combined operation of sections 4 and 14. We shall advert to this point at the appropriate place.[2]

CHAPTER 5

SECTION 5: EXTENSION OF THE PRESCRIBED PERIOD FOR SUFFICIENT CAUSE

Section 5

5.1. Section 5 empowers the court, for "sufficient cause", to entertain an appeal or application (except an application for execution) filed after expiry of the prescribed period. A number of points require to be considered with reference to this section. The section does not apply to suits.

I. Suits

5.2. Section 5, as stated above, does not apply to suits. We have considered the question whether the section should be amended so as to include within its ambit suits filed after the prescribed period. Delving into the old records relating to the drafting of the Indian Limitation Bill, 1908, we discovered that this question was considered at that distance of time also. When the draft of the Indian Limitation Bill 1908 was circulated for comments, Dr. Hari Singh Gaur commented[3] as under:

> "I am not sure if a suit may not be also included in the clause: if the intending plaintiff is wrongfully confined by the defendant, why he should lose his suit? Section 18 'fraud' does not cover such a case."

However, the Divisional Judge, Nagpur,[4] was apprehensive that if the ambit of the clause was enlarged, it would lead to unsavoury practices: false grounds were often invented when the litigant found that he was out of time. In most cases they were, accordingly to him, based on purely personal incidents or conditions which his adversary was not expected to refute.

Extension of section 5 to suits not recommended.

5.3. Though there is some merit in Dr. Hari Singh Gour's suggestion, we think that enlarging the scope of section 5 to cover suits would do more harm than good to the administration of justice. The rapport between the lawyer and his rural client is generally so well established that a visit to the family lawyer on the weekly market day is always on the agenda of a villager. Such being the style of functioning of village folks, it is improbable that the munshi to the lawyer would allow his client's case to go by default by asking him to wait till the last day of limitation. If, as contemplated by Dr. Hari Singh Gour, a plaintiff may be prevented from reaching his lawyers on the last day of limitation by scheming defendants, he could as well as prevented by other

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[1]C.F. *Angadi* v. *Hirannayya*, A.I.R. 1972 S.C. 239.

[2]See discussion relating to section 14, *infra*.

[3]Dr. Hari Singh Gour: Annexure to the letter from F.S.A. Sloica, Esq. I.C.S.; Chief Secretary to the Chief Commissioner, Central Provinces, to the Secretary to the Govt. of India, Legislative Department, dated 19th December, 1907, National Archives File, page 3.

[4]Rai Bahadur Sharat Chandra Sanyal, National Archieves File

causes like breakdown of the bus service, floods, illness, etc the authorship of which cannot be imputed to the defendants.

In view of the above, we do not recommend extention of the principle of section 5 to suits.

II. Applications

Applications.

5.4. Regarding the applicability of section 5 to applications, the law as revised in 1963 is wide enough. The Law Commission had, in its report[1] on the Act of 1908, recommended that a uniform rule should be adopted, applying section 5 to all applications, except those under Order 21 of the Code of Civil Procedure, 1908. This change has been carried out, and no further change appeared to be needed in this regard. There appears to be justification for excluding applications under Order 21 (applications for execution) from the scope of the Section, since the period available is long enough (12 years)[2].

III. Erroneous legal advice

Erroneous legal advice.

5.5. In Section 5, the expression "sufficient cause" for not preferring an appeal or making an application within the prescribed period has been interpreted by the Supreme Court,[3] to include lawyers' ignorance about the law regarding calculation of the period of limitation. In that case, the High Court had refused to condone the delay and to admit the Company's appeal, but the Supreme Court, reversing the judgment of the High Court, observed as under:

> "A Company relies on its Legal Adviser and the Manager's expertise is in company management, and not in law. There is no particular reason why, when a company or other person retains a lawyer to advise it or him on legal affairs, reliance should not be placed on such counsel."

Reasonable care expected of counsel.

5.6. The principle, is in fact, well established. At the same time, courts have been circumspect in scrutinising the claim of a party that he was misled by a wrong legal advice. For example, a plea was made before the Madhya Pradesh High Court[4] by a counsel that he had relied on a Full Bench ruling of that High Court under the old Act. The Court refused to countenance such an argument, when, in point of time, the new Act had come into force a year before the event. Similarly, the Delhi High Court[5] rejected the plea for condonation of delay, when it was argued that the appellant acted upon the advice of an eminent counsel who had, in computing limitation, relied on an overruled judgment of that Court.

5.7. The fact that the appellant was misguided by the wrong advice given by his legal adviser, has not, alone and by itself, been held to be tantamount to "sufficient" cause within the meaning of section 5. The Courts have inquired that the lawyer who gave the opinion exercised reasonable care. In other words, the advice should have been the result of a *bona fide* mistake not attributable to negligence or want of skill and the view taken by the lawyer was such as would have been entertained by a competent person exercising reasonable skill[6]. As

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 13, para 26.
[2]Article 136.
[3]*Concord of India Insurance Co.* v. *Nirmala Devi*, A.I.R. 1979 S.C. 1666.
[4]*Chunilal* v. *State of M.P. A.I.R.* 1957 A.P. 127, 128.
[5]*Banwarilal* v. *Union of India*, A.I.R. 1973 Delhi 24.
[6]*Bhatti Bh. Mondal* v. *Khagendra*, A.I.R., 1968 Cal. 69; *R. Trading Co. v. M. Trading Agency*, A.I.R. 1971 Cal. 313.

the Privy Council observed[1], "there is certainly no general doctrine which saves parties from the results of wrong advice". The Supreme Court[2], while interpreting the words "sufficient cause" in section 5, has observed that the words "should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of *bona fide* is imputable to a party." In an English case[3], Brett, L.J. observed:

> "In cases where a suitor has suffered from the negligence or ignorance or gross want of legal skill of his Legal Adviser, he has his remedy against that Legal Adviser, and meantime the suitor must suffer. But where there has been a *bona fide* mistake, not through misconduct not through negligence nor through want of a reasonable skill but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited".

Questions connected with the requirement of care.

5.8. If that requirement has to be read into section 5 some questions arise. Though the expression "good faith" has been defined in section 2(h), that expression does not find a place in Section 5. Taking note of this, Abdur Rahman J. in a Lahore case[4] observed:

> "It must be, however, conceded that in finding a 'sufficient cause' under section 5 of the Act, a 'good faith' is more in general sense of that word as grammatically understood rather than in the sense in which it has been defined in section 3(7), Limitation Act.".
>
> "It may not be irrelevant to recall the definition of 'good faith' in section 3(2), General Clauses Act in that connection. An act according to that definition, may be done honestly and in perfect good faith although it may have been done negligently. Let me, however, not be understood to say that an act, however negligent—whether grossly or otherwise—should always be regarded as falling within the term 'sufficient cause' employed in section 5, Limitation Act if it is found to have been done honestly. It would depend upon the circumstances of each case although I am free to confess that it would go a long way to help a person who asks for indulgence under section 5 if he can satisfy the Court that he had been acting honestly."

Ignorance of Counsel.

5.9. Though the Supreme Court case[5] concerned itself with the counsel's ignorance about the law regarding computation of period of limitation, some observations in an earlier case of the Supreme Court[6] seem to suggest that the Court might be prepared to condone negligence on the part of the Counsel in special circumstances.

> "37. Even otherwise, in the entire circumstances of the case disclosing sheer indifference, perhaps ignorance, on the part of the advocate, Shri Bharaitinder Singh and no laches, whatever on the part of the appellant, we would have been inclined to condone the delay of 12 days under section 5 of the Limitation Act".

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[1] *Kunwar Rajendra Bahadur Singh* v. *Rajeshwar Bali*, A.I.R. 1937 P.C. 276.
[2] *State of West Bengal* v. *Howrah Municipality*, A.I.R. 1972 S.C. 749, 755.
[3] *Highten* v. *Treherne*, (1878) 39 Law Times 411.
[4] *Arura* v. *Karam Din*, A.I.R. 1947 Lah. 77.
[5] *Concord of India Insurance Co.* v. *Nirmala Devi*, A.I.R. 1979 S.C. 1666.
[6] *Chinubahai* v. *R.C. Bali*, A.I.R. 1977 SC 2319.

(Chapter 5—Section 5—Extention of the Prescribed Period for Sufficient cause)

5.10. The scope of the expression "sufficient cause" in relation to lapse on the part of a counsel came up for consideration before the Supreme Court[1] again recently. A Senior Sub-Judge of Narnaul had been authorised by the High Court to hear appeals, but as the counsel was ignorant of this fact, he had filed the appeal in the court of the Additional District Judge in 1960. In 1961, when the appeal came up for hearing, the objection regarding want of jurisdiction was sustained and the memorandum of appeal was returned to the appellants. The appellants filed the memorandum before the Senior Sub-Judge, the proper appellate Court and prayed for condonation of the delay of 185 days, being the period of pendency of the appeal in the court of the Additional District Judge. Though the Senior Sub-Judge condoned the delay, the High Court disagreed. The Supreme Court found that the High Court was in error in refusing to condone the delay, and remanded the appeal to the High Court.

Limits of the concept of "sufficient cause".

5.11. Apart from the aspect of effect of negligence, there is another aspect to be considered. The 'sufficient cause' must have arisen before expiry of the period of limitation.

A peculiar situation arose in a case from Gujarat[2], in which an appeal was preferred under the Supreme Court (Enlargement of Criminal Jurisdiction) Act, 1970 against the judgment and order of the High Court of Gujarat, setting aside the acquittal of the appellant and convicting and sentencing him for serious offences under section 302, read with section 34, Indian Penal Code and under section 326, read with section 34 of that Code. The only fact of relevance to the present inquiry is that the appeal to the High Court was filed three months after the period of limitation had expired and this delay was condoned by the High Court. The Supreme Court, however, did not countenance this action of the High Court of condoning the delay of three months under section 5 of the Limitation Act and observed:

> "It appears that initially the State Government took a decision not to file appeal and it allowed the period of limitation to lapse. Subsequently, on certain observations made by the High Court while considering a revision petition by Bhulabhai that it was a fit case where the State Government should file an appeal and on notice being issued by the High Court to the State Government in the matter, the appeal was filed. *It was filed three months after limitation had expired. A faint attempt was made to show that when the initial decision was taken not to file an appeal all the papers had not been considered by the department concerned, but we are not impressed by that allegation.* The truth appears to be that the appeal was not filed at first because the State Government saw no case on the merits for an appeal, and it was filed only because the High Court had observed—and that was long after limitation had expired—that the case was fit for appeal by the State Government. Now, it is true that a party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstances arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising *after the expiry of limitation* can constitute such sufficient cause. There may be events or circumstances *subsequent* to the expiry of limitation which may further delay the filing of the appeal. But, that the limitation has been allowed to expire

[1] *Badlu* v. *Shiv Charan*, (1980) 4 S.C.C. 401.
[2] *Ajit Singh Thakur Singh* v. *State of Gujarat*, A.I.R. 1981 S.C. 733, (1981) 1. S.C.C. 495, 497.

without the appeal being filed must be traced to a cause arising *within the period* of limitation. In the present case, there was no such cause, and the High Court erred in condoning the delay."

The Supreme Court, has in the observations quoted above, underscored an important aspect of section 5, by stating that the "sufficient cause" must be traced to a cause arising within the period of limitation.

Need for codification of the law on the subject of legal advice.

5.12. We have, on an examination of all aspects of the matter, come to the conclusion that the position on the subject of legal advice given erroneously needs to be codified. However, it would make for a better appreciation of evidence and merits of a claim under this section if the court has before it, in black and white, the advice given by counsel.

While stressing the importance of a written legal advice, we are not oblivious of the fact that the regulation of the legal profession has been entrusted by the Advocates Act, 1961, to the Bar Council of India. Hence, we recommend[1] that the Central Government should request the Bar Council of India to frame rules making it obligatory upon an advocate to tender a written legal advice in matters concerning limitation. We hope that the Bar Council of India would appreciate the necessity of such a rule when the fate of an otherwise good claim hangs on the technical plea of limitation.

We are recommending a suitable Explanation to be inserted below section 5 on the subject of erroneous legal advice[2]. The draft that we propose will show, in a concrete form, the salient features.

IV. Peculiar disabilities of married women

Married women.

5.13. We now turn to a slightly different topic namely, the position of married women. Section XII of Limitation Act No. 14 of 1859 (legal disability) provided as under:—

"XII. The following persons shall be deemed to be under legal disability within the meaning of the last preceding section married women in cases to be decided by English law, minors, idiots and lunatics."

However, in the subsequent statutes of 1871 and 1877, the class of "married women" was removed from the list of persons under legal disability. In England, the Married Women's Property Act abolished the common law rule and made married women's wages and earnings her separate property and gave her a power to recover them in her own name.

As far as Hindu or Muslim women in India were concerned, they never suffered from the disability of prohibition from acquiring property[3]. For others appropriate provision has been enacted.

No change needed as to married women.

5.14. No doubt, there are certain procedural difficulties of a married woman in seeking legal redress today. The prevalence of the dowry system and certain other anomalies have brought to surface some of the handicaps of the married women. While we fully appreciate the difficulties faced by married women (especially from the rural parts of India), in obtaining legal advice, we have

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[1]For implementation by the Central Government.
[2]See para 5.14, *infra*.
[3]See Law Commission of India, 66th Report (Married Women's Property Act, 1874).

(Chapter 5—Section 5 - Extention of the Prescribed Period for Sufficient cause)
(Chapter 6, Section 6: Legal Disability)

come to the conclusions that amending either section 5 or section 6 and creating a separate category of persons under disability would be carrying the statute too far, for the simple reason that (unlike minority or lunacy), the disability of a married woman would not come to an end until the demise of her husband or a divorce. The result would be an excessive prolongation of the period of limitation otherwise, applicable. This might result in defeating some of the basic features underlying the law of limitation. Rather than classifying them as persons under disability, education about rights would be a better solution. Consequently, no amendment of section 5 or section 6 is suggested to cover this particular problem.

V. Recommendation

Recommendation as to section 5.

5.15. In the light of the above discussion, we recommend that section 5 should be revised as under:—

Revised section 5

"5. Any appeal or any application, other than an application under any of the provisions of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation I.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

Explanation II.—Without prejudice to the generality of the provisions of this section, the fact that the appellant or the applicant was misled by any erroneous legal advice given by a legal practitioner is sufficient cause within the meaning of this section, provided:

(a) *the advice was sought and given before the expiry of the prescribed period, whether for the purpose of the particular appeal or application or otherwise, and*

(b) *the advice was given in good faith and in writing.*"

CHAPTER 6

SECTION 6 : LEGAL DISABILITY

Section 6—Legal disability.

6.1. Where a person entitled to institute proceedings is under a legal disability, some concession is obviously required in respect of the law of limitation, since it is probable that the person looking after the affairs of one under disability may not take that much interest in his affairs as is required for the institution of legal proceedings for the enforcement of a right vested in the person under disability. To provide for such a situation, section 6, in five sub-sections, enacts elaborate provisions concerning minors, insane persons and idiots. The proceedings to which the section applies are suits and applications for the execution of a decree. Broadly speaking, under sub-section (1) (which is the operative provision), if the person entitled to institute a suit or make an application for adjudication of a decree is, at the time from which the prescribed period is to be reckoned, under disability, he can institute the suit or make an application within the same period after the disability ceases, "as would otherwise have

been allowed from the time specified therefor in the third column of the Schedule". The other sub-sections of the section deal with certain matters of detail, such as disabilities of more than one kind or successive disabilities, disability followed by death, the position regarding legal representatives, and so on. The Explanation to the section makes it clear that "minor" includes a child in the womb.

No change needed.

6.2. The extensive case-law on the section, on a perusal, does not bring to light any problems that need solution by an amendment of the section. We do not, therefore, recommend any change in the section.

CHAPTER 7

SECTION 7 : DISABILITY OF ONE OF SEVERAL PERSONS

Section 7—Disability of one of several persons jointly entitled.

7.1. Continuing the subject of disability, and dealing with a special situation in that regard, section 7 provides that where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under a disability and a discharge can be given without the concurrence of such person, then time will run against all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of others or until the disability has ceased. The first Explanation to the section makes it clear that the section applies to a discharge from every kind of liability, including a liability in respect of any immovable property. The second Explanation provides that the manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving such a discharge without the concurrence of the other members of the family, only if he is in management of the joint family property.

Meaning of the expression "time will not run".

7.2. The use of the expression 'time will not run' in section 7 regarding the disability of one of several persons has given rise to difficulties of interpretation which have come to surface in a Full Bench decision of the Kerala High Court[2]. The appeal in that case pertained to movable properties belonging to one Ponnamma, who died some time in 1941, leaving two sons as the sole surviving members of the joint family. In 1943, when these two sons were minors, their father and the maternal grand-parents sold the properties, for the recovery of which the two sons filed a suit in 1954. In the meantime, the original purchaser had gifted away the properties to his minor children, who were impleaded as defendants to the suit in 1955. The first plaintiff had attained majority in 1951, though the second plaintiff continued to be a minor even in 1955 and attained majority only in 1958.

The majority of the Bench held that the suit was barred by limitation. As one of the plaintiffs acquired the capacity to give a discharge without the concurrence of the others when he became the manager in 1951, the plaintiff could not get more than three years from 1951 for filing the suit, under section 8 of the Act.

7.3. The dissenting Judge, however, held that time began to run as against both the plaintiffs (under section 7) in 1951, when the first plaintiff became the manager of the joint family, but this acquisition of majority or managership was

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[1]As to married women, see discussion in Chapter 5, *supra*.
[2]*Ponnamma* v. *Padmanabhan*, A.I.R. 1969 Ker. 163 (F.B.).

not the "cessation of disability" within the meaning of section 8. The entire period of 12 years provided by article 142 (of the Act of 1908) was available to the plaintiffs from the date 'time began to run', unaffected by the three year limit of section 8. The dissenting Judge conceded that the three-year limit of section 8 would, at best, be reckoned from 1958 onwards when the second plaintiff became a major, because, by then, both the plaintiffs ceased to be under disability.

7.4. The majority was unhappy about the drafting of section 7 and made the following observations:—

> "The wording of section 7 creates some difficulty, because the latter part of that section says that 'time will not run as against any of them until one of them becomes capable of giving such a discharge, without the concurrence of others or until the disability has ceased', which would seem to imply that the starting point of limitation itself is postponed until after the capacity so discharge has been acquired by one of them, or until the disability has ceased."

However, they got over the difficulty by putting a harmonious construction on sections 6 and 7, observing that the latter was really an appendix to the former and that the avowed purpose of both the sections was to extend the period of limitation.

7.5. The expression "time will not run" also occurred earlier in section 8 of the Act of 1871, which ran as under: History

"Disability of one joint creditor . .	8. When one of several joint creditors or claimants is under any such disability and when a discharge can be given without the concurrence of such person, time will not run against them all: but where no such discharge can be given, time will not run as against any of them until they all are free from disability."

Section 8 of the Act 1877 reads as under:

"Disability of one joint creditor .	8. When one of several joint creditors or claimants is under any such disability and when a discharge can be given without the concurrence of such person time will run against them all but where no such discharge can be given, time will not run against any of them until one of them becomes capable of giving such discharge without the concurrence of the others."

Illustrations

(a) A incurs a debt to a firm of which B, C and D are partners. B is insane and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(b) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

The expression "time has begun to run" occurs also in section 9 of the present Act which provides that where once time has begun to run, no *subsequent* disability or inability to institute a suit or make an application stops it.

English Act.

7.6. It may be of interest to mention that the difficulties arising out of the expression 'time will not run', as respects persons under disability, are not present in section 22 of the U.K. Limitation Act, 1939 (so far as is material) reads as under:—

> "If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years, or in the case of actions to which the last foregoing section applies, one year from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired."

While commenting on the special provision regarding limitation for infants, Halsbury has observed[1] that the provision is a saving clause which does not, of itself impose a disability and the plaintiff, while under disability, may bring his action in the same way as if the Act had not been passed, and may also do so within the statutory period after determination of the disability.

Law in U.S.A.

7.7 In regard to the American Law *Corpus Juris Secondum* states the position thus:

> "The saving of the position of limitation by reason of disabilities depends on the statute as it existed at the time the cause of action accrued. In the absence of such a saving clause the statute runs against all persons whether or not they are under disability".

and this statement of the law has been quoted in various cases.

However, it is observed:

> "The statute begins to run against persons under disability as soon as the disability is removed, but, unless a statute prescribed the maximum period that limitations may be tolled by disabilities, limitations do not begin to run until the disability is removed".

A reading of the above shows that even in American jurisdictions the expression "limitations do not begin to run" has been understood to mean suspension of the running of the time, even though that running of time started earlier, even against the person under disability and the expression has not been understood to mean that the starting point of limitation itself is postponed.

Need for amendment

7.8. As the expression "time will not run" (in section 7) is giving rise to difficulties of interpretation[2], we are of the view that the language of existing section 6(1) can be usefully incorporated in section 7, and section 7 should be suitably amended on those lines.[3]

Recommendation.

7.9. In the light of the above we recommend that section 7 should be revised as under:

Revised section 7

> "7. Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability *as is referred to in section* 6, *then* —

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[1]Halsbury (4th Ed.), Vol. 28, page 388, para 868. See also Vol. 24, para 895.1 *et seq.*
[2]Paragraph 7.2 to 7.4 *supra.*
[3]For the draft see paragraph 7.9 *infra.*

(Chapter 7—Section 7—Disability of one of several persons. Chapter 8—Section 8—Special Exceptions to the Provisions Concerning Disability. Chapter 9—Section 9—Continuous Running of Time.)

(a) if a discharge can be given without the concurrence of such person, *the provisions of section 6 shall not apply in favour of any of those persons*:

(b) if no such discharge can be given, *the provisions of section 6 shall apply in favour of all of them*, until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. (Rest of the section as at present).

CHAPTER 8

SECTION 8 : SPECIAL EXCEPTIONS TO THE PROVISIONS CONCERNING DISABILITY

Special Exceptions to the provisions concerning disability.

8.1. Section 8 provides that the provisions concerning disability (sections 6 and 7) do not apply to suits to enforce rights of pre-emption, nor shall be deemed to extend, for more than three years from the cessation of the disability of the death of the person affected thereby, the period of limitation of any suit or application. The section thus (i) totally excludes from the beneficial provisions suits to enforce right of pre-emption, and (ii) puts an arithmetical limit on the extent to which the beneficial provisions relating to disability can operate. The first exclusion is limited to one category of suits, while the second applies to all suits and applications.

The exclusion of suits for pre-emption appears to be based on a legislative policy of not giving any relaxation to such suits, presumably in order that transactions concerning immovable property may not be kept in suspense for a long time[1]. This is fact is the rationale underlying the requirement generally met with in rules of the substantive law concerning pre-emption, to the effect that the "demand" for pre-emption should be made immediately after the sale.

The second restriction imposed by section 8 obviously shows legislative anxiety to maintain a balance between the consideration that stale demands should be discouraged and the counter-balancing consideration that the law of limitation ought not to operate in such a way as to cause serious hardship in individual cases.

No change needed.

8.2. The section has not caused any serious difficulties or controversies, and does not seem to require change.

CHAPTER 9

SECTION 9 : CONTINUOUS RUNNING OF TIME

Section 9—Continuous running of time.

9.1. The general principle that where time has begun once to run, no subsequent disability or inability to institute a suit or make an application stops it, is incorporated in section 9. There is a proviso to the section, very limited in its operation, to the effect that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt is suspended while the administration continues. The proviso becomes necessary since the same person cannot be both the plaintiff and the defendant in the same suit.

No change needed.

9.2. The section does not seem to need any change.

[1]cf. section 16(3).

CHAPTER 10

SECTION 10 : SUITS AGAINST TRUSTEES

Section 10—Suits against trustees and their representatives.

10.1. Section 10 is one of those very rare statutory provisions which grant a *total* exemption from limitation for particular suits. In brief, it provides that certain suits against a person in whom property has become vested in trust for any specific purpose are not barred by "any length of time". The same principle applies to suits against the legal representatives of the trustee or against assigns from the trustee, not being assigns for valuable consideration. The suits to which the section applies are suits for the purpose of following, in the hands of the trustee, or his legal representatives or assigns, such property or the proceeds thereof, or for an account of such property or proceeds. There is a very important Explanation to the section, which has a long historical background.[1] It reads as under:

> *"Explanation.*—For the purposes of this section, any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof."

History of the main paragraph.

10.2. The main paragraph of the section is based on early decision and certain statutory provisions.[2] But it is more elaborately worded than the earlier English provision on the subject. The current English statutory provision on the subject is, of course, fairly elaborate.[3-4]

History of the Explanation.

10.3. The Explanation, of course, does not occur in the English statutory provisions. It was, in fact, not contained even in Indian Law before 1929. It was inserted as the second paragraph of section 10 of the Act of 1908 by the Indian Limitation (Amendment) Act, 1929 (1 of 1929) to override certain judicial pronouncements. These were decisions of the Privy Council relating to Hindu religious endowments as well as Muslim religious endowments.[6-7] The Privy Council held that property dedicated to God (in the Case of Hindu endowments) did not vest in the shebait, who was merely a Manager though, by custom, he might have certain beneficial interest.

In law, the property vested in the idol or institution, as the case may be. Similarly, under Muslim law, the moment of waqf was created, the property vested in God Almighty and the *mutawalli* or *Sajjadenashin* had no right in the property. He was not a 'trustee' in the technical sense.[8] Accordingly, the benefit of the provision in section 10 of the Act of 1908 was not available against such persons. It was to override these pronouncements that the relevant paragraph was added in section 10 of the Act of 1908—a provision which has been carried over in the present Act.

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[1]cf. B. K. Mukherjee, "Hindu Law of Religion and Charitable Trusts" (4th Edition 1979) page 298—313, para 6.69 to 6.98.

[2]Cf *Girinder Chunder v. Mackintosh*, (1879) I.L.R. 4 Cal. 897.

[3]Section 19, Limitation Act, 1939 (Eng) (See paragraph 10.6 infra).

[4]CT. *Chintaman* v. *Khanderao*, A.I.R. 1928 Bom. 58.

[5]*Vidya Varuthi v. Balusami Aiyar* A.I.R. 1922 P.C. 123, 41 M.L.J. 346.

[6]*Abdur Rehim* v. *Narain Dasa* A.I.R. 1923 P.G. 44; (I.R.) 50 Cal. 329

[7]Civil Justice Committee Report, (LR) 50, Cal. 329, followed by Council of State Bill No 8 of 1927.

[8]See, for other rulings before 1929, B. K. Mukherjea, Hindu Law of Religious and Charitable Trust & (4th Ed. 1979), pages 301-304, para 6.74 to 6.78.

Need to cover Sikh and Jain endowments.

10.4. We have considered the question whether the Explanation to section 10 should be extended to Sikh and Jain endowments, and have come to the conclusion that the scope of the Explanation should be so widened. The mode of creation of these endowments in not, substantially different from that in vogue amongst Hindus and Buddhists. The practice of having a "manager" without formally constituting him a 'trustee' is prevalent in regard to Sikh and Jain endowments also. The section of the public interested in these endowments would, therefore, need the protection conferred by Explanation, to the same extent as those already entitled to its benefit. It may be repeated that the Explanation became necessary in view of the fact that certain judicial decisions took the view that in the case of Hindu endowments, there is no express trust as such, and the concept of trust which implies the vesting of property in the trustee, could not be appropriately applied to these endowments, because there is no vesting of property in these managers.[1] Similar was the view regarding wakfs. To override this judicial pronouncements, it became necessary to provide, first that in such cases the endowment shall be deemed to be a trust; secondly, that it shall be deemed to be for a specific purpose and thirdly that the manager shall be deemed to be the trustee. The background against which the Explanation came to be inserted is to be borne in mind in suggesting its extension[2].

Need for specific provision.

10.5. The express mention of Hindus, Muslim and Buddhist endowments and the omission of mention of endowments of Sikhs and Jains may create an impression that Sikh and Jain endowments are excluded from the benefit of the section. The practice of creating trusts for 'charitable purposes' is as much prevalent amongst persons following these two religions as it is amongst Hindus, Muslims and Buddhists.[4] There is, in our view, hardly any reason why these two communities should be excluded from the beneficial provisions of the Explanation.

Accordingly, we recommend that the existing Explanation to section 10 should be amended[5] suitably, on the lines mentioned above.

Trustee who is also a beneficiary the English Act, 1980.

10.6. To proceed now to a different aspect of section 10 it may be stated that the British Parliament felt that the corresponding section 19 of their Limitation Act, 1939 was working unjustly on an 'honest trustee' who was also a beneficiary under the trust. Thus if 'X' is a trustee of, and beneficiary under a trust along with three more beneficiaries A, B and C, a fifth person D can sue without any barrier of limitation to recover the full amount of the share of the trust property to which he would have been entitled and obtain satisfaction out of the share of X, the trustee-beneficiary even though limitation has expired against the other three beneficiaries A, B and C. That is to say, if the fifth beneficiary D has a 20% share, his entire share will be carved out of the allotment of X which is only 25% of the entire assets leaving him with only 5%. The amendment effected by U.K. Limitation (Amendment) Act, 1980 has come into force on 1st May, 1980. Now, after the amendment, X will not be divested of the 20% share, but only of the excess 5%.

Section 19 of the U.K. Act of 1939 as amended in 1980 now reads as under:—

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[1]Paragraphs 10.1 and 10.2, *supra.*
[2]Paragraph 10.3, supra.
[3]*Allah Rakhi* v. *Muhammad Abdul Rahim:* (1933) I.L.R. 56 All. 111, 116 (P.C.), and cases in paragraph 10.3, supra
[4]B. K. Mukherjea Hindu Law of Religious and Charitable Trusts (4th Ed. 1979), page 328, para 7.12.
[5]See, for the suggested amendments, para 10.8 *infra.*

(Chapter 10—Section 10—Suits Against Trustees.)

"10. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(1A) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of paragraph (b) of the foregoing sub-section to recover that property or its proceeds after the expiration of the period of limitation, prescribed by this Act for bringing an action to recover trust property shall be *limited to the excess* over his proper share.

This sub-section only applies if the trustee acted honestly and reasonably in making the distribution."

Desirability of adopting the English provision.

10.7. Though the problem sought to be remedied by the recent amendment to the English Act[1] has not arisen in any case decided, the amendment incorporated a salutary rule of equity and hence we recommend its adoption in our Act.[2]

Recommendation

10.8. Accordingly, we recommend that section 10, should be re-numbered as sub-section (1) and after the words "notwithstanding anything contained in the foregoing provisions of this Act", the words and figures *"but subject to the provisions of sub-section* (2)" should be added in it. New sub-sections (2) and (3) should be added in section 10 as under:—

"(2) *Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any suit by virtue of sub-section* (1) *to recover that property or its proceeds or for an account of such property or proceeds after the expiry of the period of limitation shall be limited to the excess received or retained by him over his share.*

(3) *The provisions of sub-section* (2) *apply only if the trustee, in making the distribution, acted in good faith.*"

The Explanation to the Section should be revised as under:—

"Explanation.—For the purposes of this section any property comprised in a Hindu, Muslim, Buddhist, Sikh or Jain religions or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof."

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[1]Paragraph 10.6 *supra.*

[2]For the draft, see para 10.8 *infra.*

CHAPTER II

SUITS ON FOREIGN CAUSES OF ACTION

Section 11—Contracts entered into elsewhere.

11.1 While section 10 was a negative provision excluding from the scope of the Act certain kinds of suits, section 11(1) is a *positive* provision to the effect that suits instituted in the territories to which this Act extends on contracts entered into in the State of Jammu & Kashmir or in a foreign country shall be subject to the rules of limitation contained in the Act. Not content with this positive provision, the section, in sub-section (2), rules out the application of foreign rules of limitation by providing that no rule of limitation in force in the State of Jammu & Kashmir or in a foreign country shall be a defence to a suit instituted in the territories to which the Act extends on a contract entered into in that foreign country or in Jammu & Kashmir unless two conditions are satisfied, namely:

(a) the rule has extinguished the contract, and

(b) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule.

Principle.

11.2. The section is based on the principle well recognised in private international law in the Anglo-American Legal Systems—that rules of limitation are part of the *lex fori*. Whether an obligation is to be enforced or not depends exclusively upon the law of limitation of the forum in which the suit is brought. As observed by Story very long ago.[1]

> "It has accordingly become a formularly in international jurisprudence that all suits must be brought within the period prescribed by the local law of the country where the suit is brought (*lex fori*), otherwise the suit will be dismissed."

In contrast, the foreign law of *prescription* would be applied in a country, because when a law extinguishes the right by reason of lapse of time, the right itself does not survive, and there is nothing to enforce.

Position as to rights under Treaty of Rome.

11.3. It may be mentioned that in proceedings brought in national courts to enforce rights created by the Treaty of Rome (which established the European Economic Community), the relevant limitation period is that fixed by the State in which the action is brought.[2]

The English Law.

11.4. The traditional English rule is well settled. In Presten and Newson on Limitation of Actions, the authors wrote as follows under the heading "Private International Law":—[3]

> "The English courts have adopted a very simple method of dealing with the rules of limitation in private international law. It is common ground between all systems of private international law that matters of procedure are to be determined by the lex fori. In so far as the Statutes of Limitation prescribe periods within which actions may be brought, they are, in English courts, classified as methods of proceeding."

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[1]Story, Conflict of Laws. (8th Ed.) Article 577, page 794; *Cf. Ruckmaboye* v. *Lulloobhoy*, (1852) 5 Moo. I.A. 233, 265, 267. (P.C.).

[2]Halsbury 4th Ed. Vol 28 page 266 para 606.

[3]Presten and Newson, Limitation of Actions (1940), page 16, quoted in *Rodriguez* v. *R. J. Parker*, (1966) 3 W.L.R. 546, Cf. *ibid.* (1953 ed), page 15 (no material change).

(Chapter II—Section 11—Suits on Foreign causes of Action.)

Referring to *Don* v. *Lipmann*,[1] the authors observed.[2]

"But a foreign rule of limitation is not classified as a matter of procedure in an English court if it *extinguishes the right as well as the remedy*. The fact that on expiration of the foreign period the plaintiff's right is to be extinguished does not help a plaintiff who fails to sue in England within the English period, but a defendant may rely on the extinguishment by the foreign period irrespective of whether the English period had elapsed....."

Restatement

11.5. The rule has also been incorporated as Rule 604 of the Restatement of Law of the American Law Institute thus.[3]

Rule 604—Foreign Statute of Limitations

"If action is not barred by the statute of limitations of the forum, an action can be maintained though action is barred in the State where the cause of action arose."

Criticism by Cheshire and North.

11.6. Cheshire and North have observed[4], criticising the English approach as under:—

"English law in unfortunately committed to the view that statutes of limitation, if they merely specify a certain time after which rights cannot be enforced by action, affect procedure, not substance[5].....In the result, therefore, any relevant statute of limitation that obtains in the *lexfori* may be pleaded while a statute of same foreign law, even though it belongs to the proper law of the transaction, must be disregarded.[6] The prevailing view on the continent is to be *opposite effect*.

"This is another example where English law, through its failure to interpret a foreign rule in its context has gone astray".

Status quo recommended by U.K. Law Reform Committee.

11.7. The U.K. Law Reform Committee in its 21st Report[7] took notice of this criticism, but did not make any recommendation in this regard:

"As we have explained, English law treats limitation as part of the law of procedure. An English court will, therefore, always apply English law *lex fori*) to an issue of limitation, notwithstanding that the substantive rights in question are governed by foreign law.[8] In determining the existence of those substantive rights a distinction has to be drawn between a foreign rule of limitation and a foreign rule of prescription: if the 'proper law' of the transaction (*lex causae*) extinguishes the right through lapse of time, the English court will give effect to that extinction if, on the other hand, under the relevant lex causae lapse of time merely bars the remedy (as it does in most cases in English law), the English courts will ignore the foreign limitation period and apply English law alone.

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[1]*Don v. Lipmann* (1837) 5 Cl.&Fin. 1.
[2]See Preston & Newson, Limitation of Actions (1940), page 16, quoted in *Rodriguez* v. *R. J. Parker*, (1966) 3 W.L.R. 546, 560.
[3]A.L.I. Restatement of Conflict of Laws, Rule 604.
[4]Cheshire and North, Private International Law, (10th Edition, 1979), page 695.
[5]*Rodriguez* v. *R. J. Parker* (Male), (1967) 1 Q.B. 116, 131-136 and see *Pedresen* v. *Young*, (1964) 110 C.L.R. 162.
[6]This has been followed even in Australian jurisdiction, *Panozza & Co. Pty. Ltd.* v. *Allied Interstate (Old.) Pty. Ltd.*, (1976) 2 N.S.W.D.R. 192.
[7]Law Reform Committee, 21st Report (Cmnd. 6923) (September, 1977), page 30.
[8]*Harris* v. *Quine*, (1869) L.R. 4 Q.B. 653.

Classification of limitation is not itself part of the law of limitation but of private international law and therefore not "within our terms of reference. For that reason, we make no positive recommendation about it. Nevertheless we received from Dr. F. A. Mann a memorandum arguing persuasively in favour of making a change in the English rule (which has been heavily criticised by academic writers)[1] and we think it right to mention the matter so that it may be considered as a possible subject for reform."

11.8. Besides Cheshire another team of distinguished authors[2] have also attacked this principle of English law thus: Criticism—Sykes and Pryles.

"Statutes of limitation in the familiar sense usually prescribe that no court proceeding shall be brought to enforce a right after the lapse of a certain period of time. Sometimes however they provide that the right or title is extinguished.[3] It is only statutes of the latter type that the English classificatory technique regards as pertaining to substance. The other type of statute of limitations which merely extinguishes the remedy is regarded as procedural.[4]

"This means that a plaintiff can sue in an Australian court on a cause of action which, though barred by the proper law of the transaction, is not barred by Australian law;[5] it also means that an action cannot be brought in Australia if barred by an Australian statute of limitations, though action would still be competent by the proper law[6].

"It is suggested that such applications rest on no intelligible principle, nor is the distinction between extinction of right and extinction of remedy meaningful in this context. A statute can hardly be regarded as prescribing a mode of regulating the course of litigation if it simply says that no litigation can take place."

However, they add—

"Nevertheless, the tide of English decisions has probably set so firmly in the direction of the dichotomy between extinction of right and extinction of remedy hat no movement is now possible."

11.9. We have devoted considerable thought to this aspect. With great respect, the criticism made by Cheshire of the traditional English Rule (which has been substantially followed in section 11), appears to be based on one faulty concept of reasoning. The law of limitation may not be a part of the law of "procedure" in the narrower sense, but it is certainly a part of adjective law in the widest sense. The criticism does not do justice to the juristic aspect mentioned above. Procedure may be a narrow field, but adjective law is a wider one, covering the entire process of litigation, including the time and manner of pursuing a remedy in the Courts of a country. It is but fair that the courts operating within a country should have regard only to the law of that country, so far as the pursuit of Correct approach.

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[1]E.g. J.D. Falconbridge, Essays on the Conflict of Laws, 2nd ed., Ch. 12, Cheshire, Private International Law, 9th Ed. (ed. North), pages 687-690.

[2]Sykes and Pryles, "Australian Private International law" (1979), page 130.

[3]As (in the English context) in the case of so-called adverse possession of land and in some cases of failure to take action in respect of chattels.

[4]*Huben* v. *Stainer*, (1835) 2 Bing (N.C.) 202; 132 E.R. 80. See *Subbotovsky* v. *Waung*, (1968) 3, N.S.W.R. 261 (Nagle J.).

[5]Harris v. Quine, (1869) L.R. 4 Q.B. 653 (Court of Queen's Bench).

[6]*British Linen Co.* v. *Drummond*, (1830) 10 B & C 903; 109 E.R. 683.

remedies in those courts is concerned. Limitation is certainly concerned with the actual process of litigation; the need for invoking a rule of limitation arises only if and when the plaintiff invokes the aid of the judicial process. In this sense, limitation is very much concerned with the enforcement of the remedy within the portale of the court and is therefore rightly regarded as belonging to adjective law.

We may quote the views of an American author[1] who has beautifully described the distinction between remedy and right:—

> "A broken promise is not repaired by the passage of a period. False words that stain a name are not made true because twelve months go by. Pain may recede in memory, but that does not mean it was not sufferred when the victim was assaulted. If these things are recognised as deserving reparation, they deserve it no less the day after the term is reached than they did the day before. Time does not heal all wounds; homily is fatuous .....
>
> "Thus, limitation appears to be not a matter of substantive right, but a practical device. It is difficult to deal with an event long after it has happened. Memories fade, witnesses die, documents vanish, proof one way or the other is hard to find. Moreover, even with all the evidence at hand, the outcome of a law suit will not necessarily coincide with truth. Much depends on the hazards of litigation, on the wisdom and honesty of judges and jurors, the luck of testimony. Hence it is only reasonable that the alleged wrong doer (in most instances, we will not be certain he did wrong) should one day be entitled to repose. Finally—most important and scarcely ever mentioned—if all disputes were kept alive forever, then there would be an infinity of litigation. In the management of a polity there needs to be an end of things."

Some theoretical aspects answering the criticism.

11.10. It has been stated by the critics of the traditional rule that "a statute can hardly be regarded as describing a mode of regulating the course of litigation, if it simply says that no litigation can take place." However, this criticism is itself open to criticism. The procedural law contains so many rules which bar the very entertaining of a suit on procedural grounds and nobody has ever said that such rules are not regarded as falling appropriately within the domain of procedure. Our own Code of Civil Procedure contains examples of such rules in section 11, section 47, section 66, section 80, section 86, Order 2, Rule 2, Order 7, Rule 11, Order 9, Rule 8, Order 23, Rule 1 and so on.

Some practical aspects of importance.

11.11. Apart from these theoretical aspects, it should also be mentioned that there is an important practical aspect which cannot be overlooked. When a court embarks upon an inquiry into the period of limitation, such an inquiry covers not merely the time limits proper (the arithmetical periods), but also various detailed rules for the computation of those periods. If we were to expect courts to have regard to foreign law of limitation, that would mean calling upon the court to study, understand and apply the foreign law in all its complexity and profusion. This would be an extremely difficult task.

11.12. For all these reasons, we have been unable to persuade ourselves to accept the criticism made by Cheshire and others[2] of the traditional English Rule—a rule which has been adopted in the American Restatement also.[3]

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[1]Charles Rembar, The Law of the Land (1980) page 81.
[2]Para 11.6 and 11.8, *supra*.
[3]Para 11.5, *supra*.

(Chapter II—Section 11—Suits on Foreign causes of Action.)

11.13. We may add that on grounds of policy also, a court ought not to be bound by the rules of limitation applicable under a foreign *lex causae*. The time limit may be either unreasonably short or unreasonably long. Policy considerations.

11.14. It is not always an easy task to ascertain foreign law. This could prove an onerous burden on the courts. The burden would be all the more onerous for the Indian courts to ascertain the foreign law of limitation of 150 countries by paying for the fees and costs of foreign experts which would unnecessarily delay the disposal of cases. It should be remembered that, as mentioned above, if the foreign law is to be applied, the Indian court will have to study not only the time limits, but also the principles for the computation of periods of limitation. This would be a stupendous undertaking. Difficulty of ascertaining foreign rule.

11.15. Therefore, we see no reason to disturb the principle underlying section 11. Some matters of detail concerning the section may now be dealt with. Though sub-section (2) of section 11 is confined to contracts, the position would not, in substance, be different for other causes of action that arise outside the territories to which the Act extends. Suits on causes of action other than contracts.

The section has been held not to be exhaustive.[1] Thus, for example, the same principle applies to execution.[2] Again, if a suit is for conversion, the same principle would apply.[3]

11.16. In this context, the history of the section is interesting. Section 12 of the Act of 1871 provided as under:— History of section 11 studied from the point of view of scope.

> "12. No foreign rule of limitation shall be a defence to a suit in British India on a contract entered into a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule."

In 1877, a positive assertion about the applicability of the Indian Act to suits instituted in British India was made. Section 11 of that Act read as under:—

> "11. Suits instituted in British India on contracts entered into a foreign country are subject to the rules prescribed by this Act.
>
> No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule."

11.17. In the draft Bill of the Indian Limitation Act, 1908 no change from the Act of 1877 was proposed as regards this section. However, one comment[4] was received which was as under:— Comment-Khandesh (1907).

> "The words 'or obligation incurred in' should be added after 'contracts entered into', in order to show that suits, of whatever class the cause of

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[1] *Dickie & Co.* v. *Mun. Board*, A.I.R. 1956 Cal. 216, 219 (Bachawat J.).

[2] *Nabibhai Vasirbhai* v. *Dayabhai Amulak*, A.I.R. 1916 Bom. 200, 201, 202: I.L.R. 40 Bom. 504.

[3] *Ruckmaboyee* v. *Luloobhoy Mothchand*, (1851-1855) 5 M.I.A. 234 (P.C.).

[4] H.S. Phadnis, Acting District Judge, Khandesh No. 2, 751 dated 30th November, 1907, National Archives Papers.

action in respect of which arises in foreign country, are subject to these provisions."

This is an interesting comment raising as it does a point which we ourselves have apart from the comment pursued.

Need for widening the section.

11.18. To revert to the present section and current needs, we wish to point out that the principle of private international law upon which the section is based, makes no distinction between suits based on contracts and other suits. Practical considerations also justify a widening of the section so as to make it applicable to all causes of action. There is no reason for adopting a different approach as to non-contractual causes of action. We think that the section should be widened.[1]

Section to be extended to proceedings other than suits.

11.19. There is another point in regard to which also the ambit of the section can be conveniently widened. The section, as it stands at present, is confined to suits; we are of the view that it should be extended to all proceedings. Although proceedings other than suits wherein the question of competition between Indian and foreign laws of limitation may be in issue are not many, there is no reason why the legislature should not recognise the principle underlying section 11 and give it the widest amplitude. Irrespective of the character of the proceeding, if the remedy sought is not barred by the law of limitation of the forum, then in that forum the law should allow the proceeding to be maintained, even though it may be barred by the law of limitation of the country where the cause of action for the particular proceeding arose. The principle on which section 11 is based— a matter which has been already elaborated in the preceding paragraphs[2]—should be regarded as equally applicable, whether the litigation is in the shape of a suit or in the shape of any other proceeding. Accordingly, we propose a widening of the section on this point also.[3]

Recommendation.

11.20. In the light of the above discussion, we recommend that section 11 should be revised as under:—

Revised section 11

"11. (1) *Suits and other proceedings* instituted in the territories to which this Act extends on causes of action arising in the State of Jammu and Kashmir or in a foreign country shall be subject to the rules of limitation contained in this Act.

(2) No rule of limitation in force in the State of Jammu and Kashmir or in a foreign country shall be a defence to a suit or proceeding instituted in the said territories *on a cause of action arising* in that State or in a foreign country unless—

(*a*) the rule has extinguished *the right which the cause of action is founded:* and

(*b*) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule."

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[1]For a draft of revised section 11, see para 11.20, *infra.*

[2]Paragraphs 11.2 to 11.4, *supra.*

[3]For the draft see para 11.20, *infra.*

CHAPTER 12

SECTION 12: EXCLUSION OF TIME IN LEGAL PROCEEDINGS

Section 12.

12.1. With section 12 begins a set of provisions dealing with the computation of periods of limitation. Assuming that the Indian law of limitation applies to the case, attention has also to be paid to the arithmetic of the matter. In section 12, one finds two sets of provisions—one general, the other of a more limited application. The first set of provisions provides for excluding the first day—the day from which the period is to be reckoned. The second set of provisions provides for excluding, in computing the period of limitation, the time requisite for obtaining certain copies. The second set of provisions is confined to appeals and certain applications, while the first set applies to all suits, appeals and applications. The two sets have nothing common to them and it is only the accidents of legislation that have brought them together.

The principle underlying exclusion of the first day.

12.2. The first set of provisions is to be found in section 12(1) and in the earlier part of section 12(2). Section 12(1) provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded. On the same analogy, the earlier part of section 12(2) provides that in computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced, shall be excluded. Broadly stated, the principle here is that the date of accrual of the cause of action is to be excluded.[1]

Provisions for excluding the first day are contained in the General Clauses Act[2] and the Transfer of Property Act[3] also. This is more a rule of convenience than a rule based on any fundamental principle of justice.

Principle underlying sections 12(2), 12(3) and 12(4)—exclusion of time requisite for obtaining copies.

12.3. The second set of provisions deals with the time requisite for obtaining copies of judgments, decrees, sentences, orders and awards, where an appeal or an application of the specified category is to be filed. These are contained in section 12(2), latter half and sections 12(2)(3) and 12(4).

The Explanation to the section (which has provoked some controversy, to be mentioned later[4]) reads as under:

> "*Explanation.*—In computing under this section the time requisite for obtaining a copy of a decree or order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded."

The principle underlying the set of provisions for the exclusion of "time requisite" in obtaining copies of judicial determinations is two-fold. In the first place, before a litigant aggrieved by the decision of a court or arbitrator pursues a remedy by way of appeal or application in order to contest the legality, propriety or correctness of such decision, it is proper that he should have

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[1] *Cf. Ganapati* v. *Sitharama* (1886) I.L.R. 10 Mad. 292.

[2] Section 9, General Clauses Act, 1897.

[3] Section 110—Transfer of Property Act, 1882.

[4] See discussion relating to section 12 Explanation *infra*.

knowledge of its full contents.[1] Secondly, in some cases, the law requires that the appeal or application must be accompanied by a copy of such decision[2].

Law Commission Report.

12.4. The Law Commission, in its Report on the Act of 1908, while commenting[3] on section 12 of the Act, observed as under:—

> "Some courts have taken the view that the delay in drafting the decree before an application for a copy is made should be deducted as 'time requisite'. But we think that a delay of the office before the application for a copy is made should not count in favour of the party. A suitable provision should be added to make this clear."

The Commission also recommended a draft of an Explanation to be added at the end of section 12 for achieving the above object:

> "*Explanation.*—Any time taken by the Court to prepare the decree or order before an application for copy thereof is filed *shall not be regarded as time requisite* for obtaining the copy within the meaning of this section."

12.5. Even though the recommendation of the Commission was accepted in principle, the Explanation that was enacted has used the expression "shall not be excluded" instead of the wording suggested by the Commission "shall not be regarded as time requisite". The Explanation emerged as follows in the Act as passed in 1963:

> "*Explanation.*—In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made *shall not be excluded.*"

Case law regarding the newly added explanation.

12.6. Difficulties of interpretation arose under the newly added Explanation to Section 12. In a full Bench decision of the Bombay High Court[4], it was observed:—

> "On the plain and grammatical construction of the Explanation to section 12(2) of the Act the intention of the Legislature is clear namely, that while computing the time requisite for obtaining a copy of decree any time taken by the court for preparation of the decree before an application for a copy thereof is made *is not to be* excluded, that is to say, such period will have to be included in computing the time requisite for obtaining copy."

Earlier, a full Bench of Patna High Court[5] had taken notice of the rationale underlying the recommendations of the Law Commission, but concluded that the text of the Explanation said just the opposite:—

> "I am aware that the Law Commission, while recommending the recast of the old Limitation Act, stated that in their view, the period taken by the court for preparing the decree before an application for a copy is made, "should not be counted in favour of the applicant. One of the objects and reasons given in the bill was that any delay in the office of the court in

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[1] *Cf. Surty* v. *Chettyar*, (1928) 55 I.A. 161, 170 (PC).
[2] 0.41, r.1, C.P.C. is one example.
[3] Law Commission of India, 3rd Report (Limitation Act, 1908), page 17-18, para 37, page 76 (section 12).
[4] *Subbash* v. *Maroti*, A.I.R. 1975 Bombay 244 (F.B.).
[5] *State of Bihar* v. *Md. Ismail*, A.I.R. 1966 Patna 1 (F.B.).

drawing up a decree or order before the application for a copy thereof is made, shall not be excluded. The recommendation of the Law Commission or the objects and reasons stated in the bill cannot alter the clear and unambiguous meaning of the actual enactment that the parliament passed."

Quietus by Supreme Court.

12.7. Fortunately, the Supreme Court,[1] has now settled the position and interpreted the Explanation to section 12 to mean that a person cannot get exclusion of the period that elapsed between pronouncement of the judgment and the signing of the decree, if he made the application for a copy only after preparation of the decree. In view of the latest judgment of the Supreme Court, the controversy has subsided. However, in order to express the intention and true meaning more clearly, we recommend a suitable change in the Explanation under discussion.[2]

Legal impediment to the preparation of a decree.

12.8. A situation may arise when there is a legal impediment to preparing a decree. When there is a legal impediment to prepare a decree on account for non-compliance with such direction or for other legally permissible reasons the law should allow relaxation. The point was adverted to in one case before the Supreme Court.[3] We are recommending a suitable amendment[4] inserting a specific provision on the subject.

Order 20, rule 6A, Civil Procedure Code—Effect of.

12.9. At this stage, we may also take notice of the newly added rule 6A to Order 20, Code of Civil Procedure, 1908. In implementation of the recommendations of the Law Commission made in its Report, (on that Code)[5] it has now been made obligatory upon the courts to prepare the decree as expeditiously as possible and, if it cannot be so done within 15 days from the date of the pronouncement of the judgment, the aggrieved party is enabled to obtain a certificate that the decree has not been drawn up. The aggrieved party can in such case prefer an appeal treating the last paragraph of the judgment as a decree. Similarly, the decree holder can initiate the process of execution on the basis of the last paragraph of the judgment, which itself shall be deemed to be the "decree" for the purpose of execution. The amendment made in 1976 thus confers the status of a decree upon the copy of the last paragraph of the judgment, but that status comes to an end the moment a regular decree is drawn up.

Amendment of Section 12 regarding copy of the last paragraph of the judgment.

12.10. So far as the inter-connection of Rule 6A of Order 20, Code of Civil Procedure, 1908 with Section 12, Limitation Act is concerned, it would be uncontraverted that the aggrieved party would as much be entitled to obtain an exclusion of time on account of delay in obtaining a copy of the last paragraph of the judgment (on the basis of which he can now take steps for filing an appeal), as he would be in obtaining a copy of the actual decree. It is true that the party would be able to obtain a copy of the last paragraph of the judgment somewhat earlier than copy of the decree. Nonetheless, the copying section of the court is bound to take some time in supplying a copy of even the last paragraph of the judgment. To put the matter beyond the pale of doubt, we recomend that a suitable Explanation should be added to section 12 on the above point.[6]

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[1] *Udayan Chinubhai* v. *R.C. Bali*, A.I.R. 1977 S.C. 2319.
[2] See para 12.13 infra for the draft discussion.
[3] *Udayan Chinubhai* v. *R. C. Bali*, A.I.R. 1977 S.C. 2319, 2337. Para 35.
[4] See para 12.13 *infra*.
[5] Law Commission of India, 54th Report (Code of Civil Procedure, 1908) Chapter 20.
[6] See paragraph 12.13 *infra*.

(Chapter 12—Section 12—Exclusion of time in legal proceedings)

Quasi-judicial tribunals.

12.11. One more change needed in Section 12 concerns tribunals. We are of the opinion that the section should, by an express provision, be extended to quasi-judicial bodies, since there is no reason why the time taken in the various steps contemplated by the section should not be available in regard to appeals before such tribunals. It is desirable that the matter should be governed by a specific provision applicable to all such tribunals rather than be left to be dealt with on a case-to-case basis.

Marginal note to section 12 to be amended.

12.12. There is yet another point (though a minor one) on which Section 12 will need amendment. The marginal note to section 12 speaks of "Exclusion of time in legal proceedings", and the expression "legal proceedings" should be given a wide meaning so as to include proceedings before tribunals. This would mean amending the section. If section 12 is to be amended so as to put it beyond doubt that the section is applicable to proceedings before tribunals,[1] it would be better to amend the marginal note also. This is so because where the marginal note has not been amended despite the addition of matter in the section, sometimes controversies arise.[2] Such controversies are worth avoiding wherever possible.

Recommendation.

12.13. In the light of the above discussion, we recommend the following amendments to section 12:—

(i) The marginal note to the section should be revised as under:—

"Exclusion of time in legal proceedings, *including proceedings before quasi-judicial tribunal.*[3]

(ii) The present Explanation should be revised, and certain further Explanations should be added. The Explanations to appear before section 12 will now read as under:—

(S. 12, Expl. I)

"Explanation I.—Any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be regarded as time requisite for obtaining the copy within the meaning of this section."[4]

(New)

Explanation II.—Where there is a legal impediment to the preparation of a decree or order on account of a direction in the judgment or non-compliance with the direction or for any other legally permissible reason, any time during which the decree or order cannot be prepared on account of such legal impediment shall be regarded as time requisite for obtaining the copy within the meaning of this section.[5]

(New)

"Explanation III.—For the purposes of this section, 'decree' includes the last paragraph of the judgment, where it is proposed to use a copy thereof for the purpose permitted by rule 6A of Order XX in the First Schedule to Code of Civil Procedure, 1908.[6]

(New)

"Explanation IV.—For the removal of doubts, it is hereby declared that the provisions of this section apply to proceedings before quasi-judicial tribunals, as they apply to proceedings before courts."[7]

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[1]Paragraph 12.11. *supra.*
[2]*Tara Prasad Singh* etc. v. *Union of India & others* (1981) 1 S.C.J. 53, 67.
[3]Paragraph 12.12 *supra.*
[4]Paragraph 12.9 *supra.*
[5]Paragraph 12.8 *supra.*
[6]Paragraph 12.10 *supra.*
[7]Paragraph 12.11 *supra.*

(Chapter 13—Section 13– Exclusion of time where leave to sue or appeal as pauper is applied for

CHAPTER 13

SECTION 13: EXCLUSION OF TIME WHERE LEAVE TO SUE OR APPEAL AS PAUPER IS APPLIED FOR

Section 13.

13.1 Section 13 deals with a very special case; provision is made for excluding time taken in prosecuting an application for leave to sue or appeal as a "pauper", where ultimately such leave is refused, and the "pauper", has then to file a suit or appeal as an ordinary person. The section was introduced in 1963. It was not contained in the original Bill and was inserted[1] by the Joint Committee on the Bill for the following reasons:—

> "The Committee feel that in a case where an application for leave to sue or appeal as a pauper has been made and rejected, the time taken in prosecuting in good faith such application should be excluded in computing the period of limitation prescribed."

Analysis.

13.2. The Section really consists of two parts, and its content may be restated in a simplified form thus:

(1) Where an application for leave to sue or appeal as a pauper has been made and rejected, then, in computing the period of limitation prescribed for any suit or appeal in such case, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded.

(2) The Court may, on payment of the court fee prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the court fee had been paid in the first instance.

Procedural provisions as to indigent persons.

13.3. The purport and significance of section 13 will be better understood if one bears in mind the scheme of the provisions[2] in the Code of Civil Procedure, 1908 as to suits and appeals by "indigent persons" (who were, before the amendment of the Code in 1976, described as "paupers"). A person who does not have sufficient means to pay the court fee prescribed for the plaint can seek leave of the court to sue as an indigent person. To determine whether such leave should be granted, the court is required to hold a preliminary inquiry, at the end of which either the leave prayed for is granted or refused.

If the leave is granted, then the application is converted into a plaint—the Code of Civil Procedure, 1908 so provides in express terms. In harmony with this procedural provision, the Limitation Act[3] enacts that for the purposes of the Limitation Act,

> "(a) a suit is instituted.....
>
> (ii) in the case of a pauper when his application for leave to sue as a pauper is made."

What happens, however, where the application is refused and the applicant has to file a suit in the ordinary manner after payment of court fees? The Indian Limitation Act, 1908 contained no provision on the subject. As regards the

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[1]Joint Committee Report on the Limitation Bill, 20 November, 1962.
[2]Orders 33 and 44, Code Civil Procedure, 1908.
[3]Section 3(2)(d)(ii), Limitation Act, 1963.

(*Chapter* 13—*Section* 13—*Exclusion of time where leave to sue or appeal as pauper is applied for*
(*Chapter* 14—*Section* 14—*Time taken in infructuous legal proceedings.*)

Code of Civil Procedure, section 149 of the Code empowers the Court to give time to a person for the payment of court fees generally. However, this section does not provide for the starting point of Limitation. Moreover, there is a conflict of decisions on the precise effect of an order under the section.[1] So there was no "relation" back of the suit filed within the extended time.[2]

The provision in section 13 of the present Limitation Act now gives a definite answer; the time taken in the (infructuous) application is excluded when computing the period of limitation prescribed for the suit filed (on payment of court fees). As regards appeals, the Courts, under the earlier Limitation Act, generally used to allow the benefit of the relaxing power under section 5 of the Limitation Act, treating the fact that the infructuous proceedings had been prosecuted in good faith as a "sufficient cause" within the meaning of section 5 for condoning the delay. Under the present section 13, resort to section 5 is no longer required, since section 13 makes an appropriate for appeals also.

Verbal change recommended.

13.4. While no changes of substance are needed in the section, it is necessary to point out that the words "as a pauper" occurring in the section are out of tune with the phraseology of the Code of Civil Procedure, 1908 as amended in 1976 on the recommendation[3] of the Law Commission. The current phraseology is "indigent person" in the amended Code.

Accordingly, we recommend that in section 13, for the words "as a pauper", the words *"as an indigent person"* should be substituted.

CHAPTER 14

SECTION 14 : TIME TAKEN IN INFRUCTUOUS LEGAL PROCEEDINGS

Section 14—Exclusion of time taken by infructuous legal proceedings.

14.1 It often happens that a litigant pursues civil proceedings *bona fide* and with due diligence, but the proceedings fail because the Court is unable to entertain them by reason of defect of jurisdiction or other cause of a like nature. The litigant is therefore, compelled to institute fresh proceedings in a competent court in the proper manner. It is but fair that the time taken in the earlier civil proceedings should be given credit, when computing the period of limitation for the later proceedings. Though the English law recognises no such rule, the Indian legislature has, for a long time, given recognition to this principle, in regard to certain situations. Section 14 codifies the principle. Sub-section (1) covers suits relating to the same matter in issue. Sub-section (2) covers applications for the same relief. Sub-section (3), which was inserted for the first time in 1963, is meant for a case where the first suit was withdrawn under 0.23, R. 2 of the Code of Civil Procedure, with permission to file a fresh suit. In all the three sub-sections, it is necessary that the earlier proceeding must have failed by reason of a "defect in jurisdiction or other cause of a like nature".[4]

An Explanation to the section—

(a) provides that the day of institution and the day of termination of the earlier civil proceeding are both to be counted;

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[1]Mulla, Code of Civil Procedure, Abridged edition (1982), page 323.
[2]*Naraini* v. *Makhan*, (1885), I.L.R. 17 All 526.
[3]Law Commission of India, 54th Report (Code of Civil Procedure, 1908), Chapters 33 and 44.
[4]For various conditions of the section, see *Peerappa* v. *Basamma*, A.I.R. 1981 Karn. 163.

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(b) makes it clear that a plaintiff or an applicant resisting an appeal shall be deemed to be 'prosecuting' a proceeding; and,

(c) expressly provides that misjoinder of parties or of causes of action shall be deemed to be "a cause of a like nature with defect of jurisdiction".

In the Indian Limitation Bill, 1908, as circulated for comments, the Explanation regarding inclusion of misjoinder of parties or causes of action was absent, with the result that a number of comments were received,[1] urging the Legislative Department to resolve the conflict[2] on the question whether misjoinder of parties or cause of action fell within this clause. These suggestions were accepted, and that is how the Explanation made its appearance on the statute book.

14.2. An important question that has arisen in the context of section 14 may be considered at the outset, since it concerns section 4 as well. Put in simple terms, the question is this—Can a plaintiff avail himself of the combined benefit of section 4 and section 14. A Supreme Court case[3] illustrates the problem. A suit for damages was filed in a Karnal Court on 2nd March, 1959. Limitation had expired on 1st March, 1959, but that was a holiday. The presentation being to a wrong court, the Karnal court returned the plaint on October 28, 1959, and it was presented the next day, i.e., on 29th October, 1959 to the Ambala Court, which had jurisdiction to try the same. The plaintiff claimed (1) exclusion of the delay of one day in presenting the plaint in the Karnal Court under section 4 and (ii) exclusion of the succeeding period spent in the Karnal Court under section 14. The Supreme Court, relying on an earlier decision of the Privy Council[4], held that section 4 is inapplicable where the plaint is *presented to a wrong court,* and observed as under: **Section 4 and Section 14.**

> "If the plaintiff had filed the suit in the trial court on March 2, 1959, then certainly the suit would have been within time under section 4, as that was the proper Court in which the suit should have been filed. As the Karnal Court had no jurisdiction to entertain the plaint, it was not the proper Court. The fact that the plaintiff would be entitled to take advantage of the provisions of section 14 of the Act would not, in any way, affect the question whether the suit was filed within the time as provided in section 4 in the Karnal Court. Section 14 of the Act only provided for the exclusion of the time during which the plaintiff has been prosecuting with due diligence another civil proceeding against the defendant, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it. Even if the plaintiff was entitled to get an exclusion of the time during which he was prosecuting the suit in the Karnal and Panipat Courts, the suit would not be within time, as the filing of the suit in the Karnal Court was beyond the period of limitation".

14.3. A strict interpretation to the effect that nothing more than the exact period during which the suit was pending in a Court which discovered that it had no jurisdiction to try the same was given earlier in a Madras case[5]. The last day of filing the suit was 9-9-1918, which was a holiday. The plaint was presented to a wrong court on 10-9-1918. It was returned on 23-1-1920 for **Madras case.**

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[1]Chief Justice of Calcutta High Court No. 602, dated 21st February, 1908; Chief Justice L. Jenkins of Bombay High Court No. 2469, dated 18th December, 1907; District Judge, Dacca No. 1982 dated 5th December, 1907.

[2]I.L.R. 29 Bom 225; 6 W.R.C.R. 184; I.L.R. 10 Cal 86; I.L.R 23 Cal 821; ILR 22 Mad 494; I.L.R. 10 Bom. 608; I.L.R. 22 All. 248.

[3]*Amar Chand Irani* v. *Union of India,* A.I.R. 1973 S.C. 373; (1973) 1 S.C.C. 115.

[4]*Maqbul Ahmed* v. *Pratap Narain Singh,* A.I.R. 1935 P.C. 85; I.A. 80.

[5]*Govindasami Padayachi* v. *R. Sami Padayachi,* A.I.R. 1923 Mad. 114(2), 116, 119.

presentation to the proper Court and was re-presented on 26-1-1920. So far as the period from 10-9-1918 to 26-1-1920 was concerned, section 14 was held to be applicable and the period from 24-1-1920 to 26-1-1920 was held to be covered by section 4 of the Act. But the one day between 9-9-1918 and 10-9-1918 could not be excluded, either under section 4 or under section 14 and hence the suit was held to be time-barred. The inapplicability of section in such cases has been reiterated by that High Court,[1-2] in subsequent decisions.

Nagpur case.

14.4. A Nagpur case[3] has followed the majority trend in holding that section 4 of the Limitation Act cannot refer to other Courts in which an unsuccessful attempt at institution of a suit was made during the summer vacation when the Court was closed. However, in a later case[4], this ruling was distinguished and it was held that section 4, which by itself excludes no time, can be tacked on to section 14 of the Limitation Act.

Lahore case.

14.5. The inapplicability of section 4 to such cases has been the view in Lahore[5] also.

14.6. In a judgment of the Bombay High Court[6] we have the following observations:

> "Clearly the plaintiff is entitled to take advantage of those days during which the first Court was closed for the vacation, and the computation should be made in the same way as if the second Court had been closed for the vacation."

Need for amendment.

14.7. Having considered that matter at some length we are of the view that the situation as in the Supreme Court case[7] requires to be remedied, We take the view that where a plaintiff, filing a suit in a Court without jurisdiction on a day next following the day when the limitation period expired because the earlier day was *dies non*, finds himself denied the benefit of section 4, hardship is bound to result. If the principle of section 4 is that a plaintiff or applicant should not be penalised merely because the day on which he should have filed the plaint or application in court was a court holiday, there is no reason why the principle should not be extended to the situation when the plaintiff *bona fide* files the plaint in a Court which later on discovers that it has no jurisdiction to try the suit.

Explanation to be inserted.

14.8. We therefore recommend that a suitable Explanation should be added to section 4, on the point discussed above.[8]

Appeals.

14.9. Another question relating to the scope of section 14 pertains to the nature of the proceedings covered by the section. Section 14 speaks of computation of the period of limitation for any "suit", and in view of the definition of the word 'suit' in section 2(1), the section does not apply to appeals.

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[1]*Jayarama Aiyar* v. *S. Rajagopalan*, A.I.R. 1965 Mad. 459.

[2]*Ramachandra Iyer* v. *Annamalai*, A.I.R. 1968 Mad. 103, 105.

[3]*Wamanrao* v. *Umrao*, A.I.R. 1937 Nag. 215, 215, 216; I.L.R. 1937 Nag. 217.

[4]*Chudamansao* v. *Ramkumar*, A.I.R. 1948 Nag. 15.

[5]*Dharaman Ram* v. *Ganga Ram*, A.I.R. 1929 Lah. 425.

[6]*Basayanappa* v. *Krishnadas*, A.I.R. 1921 Bom. 379, 380.

[7]*Amar Chand Irani* v. *Union of India*, A.I.R. 1973 S.C. 373; (1973) 1 S.C.C. 115 [Para 14.2, *supra*]

[8]See para 14.23, *infra:* proposed section 4, Explanation II.

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14.10. However, several decisions hold that even though section 14 has no application to appeals which are governed by section 5, the principles of section 14 will apply even to proceedings in appeal.[1]

In a Saurashtra case,[2] the High Court relied on three Privy Council rulings on the subject[3-4-5] and summarised the result of these cases thus.

> "These three Privy Council rulings seem to lay down that although section 14 of the Limitation Act is not directly applicable to appeals, the principles underlying it on grounds of equity should be applied to appeals in considering an application under section 5 of the Limitation Act. The existence of circumstances contemplated by section 14 has consequently been regarded as a ground for excusing the delay caused by the wrong proceedings, and a sufficient cause for the delay within the meaning of section 5 of the Limitation Act, it being assumed that the party would be deemed to have acted with reasonable diligence where such circumstances existed."

14.11. A few other cases on the subject also take the same view.[6-8]

Need to extend Section 14—to appeals.

14.12. No doubt, even though section 14 does not apply to appeals, invoking the provisions of section 5 may in practice solve the hardship that would otherwise result[9] We, are, however, of the view that a right should be given to an *appellant* to exclude the time taken in proceedings *bona fide* in a court without jurisdiction, rather than leaving the matter to the discretion of the court under section 5 to be exercised for "sufficient cause". While interpreting the expression "sufficient cause," the courts may take conflicting views which appear to be worth avoiding on such matters.

We, therefore, recommend the extension of section 14 to appeals by express phraseology[10].

Time taken in journey.

14.13. When the plaint is returned and the plaintiff is required to undertake some journey to present the plaint to the proper court, the question may arise whether the time taken in such a journey should also count for the purposes of section 14. It has been held in an Allahabad case,[11] that reasonable time spent for going to place of proper court can be excluded but if the plaintiff falls ill after the plaint was returned, the period of his illness can, in no case, be excused to condone the delay. We are of the view that in a country as diverse as ours, with means of communications not always satisfactory, a plaintiff or applicant is bound to take some time in performing the physical act of carrying the plaint from the court which pronounces want of jurisdiction, to the proper court. The period spent in performing this physical process would depend upon the distance between these two courts, but it cannot be gainsaid that some time is bound to be spent in this journey. Consequently, we recommend that the Explanation to section 14 should be amended suitably for the purpose.[12]

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[1] *Subedar Baman* v. *Mt. Masti*, A.I.R. 1960 H.P. 14.
[2] *Bai Hirubai* v. *Girdhar Keshav*, A.I.R. 1962 Sau. 20.
[3] *Brij Indar Singh* v. *Kanshi Ram*, (1918) I.L.R. 45 Cal. 94.
[4] *Sunderbai* v. *Collector of Belgaum*, A.I.R. 1918 P.C. 135.
[5] *Rajendra Bahadur Singh* v. *Rajeshwar Bali*, A.I.R. 1937 P.C. 276.
[6] *Munshi Ram* v. *Raghubir Chand*, A.I.R. 1953 H.P. 15.
[7] *Balbir Chand* v. *Gopal Chand*, A.I.R. 1954 PEPSU 126.
[8] *Ananti Ram* v. *Mt. Chaduri*, A.I.R. 1956 Assam 63.
[9] *Ram Lal* v. *Rewa Coalfields*, A.I.R. 1962 S.C. 361, 365.
[10] See para 14.23 *Infra* Section 14 (2A) as proposed.
[11] *Rihkab Dass* v. *Smt. Chandro*, *A.I.R.* 1971 All, 234.
[12] See para 14.23, *infra* Explanation to Section 14, clause (a)(ii) as proposed.

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Arbitrations.

14.14. At this stage, it is proper to refer to a point concerning the applicability of section 14 to arbitration proceedings. The question is whether the benefit of section 14 can be claimed where the earlier infructuous proceedings took place before arbitrators, and not before courts. In this context, one has to make a distinction between (i) arbitrations governed by the Arbitration Act, 1940 and (ii) arbitrations not governed by that Act. As regards the first category of arbitrations, section 37(5) of the Arbitration Act, 1940 has made a suitable provision for the exclusion of time taken in an arbitration. As regards the second category of arbitrations, though the Arbitration Act, 1940 will naturally be inapplicable, it seems from a fairly recent judgment of the Allahabad High Court[1] that the benefit of section 14 can be availed of in such arbitrations. It also appears that before the incorporation of the relevant provisions in the Arbitration law,[2] there were other rulings which regarded section 14 as applicable to the arbitration.[3-4] We do not, of course, consider it necessary to suggest any express amendment on the above point.

Time taken in copies.

14.15. In connection with section 14 it is of interest to refer to one suggestion which was made by a District Judge[5] in 1907. He suggested the addition of the following further clause to section 14:—

> "(3) The time requisite for obtaining a copy of the decree or order in the cases mentioned in clauses (1) and (2) and the time which the plaintiff or the applicant prosecuting the suits or application with due diligence requires in going to the proper court, shall be excluded."

The suggestion falls in two parts: (i) exclusion of the time spent in obtaining copies of the final order of the court, where the plaintiff or the applicant was wrongly prosecuting his claim; (ii) exclusion of the time required by the plaintiff or the applicant in *physically performing* the journey from the wrong court to the proper court.

The second part deals with a point that has been already attended to.[6] The first point is dealt with below.

Conflict of views.

14.16. An examination of the case law discloses that there is some conflict on the subject. For example, an Andhra Pradesh case[7] takes the view that the *time occupied in obtaining* certified copies of the judgment, and in taking other indispensable and necessary steps preparatory to an initiation of the proceedings in a court which ultimately proved to be fruitless, should also be regarded as the time during which the plaintiff has been prosecuting the civil proceedings.

14.17. The Patna High Court has, however, taken a contrary view on the subject.[8]

"There is nothing in section 14(1) which can justify the view that the time taken by a party in taking steps for invoking the aid of the Court should also be excluded while computing the period of limitation. Explanation I to section 14

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[1] *Chaman Lal* v. *State of U.P.*, A.I.R. 1980 All. 308.
[2] See also *State of U.P.* v. *Satya Prakash*, 1978 All. L.J. 564.
[3] *Ramdutt Ramkissandass* v. *E. D. Sassoon.* (1929) 56 Ind. App. 128 (P.C.).
[4] *Abdul Rahim* v. *Ojamshee*, (1930) I.L.R. 56 Cal. 139.
[5] District Judge, Rajshahi (Eastern Bengal & Assam); National Archives Papers relating to the Limitation Act of 1907. Paper No. 2704G., dated 7-12-1907.
[6] Para 14.13, *supra.*
[7] *Tirumareddi* v. *State of A.P.*, A.I.R. 1965 A.P. 388 (F.B.)
[8] *Narain Das* v. *Banarsi Lal*, A.I.R. 1970 Pat. 50.

clearly provides that in excluding the time during which a former suit or application was pending, the day on which a former suit or application was pending, the day on which the suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted. Section 14 has to be read as a whole along with the Explanation to that section. It is true that in section 14(1), the word 'prosecution' has been mentioned, but in Explanation I the word 'pending' has been mentioned. The position thus is that reading section 14(1) along with Explanation I, it is the pendency of a Civil proceeding, either in a Court of first instance or in a Court of appeal, which has to ascertain the period during which the proceeding actually remained pending".

In an earlier Patna case,[1] Fasl Ali J. had also propounded the view that the only period that the plaintiff is entitled to exclude while computing the period of limitation is the period during which the plaint was pending in the Court returning the plaint.

14.18. A judgment of the Madhya Pradesh High Court[2] allowed, however, the time requisite for obtaining certified copies for filing appeal as the period which counted in favour of the plaintiff.

14.19. Still earlier, a single judge of the Lahore Court[3] said held that the time spent in challenging the soundness of the order of the court of first instance in returning the plaint was also excluded under section 14 of the Limitation Act.

14.20. Upon a review of the conflict of decisions, we are of the view that to allow maximum latitude to the plaintiff or applicant by allowing him exclusion (from the prescribed period) of time spent in obtaining copies of orders, decrees or arguments or challenging in higher courts the order of want of jurisdiction may encourage dilatory tactics and hence no change of law is needed on this point. **No change needed.**

14.21. Sometimes the Court returning the plaint passes an order permitting the plaintiff to file the returned plaint in the proper court in an extended period[4] after expressing an opinion that a fraud had been perpetrated entitling the plaintiff to the benefit of section 14 of the Act. This, however, is beyond the powers of the court and it has been held in an Allahabad case[5] that whether the plaintiff was entitled to the benefit of section 14 of the Limitation Act is not to be decided by the court directing the return of the plaint. The point, of course, does not necessitate any change in the law. **Direction by the earlier Court.**

14.22. It sometimes happens that the plaintiff filed successive petitions to a wrong court and seeks to plead the benefit of section 14(2). The period forming the intervals between successive petitions (when the party merely stood by, allowing limitation to run) cannot, however, be considered as a period of "prosecuting" proceedings, within the ambit of the rule.[6] **Successive petitions.**

No change, of course, is needed on this point.

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[1] *Pirm Jiwanram Ramchandra* v. *Jagernath Sahu*, A.I.R. 1937 Pat. 496.
[2] *Mst. Duliyabai* v. *Vilayatalli A.I.R.* 1959 *M.P.* 271.
[3] *Gurdit Singh* v. *Mota Singh*, A.I.R. 1939 Lah. 47.
[4] *Parameswara Kurun* v. *Vasudeva Kurun*, I.L.R. (1964) Kerala 625.
[5] *Ranjeet Singh* v. *Bind Bahadur*, A.I.R. 1975 All. 547.
[6] *S. V. Krishnier* v. *A.R. Ramchandra*, A.I.R. 1961 Mad. 197.

(*Chapter* 14—*Section* 14—*Time taken in infructuous legal proceedings.*)

(*Chapter* 15—*Section* 15 : *Exclusion of Time in certain other cases.*)

Recomendations for amending sections 14 and 4.

14.23. In the light of the above discussion, we recommend that amendments on the following lines should be effected in sections 14 and 4.

(i) Section 14 should be amended as under:—

Sub-sections (1) and (2) of section 14 as they are.

New Subsection (2A) should be inserted in section 14 as under:—

"(2A) *In computing the period of limitation for any appeal, the time during which the appellant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or appeal or revision against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it,*"[1]

(ii) The Explanation should be revised as under in section 14:—

"*Explanation.*—For the purposes of this section—

(a) in excluding the time during which a former civil proceeding was pending—

(i) the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(ii) *the time reasonably necessary for a plaintiff or an applicant or an appellant to perform the journey from the place where the former civil proceeding was pending to the place where the proper court is situated shall be deemed to be time during which the former civil proceeding was pending.*"[2]

[Clauses (b) and (c) of the Explanation as they are at present].

(iii) Section 4 should be amended by adding thereto another Explanation (after re-numbering the present Explanation as Explanation I). The added Explanation will read as under:—

"*Explanation II.—For the purposes of this section, the word 'court' includes a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain the suit, appeal or application, as the case may be, provided the suit, appeal or application was prosecuted in good faith in that court.*[3]

CHAPTER 15

SECTION 15 : EXCLUSION OF TIME IN CERTAIN OTHER CASES

Section 15—Exclusion of time in certain other cases.

15.1. There are certain other cases, not covered by the provisions so far discussed, where though the cause of action may be ripe, circumstances render the institution of legal proceedings legally impossible or difficult for a variety of reasons. Taking due note of such impossibility, the Act in Section 15, makes a suitable provision for the exclusion of time in five sub-sections, each addressed to a different situation but each more or less deriving its justification from impossibility or difficulty of the nature mentoned above.

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[1]See para 14.12, *supra.*
[2]See para 14.13, *supra.*
[3]See para 14.2 to 14.8, *supra.*

(Chapter 15—Section 15—Exclusion of Time in certain other cases.)

Sub-section (1) of section 15 concerns itself with the case where the institution of a suit or execution of a decree has been stayed by an injunction or order. The period during which the injunction or order continued is to be excluded in computing the period of limitation for the suit or for an application for execution of the decree in respect of which the injunction or order was issued.

In sub-section (2), we have the case where, before the institution of a suit, notice is required to be given or the previous consent or sanction of the Government or other authority is required, by law. The period of such notice (if given) or the time required for obtaining such consent or sanction is excluded in computing the period of limitation for such suit.

Under sub-section (3), where a receiver or liquidator is appointed in insolvency or liquidation proceedings, the period beginning with institution of such proceeding and ending with expiry of three months from appointment of the receiver or liquidator is excluded, in computing the period of limitation for any suit or application for execution of a decree by the receiver or liquidator.

Sub-section (4) provides that where a purchaser at an execution sale sues for possession of the property sold, the time during a proceeding to set aside the sale has been prosecuted shall be excluded in computing the period of limitation for such suit.

Finally—and this is the most important provision—sub-section (5) of section 15 deals with the defendant's absence from India, in the following terms:—

> "(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, shall be excluded."

Such points of detail as require to be considered in connection with the section are dealt with below, sub-section wise.

Section 15(1)—Attachment of a decree.

15.2 Section 15(1), *inter alia*, grants exclusion of time when the execution of a decree has been stayed by an injunction or order; the words 'injunction' and 'order', as occurring in the section, have been interpreted differently by different courts in the context of attachment of a decree. In a Punjab case,[1] an objection to the attachment of a house was preferred under section 47 of the Code of Civil Procedure 1908. An order was passed to the effect that the person entitled objecting was to stay in that house during her lifetime, and that the attached property could not be sold in execution, but that the decretal amount remained a charge on that property. It was held that this order did not operate to "stay" the execution proceedings during the lifetime of the objector, and in no way affected the right of the decree-holder to obtain satisfaction by attaching other property of the judgment-debtor. Consequently, section 15 was held to have no applicability to the case.

However, in Calcutta, 'an attachment of a decree under Order 21, Rule 53 of the Code of Civil Procedure 1908 was held to operate as a stay of the execution[2], though a contrary view has been taken by the Andhra Pradesh High Court.[3]

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[1] *Jaswant Rai* v. *Dogarmal*, A.I.R. 1968 Punjab 509.
[2] Kiran Shashi Debi v. Chandrika Prasad, A.I.R. 1916 Cal. 620, See cases cited in para 15.3, *infra*.
[3] *K. Ramayya* v. *K. Nageswararao*, A.I.R. 1969 A.B. 250, 256.

(Chapter 15—Section 15—Exclusion of Time in certain other cases.)

Conflict settled by Supreme Court—need for codifying the present position.

15.3. By an unreported decision of the Supreme Court,[1] it is now settled that an attachment of a decree under Order 21, Rule 53 of the Code of Civil Procedure, 1908, does not amount to "stay" within the meaning of section 15(1).

Having regard to the fact that the judgment of the Supreme Court referred to above[2] does not appear in the series of law reports usually consulted, we consider it desirable that section 15 should contain a specific provision in this regard, so as to avoid controversy in future.

Such a clarification would be faithfull to be legal position as it was understood by the majority of the High Courts[3-6] even before the Supreme Court Judgment.[7]

Principle accepted in 1851 case.

15.4. Under section 15(5), the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, is excluded in computing the period of limitation for any suit against such a defendant. As long back as in 1851, an action was brought in the Supreme Court of Judicature[8] at Bombay for conversion of certain chests of opium. Upon a defence being raised that the suit was barred by limitation, as having been brought beyond six years of the accrual of cause of action, the plaintiff alleged that the defendant was residing outside the jurisdiction of the Supreme Court of Judicature at Bombay and beyond the territory subject to the Government of the East India Company and, therefore, the suit was not barred. The Supreme Court upheld the plaintiff's contention on the basis of the British statutes then in force in the country[9].

Hardship-co-contractors.

15.5. The word "defendant" in section 15(5) has given rise to certain problems, in as much as the section does not indicate in so many words as to what a plaintiff should do when he is to file a suit against *several defendants some of whom are absent from India.* In a suit on the original side of the Calcutta High Court[10], the plaintiff sought to take advantage of this sub-section against an absent defendant after exhausting his remedy of filing a suit against his co-promisor in a promisory note executed by the absent defendant as well as others. This was turned down, but Garth C.J. observed as follows about the inequity of the provisions:

"It is true that the rule upon which I am acting may possibly lead to some hardship in cases when one or more of several co-contractors is out of the jurisdiction, and the plaintiff, if he waits for his return, would be barred by the Statute of Limitation. But this is an injustice which the legistlature, if they so pleased, could easily remedy, and which has been, in fact, remedied in England by the Statute of 19 and 20 Vict., c. 97."

His brother on the Bench Markby J., pointed out how the rule had been modified in England:

"The rule laid down by Parke, B., in *King* v. *Hoare*[11] is very likely correct in theory. It is at any rate identical, or nearly identical, with the strict rule of the

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[1]*Shantaranjandas* v. *D. Misramal*, (1976) Unreported Judgment S.C. 232.
[2]*Shantaranjandas* v. *D. Misramal*, (1976) Unreported Judgement S.C. 232.
[3]*Chanbasappa* v. *Holibasappa*, A.I.R. 1924 Bom. 383, 384.
[4]*Saroj Ranjan* v. *Joy Durga*, A.I.R. 1934 Cal. 140, 141.
[5]*Firm Deochand Panualal* v. *Shubhakaran*, A.I.R. 1916 Cal. 620.
[6]*Kiran Shashi Debi* v. *Chandrika Prasad*, A.I.R. 1916 Cal. 620.
[7]For the draft, see para 15.19 *infra* section 15, Explanation I, as proposed.
[8]*Ruckmaboyee* v. *Lulloobhoy Motichand*, (1851-1855) 5 M.I.A. 234 (P.C.).
[9]Statute 21 James I Ch. 15 and 4 Anne. Ch. 16.
[10]*Hemendro Coomar, Mullick* v. *Rajendro Lal Moonshee*, (1878) I.L.R. 3 Cal. 353, 362.
[11]*King* v. *Hoare* (1844) 14 L.J. Est. 29 : 67 R.R. 694, 702, 703, 704.

ancient Roman law. But it must be borne in mind that this rule was abolished in the Roman law 1300 years ago, and has been since repudiated in America and everywhere in Europe, except in England. Even in England, until the decision of *King* v. *Hoare*[1] it was very doubtful whether the rule prevailed or not in joint contract; whilst since that time one learned Judge (Sir James Knight Bruce) has spoken of the rule in strong terms of disapprobation (27 L.J. Bank, 29). Lord Mansfield also expressed the opinion in *Rice* v. *Shute* that all contracts with partners were joint and several, and the rule in *King* v. *Hoare* has been since modified by Statute in England. The 19 and 20 Vict., c. 97, Section 11 directs that the period of limitation as to joint debtors shall run notwithstanding that some are beyond seas but expressly provides that the creditor shall not be barred as against those out of the jurisdiction by judgment recovered against those who remain within it. If the rule laid down in *King* v. *Hoare* be combined with the law of limitation here, which is very strict, it is by no means clear that a creditor might not very often be left to the choice between a remedy against an insolvent debtor and having his debt barred."

15.6. When the draft Bill of the Indian Limitation Act, 1908 was circulated for comments, the injustice arising out of such an interpretation formed the subject matter of the comments of one Mr. M. Gupta:— Comment.

"Section 13 [present section 15(5)] of the Act might be with advantage amended so as to provide for the case where some of the defendants have been absent from British India. If on the grammatical construction of the section it is held to be applicable to a case where only some of the defendants have been absent from British India, then it has been observed that if some of the joint debtors who are within British territories are insolvent and the plaintiff waits for the return for the absent defendants, he will often find himself altogether barred by limitation"[2].

15.7. Dr. Whitley Stockes in his Anglo-Indian Codes[3] has also made similar observations. Comment-Dr. Whitley Stokes.

15.8. In England, section 11 of the 19 and 20 Vict., c. 97, had removed the anomaly pointed out by the Calcutta High Court. The section reads:

"11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas, at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action

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[1]*King* v. *Hoare* (1844) 14 L.J. Et. 29 : 67 R.R. 694, 702, 703, 704.

[2]M. Gupta, Barrister-at-Law, Hoshangabad. Annexure II to the letter No. 2063, dated 19th December, 1907 from the Chief Secretary to the Chief Commissioner, Central Provinces to the Secretary to the Govt. of India, Legislative Department, National Archieves file.

[3]Stokes Anglo-Indian Codes (1888) Vol. 2 page 950.

or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid."

Law Commission Report on Contract Act.

15.9. The difficulties raised by the Calcutta judgement, as well as by cases of other High Courts, were considered by the Law Commission in its Report on the Contract Act, 1872[1] and we reproduce below their observations from that Report:—

"70. The Contract Act treats all contracts as joint and several. The necessary consequence is that it is not open to one promisor who is sued to compel the promisee to sue others. There has, however, been considerable divergence of opinion on the effect of a judgment obtained by the promisee against one out of a number of promisors. In the words of the Federal Court[2], unlike English Law, the Indian Law makes a general liability joint and several, in the absence of an agreement to the contrary. It is, therefore, open to the promisee to sue any one or some of the joint promisors and it is no defence to such a suit that all the promisors should have been made parties. We think that Strachey, C.J., correctly stated the law in *Muhammad Askari* v. *Radhe Ram*[3] when he said: The doctrine now rests not so much on *King* v. *Hoare*[4] as on the judgment of the Law Lords in *Kendall* v. *Hamilton*[5]. As explained in these judgments, the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on, is essentially based on the right of joint debtors in England to have all their contractors joined as defendants in any suit to enforce the joint obligation.

The right was in England enforceable before the Judicature Act by means of a plea in abatement, and since the Judicature Acts by an application for joinder which is determined on the same principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors has been expressly excluded by section 43 of the Contract Act, and, therefore, the basis of the doctrine being absent, the doctrine itself is inapplicable. *Cessante ratione legis, cessat ipsa lex.*[6] The result is that a decree obtained against some of several joint promisors remaining unsatisfied ought not to be held as a bar to a subsequent action against the other promisors. We recommend that this result may be incorporated in the Act by inserting a new section[7]."

After making these observations, the Law Commission recommended[8] the insertion of a new section 44 A as follows in the Contract Act:—

"44 A. *Effect of decree obtained against one promisor.*—A decree against any one or more of a number of joint promisors does not, if it has remained unsatisfied, and in the absence of express agreement to the contrary, bar a subsequent suit against any one or more of the other promisors."

We reiterate the recommendation for amending the Contract Act, quoted above. Such an amendment would resolve the difficulty that at present arises in the law of limitation, when only some of the defendants (joint promisors) have been absent from India.

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[1]Law Commission of India, 13th Report (Contract Act, 1872), pages 32-33.
[2]*Jainarain* v. *Surajmull*, 1949) 12 Fed. L.J. 216, 225.
[3]22 All. 307.
[4]King V. Hoare (1844) 153 E.R. 206, 67 RR 694.
[5](1879) 4 A.C. 504.
[6]22 All. 307 (311, 312).
[7]Vide section 44A, Appendix I (of the 13th Report).
[8]Law Commission of India, 13th Report (Contract Act, 1872), App. I. section 44A.

(*Chapter* 15—*Section* 15—*Exclusion of Time in certain other cases.*)

15.10. Another point relating to section 15 is concerned with cases where the defendant had an agent in India. A Full Bench of the Calcutta High Court[1] decided that section 13 of the Limitation Act, 1877 which excluded the time during which a defendant had been absent from British India in computing the period of limitation for any suit applied even where, to the knowledge of the plaintiff, the defendants, (partners in a firm), were during the period of their absence, carrying on business in British India through an authorised agent who was authorised to bring suits in India. The Full Bench overruled an earlier case of the same High Court,[2] and observed:— **Agent in India-effect of.**

> "In support of this contention the case of *Harrington* v. *Gonesh Roy* is strongly relied on by the defendants. I doubt, however, whether, having regard to the clear and precise language of section 13, that decision is well founded, for it seems to me that, whatever may be the common sense of the decision, it can only be arrived at by interpolating into the section words that are not there, words to the effect that the time of absence is not to be excluded if the defendants are, during the period of personal absence, represented by a duly constituted agent in British India. Although we have been referred to the case of *Hawkins* v. *Gathercole*,[3] as to the manner in which statutes are to be construed, I do not see my way to put the construction upon the section for which the defendants contend; if we did so; I think we should be rather legislating than adjudicating upon the section as it stands. It may well be that it would be expedient, not to allow the time of absence from British India to be excluded, if the defendants be carrying on business in British India, and be represented by a duly authorised agent during such absence; but if this change is to be made, it must be made by the Legislature. Reading the language of section 13—a section be it remembered in a Limitation Act, the provisions of which must be construed strictly, and which, when set up as a defence, must not be extended to cases which are not strictly within the enactment, whilst exceptions of an exemption from its operation are to be construed leberally (see per Lord Cranworth in *Boddan* v. *Morely*,)[4]— reading, I say, that section according to the ordinary significance of the words used, I think we are not warranted in holding that the section does not apply to cases where the defendants are during the period of absence, carrying on business in British India through an authorised agent. In other words, I do not see my way to getting over the clear and precise language of the section, feeling as I do that the words of the section are too strong against the view contended for by the defendants, and that we could only support that view by the interpolation of words to the effect I have stated above."

15.11. The Full Bench ruling based itself decision on the strict interpretation of the provisions of section 13 of the Limitation Act of 1877 (corresponding to section 15 of the present Act). In Harrington's case,[5] the division bench had held that section 13 of the 1877 Act did not apply to a case when to the knowledge of the plaintiff, the defendant, though not residing in British India, is represented by a duly constituted agent and mookhtar. Powerful arguments were advanced to reverse the finding of the District Judge, who had held otherwise and the court said:

> "The Judge relies on section 13 of the Limitation Act, which provides that 'in computing the period of limitation prescribed for any suit, the time

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[1] *Poorno Chunder Ghose* v. *Sassoon*. (1897) I.L.R. 25 Cal. 476 (F.B.).
[2] Harrington v. Gonesh Roy, (1884) I.L.R. 10 Cal. 440.
[3] *Hawkins* v. *Gathercole*, (1856) 6 De G.M.&G. 1.
[4] *Boddan* v. *Morely*, (1857) 1 De G & Jones 1(23).
[5] *Harrington* v. *Gonesh Roy*, (1884) I.L.R. 10 Cal. 440, 442.

during which the defendant has been absent from British India shall be excluded'. He goes on to say 'admittedly Mr. Harrington,' the defendant in this case, 'has been so absent from the date of dispossession till now'. It seems, however, that Mr. Harrington is represented in this country by Mr. Crowdy, who, in the first instance, was made a defendant in the case as Manager and Mookhtar of the Bhugwanpur Factory.

If the Judge's interpretation of section 13 were correct, there would be no limitation at all as against a proprietor residing in England, although suits might be conducted for and against him through his agent in this country. It is impossible to believe that this was the intention of the law."

15.12. A reading of the judgements referred to above shows that the judges in both the benches were in unison that it would be expedient not to allow the time of absence from British India to be excluded under section 15(5), if the defendant is represented by a duly authorised agent during such absence. The difference between the approaches of the two benches was that while the Full Bench in the later ruling felt hamstrung by the language of the section and left it to the legislature to amend it, the Division Bench in the earlier ruling sought to put an interpretation on that section which in their opinion accords with the true intention of the legislature".

15.13. Whatever way one looks at it, seems to us most incogruent—considering the fact that more and more of non-residents are carrying on business in India through their authorised agents—that the non-residence in India of such a defendant himself should ensure to the advantage of a plaintiff, who knows that the defendant could be served through a duly authorised agent in India.[1]

Aspect of conflict of laws.

15.14. It could as well happen that a judgment against the defendant, operating through an agent, would be in conformity with the tenets of private international law also. By appointing an agent to use or defend, the absentee defendant has, in a sense, submitted to the jurisdiction of the court where the agent is working for gain. However, we need not express any firm view on this point. This aspect in any case is not directly material to the present issue.

In view of the above discussion it is desirable that a suitable Explanation should be added to section 15(5) on the above point.[2]

Both parties residing abroad.

15.15. We now deal with another situation to which section 15(5) applies. Considering the number of Indians going abroad for trade, commerce or seeking livelihood, it could as well happen that the plaintiff and the defendant were both residing outside India during the relevant period and the plaintiff could have obtained redress without much difficulty, in the court of that country where they were so residing. In such a case, it would be unjust to allow such a plaintiff the benefit of exclusion of the period during which the defendant was residing outside India, when the plaintiff himself was also during the same period, outside India and could have sued the defendant in the foreign country.

15.16. A situation of the nature contemplated above is not merely hypothetical; such a case[3] did occur more than a century ago in the then North West Provinces and was decided under the Limitation Act of 1859.

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[1]Cf. *Sayaji Rao* v. *Madhav Rao* A.I.R. 1929 Bom. 14, 20.

[2]See para 15, 19, infra; section 15, Explanation II, as proposed.

[3]*Mahomed Museeh-ood-deen Khan* v. *Clara Jane Museeh-ood-deen*, 2 N.W.P.H.C.R. 173 (case under Limitation Act of 1859)—quoted in *Muthukanni* v. *Andappa*, A.I.R. 1955 Mad. 96 (F.B.).

This was a suit brought in by a wife against her husband for the recovery of the amount due to her on account of dower payable under a written agreement and for maintenance and other reliefs. The parties were married in England in 1863, according to Mohammadan law. The defendant—husband left England and eventually returned to India in December, 1865, only to be followed by his wife in June, 1869, who, immediately, upon arrival, instituted the suit in India.

It was argued by the wife-plaintiff that she was entitled to rely on the provisions of section 13 of the Limitation Act, 1859 [corresponding to present section 15(5)] and to exclude, from the computation of the periods of limitation applicable to her several claims, the time during which the defendant husband was absent from British India. This contention was countered by the husband-defendant, according to whom, when both the parties were living in England, to put a construction on section 13 and to allow one of the parties to take advantage of the absence of the other party from British India would lead to extremely inconvenient results. Repelling the defendant's argument, the High Court said:

> *"It is true that such a construction may lead to very inconvenient results.*[1] A person may resides out of India for years, and according to the law of limitation of the country in which he resides, the remedy against him in respect of a cause of action of the nature of a *personal action* may be lost, yet, on his coming to India, it will revive. We can hardly conceive that this was the intention of the legislature. *It would seem that in the Act no provision has been made for cases in which the cause of action arises in a foreign country, or in which, at the time the cause of action accrues, both parties are residing in one and the same foreign country possessing tribunals to which they might have recourses; at the same time, it is to be remembered that the law of limitation is a law which bars the remedy and does not destroy the right, and therefore, if by any of its sections we find indulgence shown to suitors, we are bound to give full effect to the language in which that indulgence is conceded."*

15.17. The judgment referred to above raises two important issues: first, whether the Indian courts should entertain a suit by a person based on a cause of action arising in a foreign country when his remedy to obtain redress in the foreign court would have been barred on account of the law governing actions in that foreign country? Secondly, whether the exclusion of time allowable under section 15(5) should also be granted even if the plaintiff was residing in the same foreign country where the defendant was residing during the relevant period? **Questions raised by the judgment.**

As regards the first point, it falls within the ambit[2] of section 11. However, the second limb of the suggestion in the judgment, namely, that the benefit of section 15(5) should not be available to the plaintiff who, during the relevant time, was also residing in the same foreign country where the defendant also resided, deserves acceptance in our opinion. A plaintiff who could, but did not choose to, resort to the court of competent jurisdiction in the foreign country where he was then residing should not in an Indian court be allowed the advantage of an extension of limitation period. Accordingly, we recommend that an exception should be engrafted on section 15(5) on the subject.[3]

15.18. The draftsman of section 15(5) may not have focussed his attention on the possibility of a defendant flitting across the globe more than once during the period of limitation. But scientific advances in jet propulsion have made such **Frequent trips to foreign countries.**

[1]Emphasis added.
[2]See discussion as to section 11, *supra*. (Chapter 11).
[3]See para 15, 19 *infra* Section 15(5), Exception as proposed.

(*Chapter* 15—*Section* 15—*Exclusion of Time in certain other cases.*)
(*Chapter* 16—*Section* 16—*Effect of Death on Limitation.*)

frequent trips possible. The courts have dealt with such a situation and given to the plaintiff the right to take into account all such periods during which the defendant was absent.[1-2] This view seems to be in conformity with the intendment of sub-section (5), and we do not recommend any amendment of the sub-section for this purpose.

Recommendation relating to section 15.

15.19. In the light of the above discussion, we recommend the following amendments to the law on the topics dealt with in section 15:—

(i) An exception should be inserted below section 15(5) of the Limitation Act as under:—

"*Exception.*—Nothing in sub-section (5) shall apply to a period subsequent to the date on which the cause of action arises, being a period during which—

(a) both the parties were residing in one and the same foreign country and the plaintiff was aware of the residence of the defendant; and

(b) *there were, in the foreign country, properly constituted courts or tribunals to which the parties had, or could have had, recourse for enforcing the cause of action.*"[3]

(ii) The following Explanations should be added to section 15 of the Limitation Act:

"*Explanation I.—The attachment of a decree under rule* 53 *of Order XXI in the First Schedule to the Code of Civil Procedure,* 1908 *does not amount to a stay of execution of the decree within the meaning of sub-section* (1)[4].

"*Explanation II.—For the purposes of this section, a defendant shall not be deemed to have been absent from India during any period during which he had, to the knowledge of the plaintiff, a duly constituted agent in India, authorised to institute and defend legal proceedings on his behalf in India.*"[5]

(iii) Amendment of the Indian Contract Act, 1872 by the insertion of new section 44A in that Act, may also be carried out, for resolving the controversy relating to decree against one of several joint promisors.[6]

CHAPTER 16
SECTION 16 : EFFECT OF DEATH ON LIMITATION

Section 16-Effect of death on or before the accrual of the right to sue.

16.1. The general principle is that when a right to sue accrues to a person during his lifetime, his death thereafter does not suspend the running of limitation. The reason is, that time commences to run at once (in general) and,[7] as the Act puts it, once time has commenced to run, no subsequent inability to sue stops or suspends its running.

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[1]*Mohammed Sulaiman Rowther* v. *N. K. A. Mohammed Ibrahim* (1967) 2 M.L.J. 483.
[2]*Ismailji Haji Halimbhai* v. *Ismail Abdul Kadar,* A.I.R. 1921 Bom. 460, 461 : I.L.R. 45 Bom. 1228.
[3]See para 15.17, *supra.*
[4]See para 15.3, *supra.*
[5]See para 15.14, *supra.*
[6]See para 15.9, *supra.*
[7]Section 9, Limitation Act, 1963.

(Chapter 16—Section 16—Effect of Death on Limitation.)

However, where a right to sue accrues for the first time after the death of a person- i.e. if a person dies before the right to sue accrues, there must be some person capable of representing his estate when the right to sue accrues. Where the right to sue accrues on the death of a person (i.e. where the death and accrual of the cause of action are simultaneous), the same is the position. Dealing with these two situations, section 16(1) of the Act provides that the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting the suit or application in question..

While section 16(1) deals with the death of the would-be plaintiff, section 16(2) applies the same principle to the case of the death of a person *liable* to be sued—the would-be defendant. Where his death takes place before, or simultaneously with, the accrual of the cause of action, the period of limitation is to be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute a suit or make an application for enforcing the cause of action in question.

However, section 16(3) provides that nothing in sub-section (1) or sub-section (2) applies—

(a) to suit to enforce rights of pre-emption, or

(b) to suits for the possession of an immovable property or of a hereditary office.

The exception takes out these suits, presumably because the application of the section to such cases would tend to create insecurity of title.[1] Moreover, the period of limitation for suits for immovable property is generally twelve years, and no hardship would be caused by the non-existence of a legal representative for some period. In the case of suits for pre-emption, though the period is not so long, there is the general rule that the demand for pre-emption must be made quickly and the legislature has not considered it proper to interfere with the operation of this rule. It may be mentioned that the same approach has been shown while dealing with the case of legal disability. The special provisions[2] enacted to give extra time to persons under legal disability do not apply to a suit to enforce a right of pre-emption[3].

16.2. The Law Commission,[4] relying on the Privy Council case of *Mayyappa* v. *Subramanya*,[5] recommended extension of the old section 17 (now section 16) of the 1908 Act even to rights of action accruing *on death* and this recommendation has since been accepted. The gist of the Privy Council decision is that time does not run or commence to run until there is a person in existence who is capable of being sued. This proposition has been sought to be clarified in present section 16, which takes the place of section 17 of the Act of 1908. The crux of the amendment in the law achieved by section 15 of the present Act is the addition, in sub-section (1), of the words "where a right to institute a suit or make an application accrues only on the death of a person" and the addition of corresponding words in sub-section (2). The change was made in the light of certain decisions that had applied section 17 of the Act of 1908 even to cases where the right to sue had accrued on death.[6]

16.3. No further change is needed in the Section. **No change needed.**

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[1] *Cf. Kesho Prasad* v. *Madho Prasad*, (1924) I.L.R. 3 Pat 880.
[2] Sections 6-7.
[3] Section 8.
[4] Law Commission of India, 3rd Report, Page 21, Para 47.
[5] *Mayyappa* v. *Subramanya*, 30 C.W.N. 833 (P.C.).
[6] *Meyappa* v. *Subramanya*, (1916) 20. C.W.N. 833 (P.C.).

CHAPTER 17

FRAUD AND MISTAKE

Section 17- Effect of fraud or mistake on limitation.

17.1 In general, a peron's ignorance of his right to sue does not suspend the running of limitation. However, it has been recognised for a long time that "the right of a party defrauded is not affected by lapse of time.....so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed".[1] Acting on this principle, section 17 provides that in the case of certain types of fraud, the period of limitation shall not start running until the fraud has been discovered. This, of course, is only a broad statement of the principle, several matters of detail which are dealt with in the section will be mentioned in due course.

More or less the same principle is applied by the Act where relief from the consequences of a mistake is the very basis of the cause of action, the period of limitation shall not begin to run until the plaintiff or applicant has discovered the mistake.

In both these cases, the relaxation is given *by the Act itself*. In addition, there is a third case where the Act gives a power *to the court* to extend the period of limitation on the ground of fraud. Where a judgment debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, on the ground of fraud. Where a judgment debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the judgment creditor's application made after the expiry of the period prescribed for execution, extend the period, if the application is made within one year from the date of discovery of fraud or the cessation of the force, as the case may be. Incidentally, this provision takes in not only fraud—a circumstance that affects knowledge-but also force—a circumstance that affects the exercise of the right, and not its knowledge.

Sources of the contents of the section.

17.2. The section may appear to be rather long: this is due to several factors, mainly historical. The main subject of the section—fraud—was dealt in the Act of 1908 in section 19.

However, that section did not specifically deal with a cause of action which itself was founded on fraud; it dealt only with fraud that prevented knowledge of a right already accrued. The Law Commission, in its Report[2] on the earlier Act, considered it proper that that case should be included—as in the English Act[3] Secondly, as recommended by the Law Commission, in the same Report the case of mistake has also been covered in the present Act again, on the lines of the English Act. In India, the earlier Limitation Act of 1908 did not contain a provision for mistake in *the body of the Act*. Article 96 of that Act, however, laid down a period of three years for a suit "For relief on the ground of mistake" and provided that the starting point shall be "When the mistake becomes known to the plaintiff."

Thus, fraud and mistake are the matters dealt with in section 17(1). Subsection (2) of the section, relating to fraud or force preventing the execution of a decree, is derived from section 48(2) proviso of the Code of Civil Procedure, 1908.

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[1] *Rolfe* v. *Gregory*, (1864) 4 De G.J. & S. 576, 579 (Lord Westbury).
[2] Law Commission of India, 3rd Report (Limitation Act, 1908) page 21, para 48-49.
[3] Section 26, Limitation Act, 1939 (Eng.).

Section 48 was repealed (as recommended by the Law Commission in its report on the Limitation Act, 1908) but it was necessary to retain, on the statute book, this part of section 48 and the Law Commission recommended that it should find a place in the Limitation Act, in the section dealing with fraud.[1]

17.3. At this stage, it would be useful to refer to certain developments in this field in the United Kingdom. Section 26 of the U.K. Limitation Act 1939[2], as it stands after its revision by the Limitation Amendment Act 1980[3] is reproduced below as of interest; **Comparative study of Indian and English law.**

"Postponement of limitation period in case of fraud, concealment or mistake.

26. (1) Subject to sub-section (3) of this section, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistakes;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

(2) For the purposes of the last foregoing sub-section, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3) Nothing in this section shall enable any action—

(a) to recover, or recover the value of, any property; or

(b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made, took place.

(4) A purchaser is an innocent third party for the purposes of this section—

(a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b) in the case of mistake if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

Case law that has accumulated on the above provision in England though of interest need not be mentioned here as it is not material for the purposes of the present Report.

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908) page 21, para 48-49.
[2]Limitation Act, 1939 (2 & 3 Geo. 6c. 21). (Eng.).
[3]Limitation Amendment Act 1980 c. 24 (Eng.).

Wide meaning to the word 'fraud' in England.

17.4. The English authorities have been interpreting the word 'fraud' very widely and have been regarding dishonesty as fraud for the purposes of the Limitation Act, even if the conduct in question, would not constitute fraud at common law.[1-2]

"The contention on behalf of the appellants that the statute is a bar unless the wrong doer is proved to have taken active measures in order to prevent detention is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsily in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to get scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing", and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote."

We do not, of course, propose any change in the article in our Act on this point.

Fraud subsequent to accrual of cause of action.

17.5. In relation to section 17, we first deal with a few cases relating to fraud subsequent to accrual of the cause of action. In a Calcutta case[3], the father of a minor obtained a decree, but died before its execution. The judgment debtor got himself appointed as guardian of the minor's property, but did not disclose to the Court his indebtedness to the minor under the decree. It was held that the judgment debtor, once he became a guardian, was under an obligation to make a full disclosure to the court of his indebtedness. His non-disclosure amounted to a fraud, both on the court and on the minor.

The Madras Law Journal, commenting on this case (while recognising that substantial justice was done in the case), doubted whether an act of fraud committed after accrual of the cause of action is within the section.[4]

The view of the Madras High Court[5] is also to the effect that section 18 of the Limitation Act, 1908 cannot apply to a case where there was no fraud at the date when the cause of action arose, but a subsequent act of fraud was relied on to save limitation.

The Patna High Court[6], while commenting upon section 18 (of the Act of 1908) in connection with an application under Order 21, rule 90 of the Civil Procedure Code, 1908, observed:—

> "It is clear from the language of this section that the petitioner, in order to get the benefit of it, must satisfy the Court that he had been kept from the knowledge of his right to file an application to set aside the sale by the opposite party. His right to set aside the sale clearly accrues after the sale. Therefore, the fraud perpetrated by the opposite party must be a fraud committed after the sale and not fraud committed in bringing about the sale: and the fraud must be one by which the petitioner has been kept from the knowledge of his right to file the application to set aside the sale."

In the absence of later case law continuing the controversy, no change is needed.

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[1] *Beaman* v. *A.R.T.S. Ltd.*, (1949) 1 All E.R. 465
[2] *Bulli Coal Mining Co.* v. *Osborne* (1899) *A.C.* 351.
[3] *Gobinda Lal* v. *Nalini Kanta*, A.I.R. 1925 Cal. 584; I.L.R. 52 Cal. 63.
[4] Comment in (1925) 48 M.L.J. (Journal) 31.
[5] *Ramalagu Servai* v. *Solai Servai*, A.I.R. 1921 Mad 283.
[6] *Jagdhar* v. *Dhorai*, A.I.R. 1920 Pat. 725.

(Chapter 17—Section 17—Fraud and Mistake)

The Indian law.

17.6. Unlike the English law (where there is no general statutory definition of "fraud"), the Indian Contract Act, 1872 defines "fraud". Case law that has developed in India around this statutory definition governs the concept of fraud, so far as that Act is concerned. Limiting ourselves to the law as contained in section 17 of the Limitation Act, we find that it would not be inconsistent with the scheme of things if we give a wider meaning and content to the word "fraud" for the purpose of the Limitation Act, leaving the definition of "fraud" in the Contract Act unaltered. That is to say, on proof, of the existence of certain circumstances, a plaintiff would be able to cross the first hurdle of limitation and to seek postponement of the point from which time shall begin to run against him under the Limitation Act. This would be regardless of the question whether the matter is tried on merits, the same set of circumstances is to be regarded as sufficient to enable him to obtain a judgment against the defendant on the ground of "fraud" as a matter of substantive rights.

English provision.

17.7. As adumbrated earlier[1], in England section 26 of the Limitation Act has been amended to enlarge the concept of fraud law or equity. The debates show that it was the intention of the legislature to allow the courts to develop this field of law. A general proposition enunciated by Lord Evershed M. R. *"that fraud is conduct or inactivity which, having regard to some special relationship between the parties concerned, was an unconscionable thing for the one to do towards the other"* appears to us to be a tersely comprehensive statement of the position[2].

Principle of English provision to be incorporated.

17.8. We are of the view that a suitable Explanation should be added to section 17 of the Limitation Act, taking the substance from the English provision as to unconscionable conduct[3]. In principle, we find the English provision a useful one.

Mistake and the case of the unconstitutional statute.

17.9. Besides dealing with fraud, section 17 also deals with relief based on mistake. The use of the expression 'mistake' raises the question of relief claimed by a person on the ground that a statute or statutory instrument on the strength of which his rights had been interfered with has been found to be unconstitutional. There are a few decisions of the Supreme Court of India on the subject, to be noticed presently.

Writ jurisdiction and the bar of limitation.

17.10. The Supreme Court has held[4] that in the absence of any provision of law specifically applicable, a period of limitation cannot be provided by judicial legislation. Nor can the court relax the law of limitation except as provided by a specific statutory provision[5].

17.11. However, a different approach is visible in the case of writs.

In a recent case[6], the question that fell for consideration revolved round the modalities of the refund of excess market fees realized by the several market committees of Haryana. The original rate of market fee of 2 per cent was increased to 3 per cent under Haryana Act 22 of 1977. This increase was challenged as being unconstitutional.

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[1]See para 17.3, *supra*.
[2]*Kitchen* v. *R.A.F. Association*, (1958) 3 All E.R. 241, 247.
[3]For the draft, see end of this Chapter.
[4]*State Bank of Bikaner and Jaipur* v. *C. S. Verma*, (1968) 1 Labour Law Journal 840, 844 (S.C.).
[5]*Cf. Rajender Singh* v. *Santa Singh*, A.I.R. 1973 S.C. 2537, 2547.
[6]*Shiv Shankar Dal Mills* v. *State of Haryana*, (1980) 2 S.C.C. 437, 438.

The challenge was upheld and the recovery of excess of 1 per cent was held to be *ultra vires*. No directions were, however, given for refund at the time when the Haryana Act 22 of 1977 was declared unconstitutional, because these amounts could not then be quantified. There was some discussion before the High Court regarding the article of limitation applicable to such a claim for refund of levies held unconstitutional by the court. But the Supreme Court observed as under on this point:—

> "There cannot be any dispute about the obligation or the amounts since the Market Committees have accounts of collections and are willing to disgorge the excess sums. Indeed, if they file suits within the limitation period, decrees must surely follow, What the period of limitation is and whether Article 226 will apply are moot as is evident from the High Court's judgment, but we are not called upon to pronounce on either point in the view we take. Where public bodies under colour of public laws, recover people's moneys, later discovered to be erroneous levies, the dharma of the situation admits of no equivocation. *There is no law of limitation,* especially *for public bodies on the virtue of returning what was wrongly recovered to whom it belongs.*
>
> Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of 'alternative remedy' since the root principle of law married to justice, is *ubi jus ibi remedium.*"

The number of occasions on which the market committee realised the increased levy of rupees three must have been legion. But, as appears from another judgment of the Supreme Court[1], the levy was effected under the provisions of Ordinance 12 of 1977 dated 5th September, 1977 (in Haryana) and Ordinance 2 of 1978 promulgated on 28th April, 1978 (in the State of Punjab). That is to say, in both the cases, if the market committees were to file suits before the judgment of the Supreme Court[2] was delivered, the civil suits would have been in time. But the observations of the Supreme Court extracted above indicate a readiness to give relief in writ jurisdiction unhampered by the technicalities of limitation.

17.12. In an earlier case[3] the Supreme Court that observed that where a person comes to the court for a relief under article 226 of the Constitution on the allegation that he has been assessed to tax under a void legislation and, having paid it under a mistake, is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and that the payment was made by mistake, is still *not bound* to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. The court, felt that it was not easy nor was it desirable to lay down any rule for universal application.

Exercise of writ jurisdiction beyond.

17.13. The observations of the Suprme Court[4] to the effect that where the delay is more than the period of limitation prescribed for a civil action (which is three years), "it will almost always be proper for the court to hold that the delay is unreasonable, "were pleaded in a recent case before the Calcutta High Court[5] on behalf of the State of West Bengal as a justification for denying the

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[1] *K. K. Puri* v. *State of Punjab* (1979) 3 S.C.R. 1217, 1228, 1262.
[2] *Shiv Shankar Dal Mills* v. *State of Haryana,* (1980) 2 S.C.C. 437, *supra.*
[3] *State of M.P.* v. *Bhailal Bhai,* A.I.R. 1962 S.C. 1008.
[4] *State of M.P.* v. *Bhailal Bhai,* paragraph 17.12, *supra.*
[5] *State of West Bengal* v. *Suresh Chandra Bose,* (1980) 84 Calcutta Weekly Notes 229, 237.

refund of certain taxes paid by a sanitary contractor under the Bengal Finance (Sales Tax) Act, 1941. Rejecting the contention, however, the High Court observed:—

> "In our view, in *Bhailal Bhai's case,* the Supreme Court has not laid down any fixed period namely, three years when the mistake was detected as in Article 96 of the Indian Limitation Act, 1908. As we have understood the decision of the Supreme Court in *Bhailal's case,* it has been laid down by the Supreme Court that the High Court *should not normally exercise its discretion* when the claim for refund is made beyond the period of three years from the date the mistake came to be known to the party. The use of the words 'almost always' is very significant. The facts and circumstances of a particular case may be such as to persuade the High Court to exercise its discretion in favour of the party claiming refund even *beyond the period of three years from the date of his knowledge of the mistake.* If a party, after coming to know of the mistake committed by him in paying taxes not payable him because the law under which the taxes were realised was void, does not take any step in the matter either by making an application for refund or bringing it to the notice of the authorities concerned about the illegal realisation of the tax under a common mistake of law, or in other words, if the party sits idle during the period of time within which a civil action is to be brought, in such a case, the High Court should not exercise its discretion in granting relief to that party for refund."

17.14. Then there is a Madras case also on the subject. In a suit filed by Parry and Company against the State of Tamil Nadu on the original Side of the Madras High Court[1], the question of applicability of section 17(1)(c) came up for consideration. Parry and Company, a dealer in engineering equipments (for goods imported under the Import Trade Control Permit) were taxed by the sales tax authorities on certain transactions as local sales for the assessment year upto 1966-67. In view of the decision of the Supreme Court in *Khosla's case*[2] the plaintiffs became entitled to refund of the sum of Rs. 43,659/- paid by way of sales tax for the recovery of which the suit was filed. The Supreme Court judgment was delivered on 18th January 1966 and reported on 1st May 1966. The court found, as a question of fact, that the plaintiff had knowledge about the judgment on 14-3-68. As the suit was filed on 20th March, 1972, the court dismissed it as being barred by time, but there are observations in the judgment to indicate that if the plaintiff had approached the court within three years of his knowledge of the decision of the Supreme Court in *Khosla's case,* the suit would have been within limitation.

17.15. Another case[3] relating to the refund of sales tax recovered under mistake of law—this time from Madhya Pradesh brings out how the omission from the Act of 1963 of article 96 (which occurred in the Act of 1968) makes no substantial difference to the position. The following observations are pertinent:

> "Under the Indian Limitation Act, 1908, a claim for relief on the ground of mistake was governed by art. 96 and time commenced to run from the date when the mistake becomes known to the plaintiff. See The State of *Madhya Pradesh* v. *Bhailal Bhai,* 15 STC 450 A.I.R. 1964 SC 1006 and (1965) 16 STC 689 (SC) (supra). In both these cases it was held that

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[1] *Parry & Co.* v. *State of Tamil Nadu,* 1975 Tax Law Report 1565 (Madras).
[2] *K. G. Khosla & Co. Pvt. Ltd.* v. *Deputy Commissioner of Commercial Taxes, A.I.R.* 1966 S.C. 1216.
[3] *Caltex (India) Ltd.* v. *Asstt. Commissioner of Sales Tax, Indore Region, Indore, A.I.R.* 1971 M.P. 162.

article 96 applied to a suit for recovery of money paid under a mistake of law. Article 96 has been omitted in the new Limitation Act of 1963. However, section 17(1)(c) of this new Act provides that in the case of a suit for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it."

Position summed up as to mistake of law.

17.16. The upshort of the above discussion is that even though *Shiv Shankar Dal Mills case* expounds a theory that there is no law of limitation for returning what was wrongly recovered, this observation was intended to indicate only the width of the writ jurisdiction. It should not be taken to mean that the courts should ignore the provisions of section 17 read with article 113 of the Limitation Act and decree a time-barred suit.

Recommendation to insert an Explanation to Section 17.

17.17. In the result, the only change needed in section 17 is the addition of an Explanation to deal with conduct which is unconscionable, having regard to the special relationship between the parties—a point already dealt with earlier in this Chapter.[1] For this purpose, we recommend the insertion of the following Explanation below section 17:—

"Explanation.—For the purposes of this section, 'fraud' includes conduct on the part of the defendant or the opposite party, as the case may be, which, having regard to some special relationship between the parties, was unconscionable."

CHAPTER 18

SECTION 18: ACKNOWLEDGMENT

Section 18-Effect of acknowledgment in writing.

18.1. Where a suit or application is in respect of any property or right, an acknowledgement of liability in respect of such property or right, made in writing signed by the party against whom the property or right is now claimed (or by his predecessor-in-interest), gives a fresh period of limitation, to be computed from the time when the acknowledgement was so signed. This is the gist of section 18(1). Section 18(2) deals with the cases in which oral evidence of the contents of the acknowledgment may be given.

The Explanation to the section, in clause (a), lays down that an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment etc. has not yet arrived, or is accompanied by a refusal to pay etc., or is coupled with a claim to set off, or is addressed to a person entitled to the property or right.

Under Explanation (b) to the section the expression "signed" means signed either personally or by an agent duly authorised in this behalf.

Explanation (c) provides that an application for the execution of a decree or order shall not be deemed to be an application in respect of property or right".

Execution

18.2. It was as a result of the recommendations of the Law Commission[2] that Clause (c) of the Explanation modifying the earlier rules provides that an application for the execution of a decree or order does not make it equivalent to an application in respect of any property or right (Section 18). It has similarly

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[1]See paragraph 17.8. *supra.*

[2]Law Commission of India, 3rd Report, (Limitation Act 1908) page 23, para 52 and pages 80-81 Sections 17(1) and 18 Explanation.

been provided that "debt" does not include money payable under a decree or order of a court (section 19)[1]. The Law Commission was of the view that in respect for execution there should be no scope for extension of time by acknowledgment or by part payments.

One writer, commenting on a judgment of the Madras High Court[2], has observed[3] that the Act of 1963 the earlier labyrinth of rulings on step in aid in execution have no relevance.

Person under disability

18.3. Dr. Whitley Stokes in his Anglo-Indian Codes[4] has made the following suggestion relevance to the Section:—

> "Section 19 (corresponding to section 18 of 1963 Act) should provide for the case of an acknowledgment or payment in favour of a person under disability or by a person absent from British India".

This suggestion has been repeated by U.N. Mitra in his book on the Law of Limitation & Prescription[5].

Change not needed.

18.4. No decided case has, however, been noticed by us in which the courts have refused to grant the benefit of section 6 or section 15(5) (these are the relevant provisions in the present Act) in addition to the period of limitation computed in accordance with sections 18 and 19 of the Act of 1963, that is, the benefit of a fresh starting point for such computation upon an acknowledgment or payment. An attempt to clarify at this stage that sections 18 and 19 shall not preclude the taking into account of the provisions of section 6 and section 15(5) may lead to an unintended result that the other provisions of the Act which also provide for the exclusion of time in certain other specified cases are in derogation of the effect of sections 18 and 19. Consequently, even though we agree in substance with the approach of Dr. Whitley Stokes, we do not consider any amendment to the Act necessary on the point under discussion.

The English Amendment Act of 1980.

18.5. It would be of interest to compare the position in England. Unlike the phraseology used in sections 18 and 19 of the Indian Act, which provides beyond doubt that the acknowledgment or payment has to be made "before the expiration of the prescribed period", under the English Act[6] an acknowledgment or part-payment made outside the limitation period gave rise to a fresh cause of action except where the expiry of the limitation period has not simply barred the remedy, but extinguished the right[7]—say, in case of claim for recovery of land or advowson.

But it should be mentioned that by the Limitation (Amendment) Act, 1980, which came into force on 1st May, 1980, the following sub-section has been added at the end of section 28 of the principal Act:

> "Subject to the proviso to the last foregoing sub-section, a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment".

The effect of the new sub-section seems to be to prevent a cause of action from reviving once the limitation period has expired.

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[1]Section 18, Explanation (c); section 19, Explanation (b).
[2]*Damodaraswami Naicker* v. *Sundararaan*, (1972) 1 M.L.J. 346.
[3]G. Venkatanarayanan, "Step-in-Aid steps out with acknowledgment from execution proceedings (1972), 2 M.L.J. (Journal) 13.
[4]Stokes, Anglo-Indian Codes (1885) Vol. 2, (Adjective Law), page 950.
[5]U.N. Mitra, Law of Limitation and Prescription (9th Edition), page 550.
[6]Section 25(5), proviso and 29(6), proviso, Limitation Act, 1939 (Eng.).
[7]Halsbury, 4th Ed., Vol. 28, page 383, para 393, and page 408, para 910-911.

(*Chapter* 18—*Section* 18—*Acknowledgement.*)
(*Chapter* 19—*Section* 19—*Part Payment.*)

Change not needed in section 18.

18.6. So far as could be ascertained, no serious controversy exists at present on the form or substance of section 18 and we do not therefore see any need to recommend a change in the section.

CHAPTER 19

SECTION 19 : PART PAYMENT

Section 19-Effect of payment (on account of debt or of interest on legacy) and its rationale.

19.1. Analagous to the acknowledgment of liability, dealt with in section 18 is payment of a part of the amount due, made by the person liable. Such payment may be regarded as an implied acknowledgement, or at least analogous thereto. In any case it preserves evidence, and the demand is no longer a 'stale' one. The subject is dealt with in the next section—section 19. The main paragraph of the section provides for computing a fresh period of limitation when the person liable to pay a debt or legacy (or his agent) makes, on account of the debt or of interest on the legacy, payment before the expiry of the prescribed period. The proviso to the section enacts that (save in the case of a payment of interest made before the 1st day of January 1928), an "acknowledgment of the payment must appear in the handwriting of the person making payment, or in a writing signed by that person."

The Explanation to the section consists of two clauses defining in certain respects the ambit of "payment" the ambit of "debt". In clause (a), it provides that where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be "payment". Under clause (b) of the Explanation, "debt" does not include money payable under a decree or order of a court.

Suits for redemption.

19.2. In the past, the section (as occurring in the Act of 1908 gave rise to some debate as to its application to a suit for redemption.[1] It is now well settled[2] that the section applies only to suits for the recovery of a debt (and not to a suit for the recovery of property). To put the matter beyond doubt, we recommend that the section 19 should be amended so as to indicate expressly that the section is meant for a suit of *recovery* of a debt or legacy.[3]

Co-relation of the proviso to the Explanation.

19.3. The Explanation to section 19 provides that receipt by the mortgagee of rent or produce of the land mortgaged "shall be deemed to be a payment" However, the Explanation does not link itself up with the proviso preceding it, which requires that the "payment" should appear in the handwriting of, or in a writing by, the person making the payment. The non-mention of this requirement in the Explanation to section 19 has been interpreted to mean that the proviso does not apply to cases covered by the Explanation.[4] This construction can be said to be supportable on the fact that the physical possession of the property being with the mortgagee, it is not possible for the mortgagor to make the "payment" of produce which the mortgagee might appropriate to the debt. To put the matter beyond doubt, we had contemplated the addition of a clause somewhat as under:

> "Notwithstanding anything contained in the proviso to this section, it shall not be necessary to have the acknowledgment required by the proviso in respect of such payment", at the end of clause (a) of the Explanation.

But the judicial interpretation being in conformity with the philosophy of

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[1] *Mohammad Akbar Khan* v. *Motai*, A.I.R. 1948 P.C. 36, 38.
[2] *Mohammad Akbar Khan* v. *Motai. A.I.R.* 1948 P.C. 36, 39.
[3] See para 19.12, *infra*. for a draft of the revised section.
[4] *India* v. *Vanad*, A.I.R. 1966 Guj. 59, 60.

the section, we are refraining from making any suggestion in this regard.

It is apparent that in the case of land in the possession of the mortgagee, an acknowledgment of the payment would not appear in the handwriting of, or in the writing signed by, the person making the payment for the simple reason that the payer and the payee are one and the same person. As stated above, we are not recommending any clarification in this behalf to the proviso.

Section 19, Explanation (a) -Conflict as to "land".

19.4. One specific point requires attention in connection with section 19, Explanation (a). Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land is deemed to be a payment for the purposes of that section, thus enabling the computation of a fresh period of limitation from the time the payment is made. Now, the expression "land" has been differently interpreted. The Madras High Court,[1] construing the word 'rent' as *ejusdem generis* with 'produce', holds that the word 'land' in the section refers only to cultivable land and would not include a house—or even the site on which a house might have been built.

Conflict.

19.5. On the contrary, the Madhya Pradesh High Court,[2] dissenting from the Madras view,[3] and relying on the meaning as given in judicial dictionaries, holds that there is no warrant for reading the word 'rent' as *ejusdem generis* with 'produce'. According to it, the section applies not only to the rent received from the cultivable land, but also to the rent received from a house or house-site.

To the same effect are rulings of the High Courts of Bombay[4], and Gujarat[5].

Need for clarification.

19.6. In our opinion, there is no rationale in limiting the provisions of the section to cultivable land, simply because the section uses the word 'produce'. In theory, one could enlarge the applicability of the principle to cases involving moveable property, because it is conceivable that a person may hand over his property to a creditor who, in his turn, can appropriate the income derived from the use thereof towards payment of the debt (*e.g.* a taxi driver taking a loan from a bank and hypothecating his taxi to the bank). However, to avoid any further controversy on the question whether the word 'land' includes house property or not, we recommend that the Explanation to section 19 should be suitably amended by using the expression 'immovable property' for the word 'land'.[6]

Section 19 Explanation (a)- Application to charges.

19.7. Another point concerning section 19 Explanation (a) concerns the word 'mortgage', as occurring in this explanation. There is no reason why clause (a) of the Explanation should not include a 'charge'. But the Chief Court of Oudh[7] has held otherwise, and, to avoid controversy on this point, it is desirable that the section should be suitably amended to cover a case of 'charge' also.[8-9]

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[1]*Gudur Ramakrishna Reddi* v. *Muniratnammal*, A.I.R. 1954 Madras 890, 893; I.L.R. (1954) Mad. 1226: (1954) 1 M.L.J. 546.
[2]*Radha Krishna* v. *Anoop Chand*, A.I.R. 1973 M.P. 248, 251.
[3]Paragraph 19.4, *supra*.
[4]*Manik Chand* v. *Rachappa*, A.I.R. 1952 Bom. 266.
[5]*Dadia Bhailal* v. *Vannad Maganlal*, A.I.R. 1966 Guj. 59, 60, 61.
[6]See para 19.12, *infra* for a draft.
[7]*Gurden* v. *Rajkumar*, A.I.R. 1943 Oudh 211; I.L.R. 18 Luck. 637.
[8]Cf. *Muthuswami* v. *Chennamalai*, (1970) 1 M.L.J. 341, 343.
[9]See para 19.10, *infra* for a draft.

(Chapter 19—Section 19—Part Payment.)

Payment by cheque.

19.8. We now turn to the question of payment by cheque. With the progress of institutionalised banking, payment by cheque has become the normal practice, especially in urban areas. If the cheque, accepted by the creditor, is ultimately honoured, no problems present themselves. The "payment" constitutes part payment.[1] In fact, Halsbury[2] has gone further to say that "the acceptance by the debtor of a bill drawn upon him by a creditor, or the delivery to the creditor of a bill drawn by the debtor on a third person, on account of part of the debt, is also sufficient part payment, whether the bill is paid at maturity or not; it seems that in that case the part payment is deemed to be made at the time of the delivery of the bill, and not when it is paid." The effect, it is stated, would be the same if a cheque is given on the day, with an agreement that the same should not be presented to the bank until a later day and, acting upon the agreement, the creditor presents the cheque on the agreed day and receives payment.[3]

However, opinion in India on the subject is not uniform. The High Courts of Bombay[4], Patna[5], and Punjab[6] have held that the accpetance of a cheque which is subsequently dishonoured does not constitute "payment" within the meaning of section 19. The Madhya Pradesh High Court has held to the contrary.[7] According to the Andhra High Court, whether payment by cheque amounts to "payment" depends on whether the payment was accepted as such or not.[8]

Need for clarification

19.9. There appears to be a substantial case for clarification on the subject. We see no reason in principle why the benefit of section 19 should not be extended to such cases, *i.e.*, to cases where a cheque is accepted in payment irrespective of whether it is honoured or not. Such a wide view would not be doing violence to the rationale[9] on which payment is regarded as giving a fresh lease of life. Even in the substantive law, so far as a dishonoured cheque is concerned, a new cause of action accrues upon delivery of the cheque to the creditor[10].

Agreement for deferring presentation of the cheque.

19.10. We are not oblivious to the fact that while giving and accepting a cheque, the debtor and the creditor may enter into a private agreement that the creditor will defer the actual presentation of the cheque to some agreed future date, by which date the debtor is expected to arrange to ensure adequate funds to his credit with the drawee. Even in such a contingency, there appears to be no reason why the benefit of section 19 should not be extended to the creditor. If, in the hypothetical situation mentioned above, the debtor manages to have adequate funds in his account by the agreed date, none is worse off. If the debtor fails so to do and litigation becomes necessary, a fresh period of limitation would accrue in favour of the creditor. By not allowing the benefit of section 19 to cases of dishonoured cheques, the law may precipitate matters and drive the creditor to court, by denying the parties a chance to settle their accounts amicably.

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[1]*Marreco* v. *Richardson*, (1908) 2 K.B. 584 (C.A.).
[2]Halsbury, 4th Ed. Vol. 28, page 404, para 900 and f.n. 11.
[3]*Marreco* v. *Richardson* (1908) 2 K.B. 584; (1908-12) All E.R. Rep. 55 (C.A.).
[4]*Chinttaman* v. *Sadguru Narain Maharaj*, A.I.R. 1956 Bom. 553, 554.
[5]*Arjun Lal* v. *Daya Ram*, A.I.R. 1971 Pat. 278, 279, 280.
[6]*Northern India Finance Corpn.* v. *R. L. Soni*, A.I.R. 1973 Punjab 35, 37, para 5.
[7]*Gori Lal* v. *Ramjee*, A.I.R. 1961 M.P. 346, 347, para 5.
[8]*Subrahamanyam* v. *Venkataratnam*, A.I.R. 1956 Andhra 108.
[9]Cf. para 19 1, *supra*.
[10]Halbury, 4th Ed., Vol. 28, page 300, para 668.

(*Chapter* 19—*Section* 19—*Part Payment.*)
(*Chapter* 20—*Section* 20—*Acknowledgement or Payment By Another Person.*)

19.11. For these reasons, we consider it desirable that payment by cheque should be expressly covered, on lines to be indicated in the amendment that we are suggesting.[1]

19.12. In the light of the above discussion, we recommend that section 19 should be revised as indicated below:— Recommendation.

Revised Section 19

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period *for a suit or application for the recovery of such debt or legacy* by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made, *in respect of any suit or application for the recovery of such debt or legacy, as the case may be.*

Provided that, save in the case of payment of interest made before the first day of January, 1928, an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Explanation 1.—For the purposes of this section.

(a) Where immovable property which is mortgaged *or charged* is in the possession of the mortgagee or *charge-holder,* the receipt of the *income* of such *property* shall be deemed to be a payment.

(b) "debt" does not include money payable under a decree or order of a court.

Explanation II.—Where payment on account of a debt or of interest on a legacy is sought to be made by a negotiable instrument, the tender of the negotiable instrument, if accepted by the payee in such payment, amounts to payment of the amount for the purposes of this section whether or not the negotiable instrument is subsequently honoured.

CHAPTER 20

SECTION 20: ACKNOWLEDGMENT OR PAYMENT BY ANOTHER PERSON

I. Introductory

20.1. The two sections discussed in the preceding chapters—sections 18 (acknowledgment) and 19 (payment)—operate in situations of considerable variety. Thus, in business and commerce, where debts and other liabilities are dealt with through agents—the more so when the debtor is a corporate body—there might, be cases where more persons, than one share the burden of a liability, but the correspondence is carried on by only one of them. Hindu law also presents certain peculiar situations. There may be limited owners of property, on the expiry of whose limited interest others will succeed to the property. Or, which is the more common case now—a liability may have been incurred by or on behalf of a Hindu undivided family as such, but its affairs are (as is the usual practice) managed by the manager, who transacts dealings on its behalf. In all these cases, the question may arise whether, and if so, how far, a Section 20.

[1]Para 19.12, *infra.*

person is bound by an acknowledgment signed by another person *e.g.* (i) agent, (ii) another joint contractor etc. (iii) or limited owner in Hindu law or manager of a Hindu undivided family. To put it differently, to what extent is a person vicariously bound by an acknowledgment or payment made by another person, in the context of the statutory provisions under which the acknowledgment or payment has the effect of giving a fresh period of limitation.

Section 20 seeks to answer these questions, in three sub-sections—Sub-section (1) gives, to the express "agent duly authorised in this behalf"—an expression that occurs in section 18 (acknowledgment) as well as in section 19 (payment),—an extended meaning, whereunder, in the case of a person under disability, it includes his lawful guardian, committee or manager or an agent of such guardian, committee or manager.

Sub-section (2) of section 20 reads as under:—

"(2) Nothing in the said section [*i.e.*, sections 18-19] renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgement signed by, or of a payment made by, or by the agent of, any other or others of them."

Sub-section (3) deals with the special situation arising under Hindu law, mentioned above. Briefly,—(a) an acknowledgment or payment in respect of liability by a limited owner of property governed by Hindu law is valid as against a reversioner succeeding to such liability and, (b) an acknowledgement or payment in respect of a liability (incurred by or on behalf of a Hindu undivided family), made by the manager of the family for the time being is deemed to have been made on behalf of the whole family.

This is a statement of the significant features of the section. We now proceed to consider some of the important points.

II. Joint. Obligees

Joint obligees.

20.2. A point worth some discussion arises from section 20(2). Section 20(2) provides that nothing in sections 18 and 19 (dealing with the effect of acknowledgment in writing or effect of payment on account of debt) renders, one of several execution on mortgagees chargeable by reason only of a written acknowledgment signed by, or of a payment made by or by the agent of, any other or others of them. The controversies that require discussion can be better appreciated if a look is had at the English Law on the subject and its execution.

English Acts.

20.3. In England ruling by Lord Mansfield[1] that any acknowledgment or payment by one co-debtor was sufficient to take the case out of the statute of limitation, even as regards other co-debtors, raised a number of protests which resulted in curbing the ambit of the rule, as regards acknowledgments, by Lord Tenderten's Act[2] and, as regards payments, by the Mercantile Law Amendment Act.[3] The language of Lord Tenderten's Act was as under:—

"No such joint contractors, executors or administrator shall lose the benefit of the said enactments (*i.e.*, enactments as to limitation) so as to be chargeable in respect *or by reason only* of any written acknowledgment or promise made and signed by any other or others of them."

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[1]Withcomb v. Whiting (1781). Sm. L. Cas (13th Ed.), page 633.
[2]Lord Tenderten's Act, 9 Geo.4 C.14. 1828.
[3]Section 14, the Mercantile Law Amendment Act, 1856 (19-20 Vic. c. 97) (Now repealed)-see section 24(2), Limitation Act, 1939, (Eng.).

(Chapter 20—Section 20—Acknowledgement or Payment By Another Person.)

Developments in India.

20.4. It is interesting to note that within two years of the passing of the Mercantile Law Amendment Act, 1856 the Indian Government passed Act No. 14 of 1859, section IV of which read as under:—

Revival of right to sue by admission in writing.

"IV. If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same, shall have admitted that such debt or legacy or any part thereof is due, by an acknowledgment in writing signed by him, a new period of limitation according to the nature of the original liability, shall be computed from the date of such admission:

Proviso.—Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgement signed by another of them."

20.5. This general provision was expanded in section 20 of the Limitation Act, 1871 by specifically mentioning: "partners or executors" and read:

"Nothing in this section renders one of the several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them."

20.6. Joint contractors and mortgagees were added to the list of partners and executors by section 21 of the Act of 1877.

Section 20(2) an explanation to sections 18 and 19.

20.7. It has been the view of the majority of High Courts that sub-section (2) of section 20 is more or less of an Explanation to sections 18 and [1-2]- 19.

Interpretation in England and the controversy in India as to joint obligees.

20.8. The expression "chargeable by reason only of" in section 20 has been borrowed from the English Acts on the subject, where it has not given rise to any difficulty. In England, the matter is left to be determined by the general law as to whether the action of one of the joint obligees should bind the other. All that the two English statutes referred to above intended to do was to nullify the effect of a ruling of Lord Mansfield[4] on the subject. Thus, when the question arose whether a payment by a partner of a firm would bind the firm, the answer was in the affirmative.[5] However, in India, arguments continued to be advanced as regards the co-relation between the expression "by reason only" appearing in this sub-section and the effect of the general law of contracts and partnership.

The Allahabad High Court, dealing with the point observed as under[6]:—

"I understand this section to mean that the mere fact that persons are partners does not make one partner liable under an acknowledgment, etc., by another partner. But in the present case, the liability arises under section 251, Contract Act, because the acknowledgment was made in the course of the partnership business."

In this context, it may be mentioned that in a going mercantile concern, such authority may be presumed.[7]

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[1] *Kothandaraman* v. *Shunmugam*, A.I.R. 1917 Madras 895.
[2] *Theyammal* v. *Muthukumaraswami*, A.I.R. 1929 Mad. 881.
[3] *Gaya Prasad* v. *Babu Ram*, A.I.R. 1928 Allahabad 387.
[4] *Whitcomb* v. *Whiting*, (1781) 1 Sm. L. Cas. (10th Ed.) 561; 2 Dougl. 652.
[5] *Goodwin* v. *Parton & Page*. (1880) 42 L.T. 568.
[6] *Debi Dayal* v. *Baldeo Prasad*, A.I.R. 1928 All. 491.
[7] (a) *Gordhandas* v. *Bhulabhai*, (1932) 34 Bom. L.R. 623.
(b) *Premji* v. *Dossa*, (1886) I.L.R. 10 Bom. 358.

(Chapter 20—Section 20—Acknowledgement or Payment By Another Person.)

No change needed.

20.9. In the result, no change is needed in the section. A recent ruling[1] of Andhra Pradesh High Court deals with a case of joint contractors who have signed a promisory note. It was held that even though one of the promisors was the son of the other two promisors, that cannot make him liable for the endorsement made by the other two promisors on the promisory Note.

The word "only" was again noticed in a Bombay case,[2] which ruled that the meaning to be given to the word 'only' in section 21(2) is that it may, also be shown that the partners signing the acknowledgment had authority, express or implied, to do so and that, in a going mercantile concern, such agency is to be presumed as an ordinary rule.

20.10. Similar is the approach adopted when the question arises as to the effect of an acknowledgment by the principal[3] on the obligation of the surety and the repercussions of the acknowledgment by the surety[4] upon the principal. Most of the High Courts are agreed that the liability of a surety cannot be equated to that of a co-debtor or joint-contractor within the meaning of section 20(2) of the Act[5] and that the debt of the surety is distinguished from the debt of the principal debtor.[6]

The Bombay High Court in one case[7] observed:

> "The payment of interest by the debtor within limitation does not give fresh starting point for limitation against the surety under section 20 of the Limitation Act (XV of 1877) even in the absence of a prohibition by surety against the payment of interest by the debtor on his account. Let us apply the words of section 20 to the case: the principal is not the person liable to pay the debt of the surety, so that even if the payment of interest could be regarded as a payment of interest on the debt of the surety, still it was not made by a person liable to pay the surety's debt. Can it then be said that there was a payment of interest on the surety's debt by an agent duly authorised in this behalf? Apart from the difficulty of treating the interest as due on the surety's debt, we think this must be answered in the negative, the question propounded in the reference excludes an express authority, and (in our opinion) the relation of principal and surety does not give rise to any implied authority."

In this context it may be proper to emphasis that in a going mercantile concern a partner has an implied authority to bind the other partners by an acknowledgment of liability.[8,9]

No change as to partners needed.

20.11. We have given anxious thought to the question whether an Explanation should be added to section 20(2) to make it clear that nothing in sub-section (2) shall prejudice the effect of any acknowledgment as binding any other partner, *under the general law of partnership or contracts.* The object was to make it explicit that the Limitation Act. 1963, though later in point of time to the partnership Act and the Contract Act, does not purport to over-ride, in any manner, the

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[1] *Tayaramma* v. *Ramanjaneya Mercantile Co.*, A.I.R. 1977 A.P. 205.
[2] *Gordhendas* v. *Bhulabhai*—A.I.R. 1932 Bombay 316.
[3] (a) *Federal Bank* v. *Bom Dev*, A.I.R. 1956 Junj. 21, 34 para 12.
(b) *Divalu Mal* v. *Mandu*, A.I.R. 1931 Lah. 691, 694.
[4] (a) *Hazara Singh* v. *Bakshish*, A.I.R. 1962 Punj, 495, 496.
(b) *Ranjit Kumar* v. *Kishori Mohan*, A.I.R. 1940, Cal., 401, 402.
[5] *W. J. Chits* v. *Mathew* (1979) K.L.T. 566, 569.
[6] *Som Nath Raju* v. *Ramamurthy*, A.I.R. 1957 Orissa 106. 109. para 8.
[7] *Gopal Daji Sathe* v. *Gopal Bin Sonu Bait*—(1904) I.L.R. 28 Bombay 248.
[8] *Premji* v. *Dossa* (1886) I.L.R. 10 Bom. 358.
[9] *Gordhandas* v. *Bhulabhai* (1932) 34 Bom. L.R. 623, A.I.R. 1932 Bom. 315.

relevant provisions of these earlier statutes. But the exposition of this sub-section by the Courts (as discussed above) shows that the Courts are examining the facts and circumstances of each case and ascertaining whether, an agency (express or implied) is made out therefrom. In this position, we do not propose any amendment in this regard.

Personal law-No change needed.

20.12. As regards joint contractors and mortgagees, certain questions arise when Mohamedan co-heirs succeed to the estate of the deceased in severalty. The part-payment by one of the Mohamedan co-heirs cannot avail to save limitation against the other heirs.[1] This also is a matter of the personal law of succession and falls outside the scope of the present enquiry. Different considerations apply to the case of an acknowledgment of the liability by a Hindu father[2] but, as a general rule, it can be stated that where a part-payment by one of the joint debtors is made, the mere presence of the other debtors at the place of payment will not save limitation, unless it is proved that they also made the payment or that the person who actually paid it did so, being authorised by the others.[3]

Consequently, we do not recommend any change in the text of section 29(2) on this count.

No change needed in Section 20(2).

20.13. We have given anxious thought to the question whether we should recommend deletion of the words 'joint contractors, partners, executors or mortgagees' and bring the language of sub-section (2) back to the stage it was in section 4 of the Limitation Act, 1859, thereby doing away with the embellishments and illustrations added to the section in the course of time. However, we do not think that this would amount to a practical improvement and are not inclined to recommend any such change.

Substantive law.

20.14. The position is that in applying section 20 the court will have to bear in mind not merely the Limitation Act, but also the general law relating to the particular field, such as agency, joint promises, suretiship, guarantee, partnership and succession. Such an inquiry cannot be avoided. Courts have taken a commonsense view of the matter.

No change needed.

20.15. In the result, no change is needed in section 20.

CHAPTER 21

SECTION 21 : ADDITION OR SUBSTITUTION OF PARTIES

I. Introductory

Section 21-effect of addition or substitution of parties on limitation.

21.1. The sections of the Act that have been so far considered were about computing the period of limitation—something concerning the period prior to the institution of proceedings. The Act now, (in section 21) devotes some attention to determination of the date when the proceedings are deemed to have been instituted. The general rule, of course, is that a suit commences when the plaint is presented.[4] This rule creates no problems when all the parties are before the Court from the very beginning. However, often it so happens that in the course

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[1] *Pathumma Boovi* v. *Rajakrishna Menon*, A.I.R. 1975 Ker. 91.
[2] *Deen Narain* v. *Bhagauti Din*, A.I.R. 1952 All. 116.
[3] *Annoda Charan* v. *Jhatu Charan*, A.I.R. 1935 Cal. 648.
[4] Section 3(2)(a).

of litigation, a new plaintiff or defendant is substituted or added. In such a case, the general rule, if taken literally, cannot apply, and one needs a specific provision in that regard. That is to be found in section 21.

Section 21(1) enacts (in the main paragraph) that as regards a new plaintiff or defendant substituted or added after the institution of a suit, the suit is deemed to have been instituted "when he was made a party"—a date which would necessarily be later than the date of presentation of the plaint.

There is, however, a proviso to sub-section (1)—inserted at the instance of the Law Commission[1]—under which, where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit shall, as regards such plaintiff or defendant, be deemed to have been instituted on any earlier date.

Sub-section (2) of section 21 makes it clear that sub-section (1) does not apply to the following two cases:—

(i) where the addition or substitution is due to assignment or divolution of any interest during the pendency of a suit, or,

(ii) where the parties are transposed.

The reason for making this clarification is obvious. In the first case, the predecessor-in-interest of the added party was already on the record, and the suit is only sought to be continued against the successor. In the second case, the party transposed was himself on record, though arrayed on the opposite side.

Newly added proviso to section 21(1), and its exposition by the Supreme Court.

21.2. As stated above acting upon the recommendations of the Law Commission,[2] a proviso has been added to sub-section (1) of section 21 to enable the court to direct that a suit shall as regards a newly added plaintiff or defendant, be deemed to have been instituted on an earlier date, if certain conditions are satisfied.

The Supreme Court also regretted that this newly added proviso had no application to the facts of the case before it, with the result that it had no power to direct that the suit should be deemed to have been instituted on a date earlier than November 4, 1958.

Law before the addition of the proviso.

21.3. Before the addition of the proviso in section 21(1), there was considerable difference of opinion as regards the power of the court to add new parties on a date when the relevant limitation period had already expired. In a Calcutta case,[3] an eminent judge, Ameer Ali J. refused to permit the addition of one of the partners after the expiry of the limitation period and observed:—

> "What was the reason for leaving him (*i.e.*, one of the partners) out I do not know. These people have innumerable combinations and for all kinds of reason, firms with different names but the same partners, firms with the same names and different partners and so forth. They take undue advantage of the facilities provided by the law and they must not be surprised if the law sometimes takes advantage of them".

Same was the view of the High Courts of Madras,[4] Rajasthan[5] and Jammu and Kashmir.[6]

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[1]Cf. Law Commission of India, 3rd Report, (Limitation Act, 1908), page 23, para 54.
[2]Law Commission of India, 3rd Report, (Limitation Act, 1908), page 23, para 54, and page 81-82, section 20. See *Remprasad* v. *Vijay Kumar*, A.I.R. 1967 S.C. 278, 284.
[3]*Bhairobux* v. *Deokaran*, A.I.R. 1934, Calcutta 253.
[4]*Vyarathammal* v. *Somasundaram*, A.I.R. 1960 **Mad.** 134.
[5]*Firm Seth Hiralal* v. *Jagan Nath*, A.I.R. 1957 **Raj.** 298.
[6]*Mohi-ud-din* v. *Chandra Mohan*, A.I.R. 1966 **I & K** 64.

21. 4-5. On the other hand, in a Madras case, a foreign firm instituted a suit in its own name which it could not do in view of Order 30, Rule 1, Code of Civil Procedures, 1908. Upon an objection being raised regarding the maintainability of the suit, the firm sought an amendment of the plaint by the substitution of the names of the partners. It was held that there was no addition of new plaintiffs, but merely a classification of the individuals already on record.[1] It is unnecessary to multiply the authorities.

21.6. The Calcutta[2] case was criticised, and dissented from by the Madhya Pradesh High Court[3] in which a comparison has been drawn between the drafting of Order 30, Rule 2 of Civil Procedure Code and Order I, Rule 10 thereof. Whereas the latter specifically makes a mention of the Limitation Act, the former does not do so and the court for this reason concluded that in the absence of any reference to section 22 of the Limitation Act in Order 30, Rule 2, Code of Civil Procedure, 1908, it would not be proper to apply it to the disclosure of names. The omission to sign the plaint by one partner was allowed to be cured in a case from Himachal Pradesh,[4] on the ground that this was not a case of addition of new plaintiff.

21.7. A peculiar situation arose in a Patna case,[5] where the names of only two out of five partners appeared in the certificate of registration and the remaining partners were sought to be added as proforma defendants after the expiry of the period of limitation. By harmonious construction of section 69 of the Partnership Act, Order 30, Rule 1, of the Code of Civil Procedure and section 22 of the Limitation Act of 1908 (corresponding to present section 21), the court allowed the application on the ground that the provisions of section 22 of the Limitation Act 1908 were not attracted in such a case.

21.8. The enabling powers of this proviso have been utilised for the benefit of the party who, on account of a *bona fide* mistake, had failed to add a necessary party to a suit. In Madras[6] the court allowed the plaintiff to bring on record the legal representatives of a defendant who had died on or before the date of filing of the suit,—which fact was not within the knowledge of the plaintiff. Newly added proviso utilised by Courts.

II. Joint Families

21.9. Even though the newly added proviso to section 21(1) takes care of such contingencies where the plaintiff has inadvertently forgotten to implead a necessary party, it must be conceded that suits by or against joint Hindu families form a class by themselves and need an express provision. The legislative history of this section throws considerable light as regards the thinking on the subject even in 1907, when the draft Bill which led to the Limitation Act, 1908 was circulated for comments. Joint Hindu Families-Suits by or against-Legislative history.

21.10. Mr. H. S. Phadnis, Acting District Judge Khandesh, while commenting upon the newly added sub-section (2) to section 21 exempting certain cases from the operation of sub-section (1), observed that at the end of sub-section (2), the following words should be added[7]:— Comment—1907

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[1] *Mohideen* v. *V.O.A. Mohamed*, A.I.R. 1955 Mad. 294.
[2] *Bhairo Bux Mangilal* v. *Deokaran*, A.I.R. 1934 Calcutta 253. (para 21.3, *supra*).
[3] *Firm Narain Das* v. *Anand Behari*, A.I.R. 1958 Madhya Pradesh 408.
[4] *Bijai Ram* v. *Jai Ram*, A.I.R. 1955 H.P. 57.
[5] *Chaman Lal* v. *Firm New India Traders*, A.I.R. 1962 Pat. 25.
[6] *Ramamurthi* v. *Karuppa Sami*, (1979) 1 M.L.J. 298.
[7] No. 2751 dt. the 30th November, 1907, National Archives File relating to the Indian limitation Act 1908.

"Nor to a suit by or against the members of a joint Hindu family to enforce a joint family right or liability, where one or more of the members being originally omitted are brought on record in the course of the suit at the instance of either party."

Explaining the reasons in support of his proposal, the District Judge observed:—

"By reason of improved facilities for travelling and other courses, different members of a joint Hindu family are now-a-days generally found living in different places. A joint family creditor, being unaware of the existence of the whereabouts of a particular member, often omits to make him a defendant. Or, in a suit by the family, the resident members may omit to join another member living in some distant place as a co-plaintiff, under a *bona fide* belief that he was not a necessary party or that he had no active concern in the debt sued for. It is distinctly hard that in such cases a just claim should fail simply because one of the members of the family is brought on the record after the expiry of the period of limitation. The proposed addition seems desirable to meet cases of such hardship, vide *Nooranji* v. *Moti Covanji*[1] where it is laid down that in a suit in respect of the property of a joint family it is essential that all the persons who compose the family should be joined as party plaintiffs."

Comment Nasik.

21.11. In the comments in 1907 Mr. B. C. Kennedy, District Judge, Nasik pointed out the inequities of the section.[2]

"There is a general feeling that it is inequitable that when A.B.C. are joint obligees and the suit is brought within time against A and B alone and C is subsequently added after the limitation period elapses the suit must necessarily fail as against all three. It is frequently the case that the existence of C is not known till after the Limitation period expires. It should be in the discretion of the court to allow or not allow C to be brought on the record even after the statutory period. The High Courts [3] [4] differ in their views as to the present state of the law."

Comment-Bombay High Court.

21.12. Honourable Mr. Justice Knight of the Bombay High Court, being well-versed in Hindu Law as prevailing in the Bombay Presidency, desired that the suits brought by a manager of a Hindu joint family should be exempted from the purview of section 21 (1) of the Act:

"I advocate the addition of a clause to the following effect:

(3) Nothing in sub-section (1) shall apply to a case where a party is added by the direction of the court,

or where the addition is made for the protection of the opposite party against the separate advancement of the same claim by the party so added, and the claim itself is not modified or extended by such addition."

"The first of these two paragraphs will embody the case law[5] in the Act, at least so far as added defendants are concerned. The object of the second paragraph is to protect claims brought by the manager of a Hindu Joint family who has omitted to join all his co-parceners as co-plaintiffs. According to Hindu ideas, though not according to the law as laid down in

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[1] *Nooranji* v. *Moti Govanji* 9 Bom. L.R. 1126.
[2] S. 16 dt. 4th December, 1907, National Archieves file.
[3] All. XIV, 524.
[4] Calcutta XXVII, 540.
[5] I.L.R. 12 Cal. 642, 24 Cal. 640 and 27 Cal. 540.

our courts, a Hindu manager is competent to institute suits on behalf of the family; and there does not seem to be any good or equitable reason for allowing a defendant to escape from the payment of a just debt by a technical plea of non-joinder. The Hindu sentiment the exemption suggested will assuredly commend itself; and it is not easy to see why others should object[1]."

Suggestions not incorporated in 1908.

21.13. Though these comments were tabulated and duly placed before the Select Committee, for some obscure reasons the suggestions were not incorporated in the Bill.

Privy Council Case.

21.14. This resulted in avoidable litigation and conflict of opinion amongst various High Courts which was ultimated settled by the Privy Council in 1911.[2] Three managing members of undivided Hindu joint family where the plaintiffs in a money suit who sought to bring other members of the family as co-plaintiffs after the period of limitation. Holding that the amendment was not fatal to the suit, the privy Council observed:—

"The Indian decisions as to the powers of managing members of an undivided Hindu joint family are somewhat conflicting. It is, however, clear that where a business, like money lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business."

Description of the plaintiff as managing member.

21.15. The law was re-affirmed by the Privy Council in 1914[3] and the lead thus given has been followed[4], by the High Courts. But the Patna High Court insisted[5] that the plaint must show that the suit was by the present managing member as managing member. This view was not followed by the Bombay High Court[6] which ruled that the plaint need not contain a statement or indication to the effect that the plaintiff was suing as a manager.

Gist of Privy Council ruling

21.16. In the Privy Council decision[7] relating to the position of suits filed concerning the affairs of a joint Hindu family and the addition of parties in such suits, two propositions seem to have been laid down with reference to section 21 of the Limitation Act of 1908, corresponding to section 21(1) of the present Act;

(i) The manager of joint Hindu family is entitled to sue in his own name on behalf of the family, without joining the other members of family, where the suit concerns affairs of the family.

(ii) If the other members of the family are later impleaded on the objection of the defendant, but by that time limitation has already run out, the plaintiff is nevertheless entitled to a decree.

To put it more briefly, in the case of a Hindu Joint Family, the manager sufficiently represents the family where he acts in the interests of the family, the other members will be bound by the result of the litigation, and the addition

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[1] *Imdad Ahmed* v. *Pabitra Partap Narain* (1910) I.L.R. 32 All. 241 (P.C.).
[2] *Kishan Pershad* v. *Har Narain Singh*, (1911) I.L.R. 33 All. 272 (P.C.).
[3] *Sheo Shankar Ram* v. *Jaddo Kunwar*, (1914) I.L.R. 36 All. 383 (P.C.).
[4] *Banwari* v. *Sekhrai*, A.I.R. 1931, All 585; *Chetan Singh* v. *Sattal Singh* A.I.R. 1924 All. 908.
[5] *Girwar* v. *Makbulunnessa* A.I.R. 1916 Patna 310.
[6] *Medgouda* v. *Halappa*, A.I.R. 1934 Bom. 178.
[7] *Kishan Prasad*, supra.

of the other members at a later stage would not be material in regard to the issue of limitation, such addition being regarded more as the addition of *proper* parties rather than the addition of *necessary* parties.

The situation of defendant's objection in regard to a joint Hindu family is illustrated in another Privy Council case[1] also. Subsequent rulings are conveniently collected in a Madras case[2]. The Supreme Court has ruled[3] that failure to describe oneself as a 'manager' in the plaint is not decisive of the question whether the suit was instituted by him in his capacity as a manager, this will depend upon the circumstances of each case. It could well be that the suit is instituted by the Manager in his personal capacity or it could be that he represented the family. The Supreme Court summarised the law as follows:—

> "In a suit by the manager of a joint Hindu family for enforcement of a mortgage, an adult member who is interested in the mortgage security, is not a necessary party though he can be joined as a proper party; and failure to join a person who is a proper party not necessary party, does not affect the maintainability of the suit nor does it invite the application of section 22, Limitation Act."

Amendments needed to suits concerning affairs of a Hindu family.

21.17. In the above position we recommend that suitable words may be added in section 21 (2) on the above point. The amendment that is being recommended[4] is merely intended to codify the well understood position as to suits concerning the affairs of the Hindu Undivided Family to which the managing member of the family is a party.

Position regarding Order 30 Bom. Rule 10 C.P.C.

21.18. It may be incidentally mentioned that under Order 30, Rule 10, as amended in 1976, a Hindu undivided Family carrying on business has been equated with a firm for the purposes of the rules contained in that order. But even before that amendment, the Bombay High Court[5] had allowed the substitution of the names of the co-parceners in regard to what was admittedly a joint family business, on the ground that it is no more than a correction of mis-description, and not an addition of a party[6].

III. Effective Date

Date of impleading.

21.19. We now come to one point of detail. In section 21(1), it has been provided that the suit shall, as regards the added party, be deemed to have been instituted when he was so made a party. The expression "when he was so made a party" has given rise to three different interpretations.

Three different interpretations.

21.20. The first view is to the effect that a person becomes a party only when he is actually brought on the record as party. The Madras judgment[7] on the subject observes as under:—

> "It cannot be said that a suit is instituted, if the plaintiff, who wants to file it in court, puts it into his drawer or keeps it in vakils' chambers. In the same manner, when a person is sought to be added as party, the person becomes a party only when he is actually brought on record as a party."

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[1]Imdad Ahmed *v.* Pabitra Partap Narain (1910) I.L.R. 32 All 241 (P.C.).
[2]*Venkatanarayana* v. *Somragu*, A.I.R. 1937 Mad. 610.
[3]*Devidas* v. *Shrishailappa*, A.I.R. 1961 S.C. 1937.
[4]See para 21.34 *infra*.
[5]*Ram Prasad* v. *Shrinavas*, A.I.R. 1925 Bombay 525, 527.
[6]See further *Law Commission of India*, 54th Report, (Code of Civil Procedure 1908) Chapter 30.
[7]*Ammayya* v. *Narayana*, A.I.R. 1925 Mad. 487.

The reasoning in the Madras case is, with respect, obscure because an applicant who wishes to add other persons as parties has done all that is in his power by filing an application in court. The analogy of keeping the plaint in the vakils' drawer does not appear to be exactly applicable.

21.21. The second view on the subject is that a diligent applicant who had applied within the period prescribed should not suffer merely because the court, for some reason or other, cannot, or does not, give him the relief within the period. On this principle it has been held by the same High Court[1] that a new person is made a party not on the date of the order of the court directing to implead him, but on the date of the application to implead.

21.22. A third view has been propounded in a Patna case[2], The ratio of the judgment seems to be that the limitation in relation to claim as against the newly added defendant commences from the date of service of the summons on him. Reliance has been placed on Order I, Rule 10(5), of the Code of Civil Procedure 1908 which speaks of the service of summons as the date when proceedings are deemed to have started. But the judgment also contains a sentence to the effect that the suit shall be deemed to have been instituted against the newly added defendant "when he was made a praty to the suit".

21.23. In view of the relative uncertainty of the position and to avoid any controversy on this point, it is desirable that a suitable explanation[3] should be added to section 21(1) to make it clear that the date of the application for impleading a party will be deemed to be the date from which section 21(1) becomes effective. Need for amendments.

IV. Misdescription

21.24. We now turn to cases of misdescription of parties. The Railway Administration being the largest net-work of public utility, a number of cases are filed against the Railways for tort or breach of contract, arising out of their function as carriers of goods and passengers. Owing to inadvertence of the counsel, the suits against Railways often contain a misdescription of parties and prayers for amendment to correct the mis-description have been agitated right upto the higher courts. Rarilways and the issue of misdescription.

21.25. In a Calcutta case[4], the suit was against the Railways for non-delivery of certain goods. In the plaint, the name of the defendant was given as "Agent of the Bengal Nagpur Railway Saheb Bahadur". An objection was taken that the frame of the suit was bad, being in contravention of the provision of Order 29, rule 1 and Appendix A to the Code of Civil Procedure, 1908. The plaintiff applied for leave to amend the plaint. Reliance was placed on a decision[5] in which the Bombay High Court had (under similar circumstances) allowed the correction of the clerical error. However, the Calcutta High Court refused to allow an amendment and distinguished the Bombay case by observing that even though, in the Bombay case, there was a mis-description in the title of the suit, the plaintiff therein had made sufficient averments to make it known to the defendant that he was seeking relief against the Railway administration, and not against the Agent. Case law.

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[1] *Trustees of Port of Madras* v. *Good Year India* A.I.R. 1973 Madras 316.
[2] *Indu Bhushan* v. *Hare Ram*, A.I.R. 1972 Patna 229.
[3] For a draft see para 21.34 infra.
[4] *Agent B. N. Rly*, v. *Behari Lal Dutt*, A.I.R. 1925 Cal. 716.
[5] *Saraspur Mfg. Co.* v. *B. B. & CI.Rly.*, A.I.R. 1923 Bom 452.

(Chapter 21—Section 21—Addition or Substitution of Parties.)

21.26. Same fate was met by the plaintiff in a Patna case[1]. But the Madras High Court[2] held that a notice claiming damages for loss of goods in railway transit which was sent to the Member-in-charge of the Railway Board was good and the mis-description in the plaint was allowed to be corrected. The court quoted from the Report of the Civil Justice Committee regarding the proper function of procedure.

> "Procedure is the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from the proper office if in place of facilitating it is permitted to obstruct and even to extinguish the legal rights and is thus made to govern where it ought to subserve."

Deity.

21.27. Apart from cases involving Railways, a mis-description can also take place while filing a suit against a deity. In a Calcutta case,[3] where a suit for possession was filed against the shebait and there was nothing in the plaint to indicate that the plaintiff was proceeding against the deity and not against the shebait, it was held that section 22 of the old Limitation Act of 1908 applies and so far as the deity was concerned the suit was barred.

Summary of the position-no change recommended as to mis-description.

21.28. A review of the above case law shows that the courts, in their anxiety to see that a plaintiff does not get non-suited merely because of bad drafting of the plaint, have been scanning the entire plaint to see whether the averments therein manifest, at some place or the other, the person who has been really the plaintiff. Here again, this exercise may prove to be futile in the case of a plaintiff who (no doubt, erroneously) believes that suing the Manager or Agent of the Railway is tantamount to a suit against the Railway administration, or that filing a suit against the shebait or pujari of the temple is equal to filing a suit against the religious institution (i.e. the institution of which the natural person is shebait or the pujari). However, it would be an arduous task to re-draft the proviso to section 20(1) so as to include cases discussed above. Ultimaely, it will have to be left to the good sense and judgment of the courts as to when the proviso should be pressed into service.

V. Appeals and applications.

Appeals and the addition of parties.

21.29. Under 0.41, r. 20 C.P.C. an appellant must implead all the parties within limitation. However O. 41, r. 20(2), C.P.C. gives power to the court to allow the impleading of a party after the expiry of limitation. The case is, of course, outside section 21, Limitation Act.

The position may be considered in some detail. A suit is instituted (in an ordinary case) when the plaint is presented to the proper officer under section 3(2)(a)(i); (Other sub-clause of section 3(2) deal with a suit by a pauper and a suit against a company). Now, what section 21(1) provides is that, if, after the "institution of a suit" which is defined in section 3(2)(a), "a new party is added, etc.", then, as regards that new party, the suit is deemed to have been instituted when he was so made a party (subject to the proviso). In this manner, section 21(1) modifies section 3(2)(a) and makes it necessary for the plaintiff to show that even on the date of impleading the new party, the suit is within time.

21.30. It would be of interest to mention, in this context, that in one of the decisions of the Patna High Court, the following observations occur regarding section 22 of the Act of 1908 (corresponding to present section 21):

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[1] *East India Rly Co* v. *Ram Lakhan*, A.I.R. 1925 Pat. 37.
[2] *G.C.-in-Council* v. *Sankarappa*, A.I.R. 1953 Mad. 838.
[3] Pravakar Roy v. Bibuti Bhushan, A.I.R. 1957 Cal. 177.

"If it were not for section 22 of the Limitation Act (1908), it could not be urged that a suit, as regards the added party should be regarded as having been instituted *when he was made a party*[1]."

21.31. Coming concretely to the position relating to appeals, Order 41, rule 20 of the Code of Civil Procedure, 1908 (as amended in 1976) reads as under:—

"20. *Power to adjourn hearing and direct persons appearing interested to be made respondents.*

(1) Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

(2) No respondent shall be added under this rule, after the expiry of the period of limitation for appeal, unless the Court, for reasons to be recorded, allows that to be done, on such terms as to costs as it thinks fit."

21.32. I would thus appear that as regards the addition of parties to an appeal, where the case falls within Order 41, rule 20, that rule takes care of the situation and we do not consider it necessary to suggest any provision in Section 21.

Applications

21.33. As regards applications, would seem that although section 3 of the Limitation Act specifically deals only with applications made in the High Court by notice of motion, the principle would be the same regarding applications in general, namely, it is enough if the application is made within time as on date of presentation to the proper officer of the court. The case law at present does not regard section 21 as applicable to applications. It has generally been recognised that if section 21 is regarded as applicable to applications, it would benefit the *opposite party* and not the applicant. The most important case is application for execution, to which also section 21 does not, at present, apply.

21.34. It is well established that section 22 of the Act of 1908 (corresponding to present section 21) did not apply to applications, so that the addition of a party during the pendency of the application does not necessarily mean that as regards him, the application will be taken as filed only on the date of the impleading of that party. This principle has been laid down by decisions of the High Court of Calcutta, Judicial Commissioner of Nagpur and High Court of Patna.[2-6]

21.35. In a Kerala case[7], present section 21 has been held to be inapplicable to a petition for revision.

Applications to be brought within section 21.

21.36. We think that section 21(1) should be amended so as to bring applications within its scope by an express provision. This will settle the position.

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[1] *Chandrika Roy* v. *Ram Kuer*, A.I.R. 1923 Pat. 88.
[2] *Indu Bhushan* v. *Hari Charan*, A.I.R. 1931 Cal. 385, 387.
[3] *Amolakrao* v. *Govindrao*, A.I.R. 1919 Nag. 150.
[4] *Gulab Kuer* v. *Syed Mohammed Zaffar*, A.I.R. 1921 Pat. 180.
[5] *Chandrika Roy* v. *Ra mKuer*, A.I.R. 1923 Pat. 88.
[6] See also *Zahurul Hussain* v. *Badi Narain*, A.I.R. 1930 All. 597.
[7] *Rugmani* v. *Challappa Rawther*, (1969) Ked. L.T. 789.

(Chapter 21—Section 21—Addition or Substitution of Parties)
(Chapter 22—Section 22—Continuing Wrongs)

VI. Recommendation

Recommendation.

21.37. In the light of the above discussion, we recommend that section 21 should be revised as under:

Revised section 21

21. (1) Where, after the institution of a suit, *or the making of an application,* a new plaintiff *or applicant,* or a new defendant or *respondent, as the case may be,* is substituted or added, the suit *or application* shall, as regards him, be deemed to have been instituted, *or made, as the case may be,* when he was made a party ;

Provided, that where the court is satisfied that the omission to include a new *plaintiff or application or a new defendant or respondent, as the case may be,* was due to a mistake made in good faith, it may direct that the suit, or *application* as regards such plaintiff *or applicant or defendant or respondent* shall be deemed to be have been instituted, *or made, as the case may be,* on any earlier date. *"Explanation.—For the purposes of this section, and subject to the provisions of the proviso to this sub-section, a person is deemed to have been made a party was the application for making his a party is made to the court.*

(2) Nothing in sub-section (1) shall apply—

(a) to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit *or application,* or,

(b) where a plaintiff is made a defendant or *an applicant is made a respondent,* or

(c) where a defendant is made a plaintiff or *a respondent is made an applicant,* or

(d) *to a suit or application by or against the members of a joint Hindu family to enforce a right or liability relating to the affairs of the joint Hindu family, where one or more of the members of the family, not being originally impleaded, is in the course of the suit or application, brought on the record at the instance of the other party."*

CHAPTER 22

SECTION 22 : CONTINUING WRONGS

Section 22-continuing breaches and torts.

22.1. Section 22 provides that in the case of a continuing breach of contract or in the case of a continuing tort[1], a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. The object of the section is to enable the injured party to wait for so long as the breach or the wrong is persisted in and then to bring a suit to recover all the damage he may have suffered, instead of being compelled to bring innumerable separate suits, one after the other[2].

History.

22.2. Section 23 of the Act of 1877, which dealt with the subject, ran as under:—

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[1]Compare section 2(m)—definition of tort.
[2]*Secy. of State* v. *Venkayya,* (1977) I.L.R. 40 Mad. 910, 920, 921.

(*Chapter* 22—*Section* 22—*Continuing Wrongs.*)

"23. In the case of a continuing breach of contract and *in the case of a continuing independent of contract*, a fresh period of limitation begins to at every moment of the time during which the breach or the wrong, as the case may be, continues."

22.3. This section was continued verbatim as section 23 of the Limitation Act, 1908.

When the draft bill for the Act of 1908 was circulated for comments, the section came to be noticed in a rather oblique way. Article 35 of the Limitation Act of 1877 provided for a period of limitation of two years for a suit for restitution of conjugal rights and provided (in the third column) that the time would begin to run when restitution is demanded and is refused by the husband or wife, being of full age and sound mind.

22.4. Dealing with this article, the Statement of Objects and Reasons annexed to the Bill of 1907 stated as under:—

"Article 35 of the Act is also proposed to be omitted.

"The scope of this article is very limited. It does not apply to cases arising under the Indian Divorce Act. The Allahabad High Court has held that it does not apply to Hindus or Muhammadans, as their personal law does not require an antecedent demand to sustain a suit for restitution of conjugal rights, nor make restitution unenforceable against a minor, and it has further held that the withholding of conjugal rights by either party is a continuing wrong, and that a claim for restitution cannot be barred by Limitation: *Binda* v. *Kausilia*, I.L.R. 13 All. 126, 146. The same view was taken in *Bai Sari* v. *Saukla*, I.L.R. 16 Bom 714. Those views have been so far modified by the rulings of the Calcutta and Madras High Courts and by the later rulings "of the Bombay High Court as to make the article applicable to Hindus and Mohammadans in cases of suits preceded by demand and refusal as mentioned in the third column; *Thunijibhoy* v. *Hirabai*, I.L.R. 25 Bom. I.L.R. 28 Mad 436. The operation of the article may be easily avoided by a 644 R.B.; *Asirunnissa* v. *Bugloo*, I.L.R. 34 Cal. 79; *Saravanal* v. *Poovavi*, party if he simply refrains from making a demand which, it may be noted, is not, under the Hindu or Mohammadan Law, necessary to give rise to a cause of section. It is a very usual thing in Hindu and Mohammadan families for a wife to go and stay with her parents or brothers and the effect of this article is that if owing to any domestic quarrel the wife should in a fit of temper refuse to return, the husband would be compelled to take the matter into court within two years."

22.5. The Government Pleader[1], Assam Valley Districts, and the Judge[2] of the Assam Valley Districts, while commenting on the Statement of Objects and Reasons quoted above, noted as under[3]:—

"It appears from Objects and Reasons under Article 35 that the Legislature would adopt the suggestion (made in I.L.R. 13 All. 126, 145) that withholding of restitution of conjugal rights is a continuing wrong. In a recent Calcutta case (11 C.W.N. 437) it has been held that section 23 (now section 25) does not apply to such a case. In view of this decision of the Calcutta High Court, the intention of the legislature should be made clear by an illustration."

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[1]Babu Kali Charan Son.
[2]Mr. W. B. Brown.
[3]On 3rd September, 1907—National Archives File.

22.6. This omisison of article 35 of the Act of 1877 from the Act of 1908 was noticed by Wazir Hasan A.J.C. in an Oudh case[1], in which a comparison was drawn between the cause of action for a suit for restitution of conjugal rights and that for dissolution of marriage. It was observed that in the former case the cause of action is founded on a breach of contract of marriage, in which the breach continues so long as the person of the wife is withheld from the husband, while, in the latter case the residuary article 120 (of the Act of 1908) applied.

Law Commission Report on the Act of 1908.

22.7. Section 23 was not disturbed in 1908. The Law Commission in its Report[2] on the Act of 1908 recommended expansion of the concept of "tort", and had suggested a draft clause which ran as under:—

> "21. *Continuing breaches and wrongs.*—In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."
>
> The Law Commission had also recommended that the expression "tort" should be defined to include *"all civil* wrongs independent of contract."

Act of 1963.

22.8. However, in section 22 as it emerged in its final form in the Act of 1963, the words "continuing wrong independent of contract" have been substituted by the words "continuing tort". The definition of "tort" in section 2(m) defines it as a civil wrong which is not exclusively the breach of a contract or breach of trust. This is not the definition that was recommended by the Law Commission[3].

Defect in the present language.

22.9. The language used has introduced a deficiency in the section. The Law Commission had recommended inclusion of all continuing wrongs in the section, but, in the present language (read with the definition of "tort") section 22 does not cover breach of trust or violation of statute.

Violations of statute.

22.10. We have considered the matter carefully. It appears that there is no reason for excluding from section 22 continuing breaches of trusts or continuous violations of statute. No doubt, section 10 does take care of certain breaches of trusts; but the topic under discussion is of *continuing wrongs.* It is proper that section 22 should cover all continuing wrongs contractual and non-contractual.

The word "wrong" can be given the widest possible connotation, and would include infringement of trade marks or other forms of intellectual property, violation of easements and breach of statutory duty. In a Punjab case[4], the fixing of a Persian wheel over a well which was in the enjoyment of the other co-owner was held to amount to a continuing wrong. Similarly, in a Lahore case[5], it was held (disregarding the technical aspect) that under Muslim Law, marriage, being a civil contract, the husband's impotency was a continuing *breach of contract of marriage.* As section 22 embodies a general enunciation of the principal of continuing wrongs, we are of the view that it would be desirable to put the matter beyond any doubt.

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[1] *Maid. Hamidullah Khan* v. *Mt. Bakhurijahan Begam* A.I.R. 1922 Oudh 109.
[2] Law Commission of India, 3rd Report (Limitation Act, 1908) page 12, paragraph 20, page 5, paragraphs 10 and 11, page 10, paragraph 14 and Bill at page 72, Clause 2(3); page 73, clause 2(ii) and page 82 clause (21).
[3] paragraph 22.7 *supra.*
[4] *Thomkan Singh* v. *Sohana,* A.I.R. 1950 East Punjab 21.
[5] *Sahib Zaiaa* v. *Abdul Ghafoor,* A.I.R. 1939 Lahore 454.

(Chapter 22—Section 22—Continuing Wrongs.)

(Chapter 23—Section 23—Acts not Actionable without Special Damage.)

Need to widen the section to cover all wrongs.

22.11. Accordingly, section 22 should be revised, so as to make it clear that the section is not limited only to breaches of contract or torts (as defined in the Act), but covers all continuing wrongs.

Relief claimed to be immaterial.

22.12. It is also necessary to refer to another aspect of section 22, which figures in a recent Madhya Pradesh ruling[1]. That ruling seems to assume that section 22 (continuing wrongs) is confined to suits for damages and does not, in terms, apply to suits where the relief for prayer is an injunction. Of course, in that case, the court did hold that the cause of action for a suit for an injunction restraining the defandants from (illegally) recovering a sum of money from the plaintiff arises every time a threat of such recovery is made. However, to avoid recurrence of such a controversy, we think that it should be made clear by an express provision that section 22 applies, irrespective of the nature of the relief claimed for the continuing wrong.

Recommendation

22.13. In the light of the above discussion, we recommended that section 22 should be revised as under:—

Revised section 22

"22—*Continuing Wrongs.*—In the case of a continuing breach of contract and *in the case of a continuing* wrong *independent of contract,* a fresh period of limitation begins to run at every moment of the time during which the *breach or the wrong,* as the case may be, continues.

Explanation.—This section applies whatever be the relief claimed."

CHAPTER 23

SECTION 23: ACTS NOT ACTIONABLE WITHOUT SPECIAL DAMAGE

Section 23—Conduct not actionable without special damage.

23.1. Section 23 provides that in the case of a suit for compensation for an act which does not give rise to a cause of action unless some "specific injury" actually results therefrom, the period of limitation shall be computed from the time when the injury results. In a sense, it modifies the general rule.

The general rule is that "Limitation runs from the earliest time at which an action could be brought"[2]. Accordingly, time would, in general, run from the occurrence of the act of omission complained of, and not from the time when the consequential damage causes. However, where specific damage is itself the gist of the cause of action[3], this general rule requires qualification. Time should commence to run only when the damage actually results, because the right to sue arises only then.[4]

The Act of 1877 and illustrations to section 24 of that Act.

23.2. The history of the section is of some relevance and may be briefly dealt with. Section 24 in the Limitation Act (15 of 1877) ran as under:—

"24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

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[1] *Mohanlal* v. *State of M.P.*, A.I.R. 1980 M.P. 1(F.B.)
[2] *Reevas* v. *Buldier*, (1891) 2 Q.B. 509, 511.
[3] cf. article 76 (compensation for slander).
[4] See *Dwarkanath* v. *Corporation of Calcutta*, (1891) I.L.R. 18 Cal. 91, 99.

(*Chapter* 23—*Section* 23—*Acts not Actionable without Special Damage.*)

Illustrations

(a) A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at least the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

(b) A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C in consequence refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal."

Case law analogous to illustration (a) of section 24 of the Act of 1877.

23.3. Illustration (a) of the above section 24 (Act of 1877) was probably dictated by the facts of a House of Lords Judgment[1], in which A was the owner of certain houses standing on land which was surrounded by the lands of B, C & D. E was the owner of mines running underneath the lands of all these persons. E worked the mines in such a manner (without actual negligence) that the lands of B, C and D sank in; and, after more than six years' interval, their sinking occasioned an injury to the houses of A. It was held that a right of action accrued to A when this injury actually occurred, and that his right was not barred by the Statute of Limitations.

This view was affirmed by the House of Lords in a later case[2], in which it was held that the cause of action in respect of further subsidence did not arise till the subsidence occurred and therefore, the injured party could maintain an action for the injury thereby caused, although more than six years had passed since the last working of the coal mine.

Comment regarding slander (1907).

23.4. We now come to illustration (b) to the Act of 1877. When the draft of the Act of 1908 was circulated for comments, Sir Lawrence O. Jenkins, Chief Justice of the Bombay High Court[3], suggested the omission of illustration (b) as "it may be open to question whether special damage is necessary in India". This was in the context of slander[4].

23.5. Acting upon this suggestion, the Act of 1908 did not repeat illustration (b). When the Act of 1963 was passed, even illustration (a) was omitted, in conformity with the general recommendation of the Law Commission to omit illustrations[5].

Applicability of section to tort and contract suits.

23.6. There is a controversy on the question whether the section, in terms applies also to suits based on contract, or whether it is confined to suits based on torts.

The Rangoon High Court consistently[6] held that section 24 applies only to suits based on torts.

However, the Allahabad High Court[7-8] seems to have taken a somewhat wider view and the following observations of Arshworth J. are worth quoting :

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[1] *Backhouse* v. *Bonomi* (1861) 9 H.L.C. 503.

[2] *Darley Main Colliery Company* v. *Thomas Bilfried Howe Mitchell,* (1866) L.R. 11 Appeal Cases 187 (H.L.).

[3] No. 2469 dated 18th Dec. 1907 from the Acting Registrar High Court, Appellate Side Bombay to the Secretary to the Government, Judicial Deptt. Bombay—National Archives File.

[4] *Cf.* discussion as to articles 75-76 (libel and slander), *infra.*

[5] Law Commission of India, 3rd Report (Limitation Act, 1908), pages 4-5, para 8.

[6] (a) *V. M. Cany* v. *Loong Ghye,* A.I.R. 1936 Rangoon 510.
(b) *Annamalai Chetyar* v. *Cowasjee,* A.I.R. 1938 Rangoon 258.

[7] *Kedar Nath* v. *Har Gobind,* A.I.R. 1925 All. 605.

[8] See also *Kothari & Sons* v. *Krishna Rao,* A.I.R. 1953 Mad. 726.

(*Chapter* 23—*Section* 23—*Acts not Actionable without Special Damage*)

"Where there is no sum named to be paid in case of breach of stipulation by way of penalty, under Indian Law a mere breach of the covenant by omission to pay, as in this case, gives no right to a claim for compensation, and the suit will come within the language of section 24 of the Limitation Act. I may mention that the word 'act' in section 24 of the Limitation Act will include an omission (see section 3(2) of the General Clauses Act, 10 of 1897). It has been urged that section 24 is only applicable to suits based on tort, but no reason appears for holding this."

23.7. The Bombay High Court[1] while dealing with a case in which misfeasance summons had been taken out against the Director of a company under section 235 of the Companies Act, 1913, observed:

"The case of *Cavandish Bentink* v. *Fann* also shows that a misfeasance application, to be successful, must establish that actual loss resulted to the company from the misfeasance. But by section 24, Limitation Act, in the case of a suit for compensation for an act which does not give rise to a right of action unless some specific injury actually arises the reform, the period of limitation is to be computed from the time when the injury results..... In this connection I think that 'injury' in section 24 includes a legal injury; and that the present application is clearly one for 'compensation', which is the expression used in section 235, Companies Act itself. And in so far, if at all, as the case is not covered by section 24, I think it comes within section 23".

23.8. Meredith J. of the Patna High Court[2] having taken stock of the controversy on this subject, ultimately observed that "the better view is that section 24 is applicable in the case of action *ex contractu* in proper cases". The case was, however, one in which the breach of contract itself had furnished the cause of action (and the aspect of special damage was not material).

23.9. The matter came up in some other cases[3-6] in an indirect way, but no concluded view was expressed on the above point.

23.10. It would appear that in section 23, the use of the word 'injury' in juxtaposition with the expression 'cause of action' indicates that all types of actions, irrespective of their form, are contemplated. Holloway J. in a Madras case has gone in detail as to what constitutes a "cause of action", and observed as under:[7] Meaning of cause of action.

"Parke, B in *Nicklin* v. *Williams*, 10 Exch. 259 and Campbell, C.J. in *Bonomi* v. *Backhouse*, E.B. & E. 622, talk of a cause of action not being an injury" to a right, but of consequential damages being that cause. It is clear, however, that this language is incorrect; and the only meaning in cases in which the cause of action is said to arise from consequential damages, is that until that damage, there was no injury at all. In that same case, Coleridge, J. says—"The right of action vests in a party whose rights are injuriously affected by the act of another person at the time when the right is so affected. Erle, J.—"A cause of action arises when this right is violated," and again, "as a general principle, it is difficult to conceive a cause of action from damage when no right has been violated, and no right has been violated,

[1] *Govind* v. *Rangnath*, A.I.R. 1930 Bombay 585.
[2] *Jagat Kishore Prasad* v. *Parmashwar Singh*, A.I.R. 1951 Pat. 348 ILR 28 Pat 974.
[3] *Rajagopala Naidu* v. *Aiyyaswamy Chattier*, A.I.R. 1965 Madras 532.
[4] *Jagannath Marwari* v. *Kalidas Raha*, A.I.R. 1929 Patna 245.
[5] *Eastern Traders (I) Ltd. New Delhi* v. *Punjab National Bank*, A.I.R. 1966 Punjab 303.
[6] *M/s. Bhajan Hardit Singh* v. *Karson Agency (India)* A.I.R. 1967 Delhi 101.
[7] *Desouza* v. *Colas* : (1866-67) M.H.C. 384, 407.

and no wrong has been done," and in the Exchequer Chamber, "Willes, J.—"the question in this case depends upon what is the character of the right". The injury in this case was to a right *in rem*. This right was not to prevent the defendant from excavating, but to have his land in its natural state. There was no '*juris vinculum*' at all until that state was disturbed; there was no disturbance until the damage accrued, and at the accruing of the disturbance arose the injury, the cause of action."

Need to extend section 23 to action on contracts.

23.11. From the above discussion it transpires that the doubts expressed about the applicability of the section to suits based on contracts have been resolved by the courts mostly in favour of its applicability. However, in order to obviate further controversy, on the point, it is desirable to extend the section expressly to suits on contracts.

Section to be extended to all wrongs.

23.12. In fact, while making it clear that section 23 is comprehensively and is not confirmed to tort, etc. opportunity can also be taken of clarifying that the section applies to *all wrongs* (for example breach of statute or breach of trust).[1]

"Specific injury"—an expression needing to be replaced.

23.13. Another point on which the section seems to require verbal improvement relates to the words "specific injury" occurring in the section. The word 'injury' is now-a-days used in the context of civil liability for the *wrong itself* (which is a legal concept), while the word "damage" is used to indicate the harmful physical consequence of the injury. The section has obviously in mind the consequence and from this angle "specific damage" is better than the present wording "specific injury". In fact, the Limitation Act itself (in the articles relating to libel and slander), uses the expression "specific damage". These words were also used in illustration (b) to section 24 of the Limitation Act of 1877[2]. The words "specific injury", therefore, should be replaced by "specific damage".

Recommendation.

23.14. In the light of the above discussion, we recommend that section 23 should be revised as under:

Revised section 23

"23. In the case of a suit for compensation for an act which does not "give rise to a cause of action unless some *specific damage* actually results therefrom, the period of limitation shall be computed from the time when *the damage results.*

Explanation.—The provisions of this section apply to a wrong which constitutes a breach of contract, as also to an act which constitutes a wrong independent of contract."

CHAPTER 24

SECTION 24: COMPUTATION OF TIME

Section 24-Computing the time mentioned in instruments.

24.1. Dates or periods of time for the performance of contractual obligations are often mentioned in instruments with reference to an Indian calendar or some calendar other than the Gregorian. In regard to such instruments, a general rule is enacted in section 24 of the Limitation Act—expressed in the form of a legal fiction. The section provides that all instruments shall, for the purposes of the Act, be deemed to be made with reference to the Gregorian calendar. In

[1] See paragraph 23.14, *infra* for a draft.
[2] Paragraph 23.2, *supra*.

effect, by virtue of the operation of the section, dates or periods mentioned with reference to any other calendar are to be converted into the corresponding dates or periods of the Gregorian calendar and the time limits prescribed by the Limitation Act would be computed on that basis.

Thus, for the purposes of the Act, the parties to every instrument are deemed to have used the terms "year" and "month" in the sense which they bear in the Gregorian calendar[1]. The section is not subject to a different intention.[2-4]

24.2. The law on this topic is now fairly well-settled and the section appears to need no change. No change needed.

CHAPTER 25

SECTION 25: ACQUISITION OF EASEMENTS BY PRESCRIPTION

25.1. It is well-known that the running of time has two important facets in law—the barring of a remedy and the creation or extinction of rights. The latter has come to be known as "prescription", while the former is known as limitation. Prescription as creating certain rights (known as acquisitive prescription) is dealt with in the Limitation Act in sections 25 and 26, in the context of easements. Acquisition of easements by prescription—The legal framework.

These two sections apply only to those areas where the Indian Easements Act, 1882 (5 of 1882) does not extend[5]. The reason why the Indian Statute Book, in two enactments extending to two different areas, deals with the subject of easements is historical. Provisions for the acquisition of easements by prescription on the analogy of the English Act[6] were introduced for the first time in India in 1871 in the Limitation Act, 1871, and repeated in the Limitation Act of 1877. [The English Act on the subject had been regarded as applicable in the Presidency towns]. Later, as a part of the plan for a civil code, the Easements Act, 1882, was passed, but it was not applied throughout India in view of the reservations expressed by some of the local Governments. Hence, the provisions in the Limitation Act relating to easements continued to apply to areas where the Easements Act had not been applied, either initially or by subsequent extension. This position continues today. Although the Law Commission, in its Report on the earlier Limitation Act, recommended[7] the extension of the Easements Act, 1882 to the whole of India (and repeal of sections 26-27, Limitation Act, 1908) that could not be done, owing to certain constitutional difficulties felt by the Ministry of Law[8]. Sections 26 and 27 of the Act of 1908 have been re-enacted in sections 25 and 26 of the present Limitation Act. For the purposes of the present Report, it is unnecessary to make any detailed comments as to the constitutional aspect. Accordingly, we proceed to a consideration of the provisions contained in the relevant sections.

25.2. Section 25 deals with the acquisition of easements by prescription. Sub-section (1) makes a two-fold provision. The first half deals with access and use of light or air to and for any building, which has been peaceably enjoyed with the building as an easement and as of right without interruption for Section 25—The theme.

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[1] *Nilkanth* v. *Dattatraya*, (1879) I.L.R. 4 Bom. 103.
[2] *Venkata Subramaniya Sastri* v. *Bhairavasami*, (1927) 53 M.L.J. 447.
[3] *Vishnu Bhatta* v. *Domakka*, A.I.R. 1958 Ker. 326.
[4] *Rungo* v. *Babaj*, (1880) I.L.R. 6 Bom. 83.
[5] Section 29(4), Limitation Act, 1963.
[6] Prescription Act, 1832 (Eng.).
[7] Law Commission of India, 3rd Report (Limitation Act, 1908), page 24, para 56.
[8] Statement of Objects and Reasons annexed to the Limitation Bill, 1962.

(Chapter 25—Section 25—Acquisition of Easements by Prescription—Chapter 26—Section 26—Reversioner—Chapter 27—Section 27—Extinguishment of Right to Property)

20 years. At the expiry of the twenty years' period, the right to such access or use of light and air becomes absolute and indefeasible. The second half of the section provides that where any way or watercourse or the use of any water or any other easement (whether affirmative or negative) has been peaceably and already enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, the right of such way, watercourse, use of water or easement becomes absolute and indefeasable.

Sub-section (2) of section 25, in substance, requires that the period of twenty years should be a period ending within two years next before the institution of the suit wherein the claim to such period relates is contested. By sub-section (3), where the property over which a right is claimed under sub-section (1) belongs to Government, the period must be thirty years. The meaning of "interruption" for the purposes of the section is explained by the Explanation to the section.

No change needed in section 25.

25.3. No change is needed in section 25. Section 26 is dealt with in the next Chapter.

CHAPTER 26

SECTION 26 : REVERSIONER

Section 26-Exclusion of certain periods.

26.1. Continuing the subject of easements in section 25 dealt with section 26 provides that in computing the period of twenty years mentioned in section 25, if the servant tenant has been held by virtue of any life interest or any other (limited) interest for a term exceeding three years, the time of enjoyment of such easement during the continuance of such life interest or limited interest shall be excluded in computing the period of twenty years, in case the claim to the easement is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the dominant tenement.

The object of this section is to preclude any easement from arising where the servient tenement is enjoyed or held for a limited period—obviously because a person having a limited interest may not have any enthusiasm in opposing or resisting any enjoyment that might ultimately ripen into an easement.

No change.

26.2. No change is needed in the Section.

CHAPTER 27

SECTION 27 : EXTINGUISHMENT OF RIGHT TO PROPERTY

Prescription as extinguishing rights.

27.1. In the context of prescription, the more important provision is to be found in section 27, which may be described as the shortest but the most important section of the Act. In terms, it deals with the extinction of rights—extinctive prescription—but, in effect, it amounts to the creation of a corresponding right, which in practice, has come to be known as title by adverse possession. The section reads as under:—

> "27. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

(*Chapter 27—Section 27—Extinguishment of Rigot to Property.*
Chapter 28—Section 28—Amendment of Certain Acts
Chapter 29— Sections 29 to 32—Savings, Transitional Provisions and Repeal.)

27.2. The theoretical as well as practical importance of the extinction and acquisition of title to property by prescription is, by now, well understood and it is hardly necessary to spend much time over the subject. While the principle enacted in the section is confined to property which it is sought to possess, at the same time, it applies to property to all kinds—movable and immovable, including a hereditary office. Again, while the section, as already stated above, purports only to deal with the extinction of rights, it is well established that actual ownership of the property is also acquired by another person who was in adverse possession of the property for the period specified in the section. In other words, a good title is also conferred upon the person in possession *de facto*.[1] Other points concerning section 27.

27.3. On a consideration of the case-law in question, no change appears to be needed in section 27. No change needed.

CHAPTER 28

SECTION 28 : AMENDMENT OF CERTAIN ACTS

28.1. Section 28 makes two amendments in other laws by directing that— Section 28—Amendment of the Easements Act and the Civil Procedure Code.

(i) in section 15 of the Indian Easements Act, 1882, for the words "sixty years", the words "thirty years" shall be substituted; and

(ii) in the Code of Civil Procedure, 1908, section 48 shall be omitted.

The first amendment is in harmony with the policy of the law to substitute thirty years for sixty years in regard to claims against the Government. The second amendment is consequential on the decision to simplify and reform the law relating to time limits for the execution of decrees.

28.2. As the section has created no serious problem, no change is needed. No change needed.

CHAPTER 29

SECTIONS 29 to 32 : SAVINGS, TRANSITIONAL PROVISIONS AND REPEAL

I. Introductory

29.1. It remains now to consider (so far as the body of the Act is concerned), the provisions of the Act in the nature of savings, transitional provisions and repeal. Of these, the most important is section 29, consisting of four sub-sections. Sub-section (1) provides that nothing in this Act shall affect section 25 of the Indian Contract Act, 1872. It may be recalled that by virtue of section 25(3) of the Contract Act, a time barred debt may, by means of a fresh promise satisfying the formalities required by that section, be revived even though there is no consideration for the promise. It should, however, be noted that a right other than a right to debt does not fall within the purview of that section of the Contract Act. Thus, a right to property or to a legacy or to damages does not fall within it. Section 29—General Scheme.

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[1] *Ganga Gobind Mandal* v. *The Collector of the Twenty-four-Pergunnahs*, (1867) 11 Moo. I.A. 345, 360;
Amirunnisa Begum v. *Umar Khan*, (1872) 8 Beng. L.R. 540;
Gossain Dass Chunder v. *Issur Chunder Nath*, (1878) I.L.R. 3 Cal. 224.
Radhabai v. Anantrao, (1885) I.L.R., 9 Bom. 198, 228.

Section 29(2) of the Limitation Act deals with those special or local laws which prescribe a period of limitation for any suit, appeal or application. The sub-section consists of two parts. According to the first half, where a special or local law prescribes a period different from that prescribed in the Limitation Act, then section 3 of the Limitation Act will apply as if that period had been set out in the Schedule to the Limitation Act. In other words, the suit, appeal or application to which the special or local law applies must, under section 3, be dismissed if it is instituted or made after the expiry of that particular period. The second half of section 29(2) provides that the provisions contained in sections 4 to 24 apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. Although apparently simple, sub section (2) has given rise to a number of questions of interpretation and application, some of which will be referred to in due course.[1]

Sub-section (3) of section 29 reads as under:

> "(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law."

This sub-section has also created certain problems in regard to suits for dower, which will be mentioned in due course.

Finally, sub-section (4) of section 29 provides that in the provisions of the Act relating to easements do not apply to cases arising in the territories to which the Indian Easements Act, 1882, for the time being extends.

II. Special and Local Laws

Section 29(2)—Earlier recommendation of the Law Commission as to special and local laws.

29.2. With reference to the savings effected as regards special and local laws, the Law Commission in its Report on the Act of 1908, while dealing with section 29 of the Limitation Act, 1908 (corresponding to present section 29), observed[2] as under:—

> "The combined operation of sub-clauses (a) and (b) of sub-section (2) is that so far as special and local laws are concerned, only sections 4, 9 to 18 and 22 of the Act apply, and that too subject to such modifications as may be prescribed. We consider that there is no need for this restriction and that the principles contained in sections 4 to 25 should be made applicable to all special and local laws, leaving it open to the legislature to exclude the application of any or all of these sections, in any given case."

Implementing this recommendation, section 29(2) as re-enacted in the present Act, reads as under :—

> "(2) Where an special or local law prescribed for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

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[1] Para 29.2, et seq, *infra*.

[2] Law Commission of India, 3rd Report (Limitation Act 1908), page 24, para 59 and pages 82-83, section 25(2).

(Chapter 29—Sections 29 to 32—Savings, Transitional Provisions and Repeal.)

"Special" and "local" law.

29.3. Several decisions of the Supreme Court [1-2-3] have made it clear that a "special law" is a law relating to a particular area or territory.

29.4. The Supreme Court has also noticed[4] the important departure made by Limitation Act, 1963 (from the Act of 1908) in so far as the provisions contained in section 29, sub-section (2) are concerned. The Court concluded that since, under the new Limitation Act, section 5 is specifically made applicable by section 29(2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law, if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. The court took notice of the fact that a time limit of 60 days was laid down by section 417(4) of the Code of Criminal Procedure 1898, which was a "special" law of limitation. But the mere fact that the special law has, by peremptory and imperative language, prescribed a period of limitation in section 417(4) was held as not a sufficient ground to displace the applicability of section 5.

Definition of special or local laws—not needed.

29.5. In view of the above authoritative pronouncement, there appears to be no need to define the expression "special law" and 'local law' as occurring in the Limitation Act.

"Expressly excluded".

29.6. The expression "expressly excluded" by such special or local law, as occurring in section 29(2) also, came up for consideration before the Supreme Court[5] in a case dealing with section 81 of the Representation of the Peoples Act 1951. The Supreme Court overruled an earlier view about the interpretation of this expression as occurring in section 29(2)(a) of the Limitation Act, 1908—a view to the effect that the exclusion must be by express words i.e., by express reference to the sections of the Limitation Act. The Supreme Court held that what had to be seen was whether the scheme of the special law and the nature of the remedy provided therein "are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it." "If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act." The Supreme Court further held that even in a case where the special law does not exclude the provisions of sections 4 to 24 of the Limitation Act by an express reference, "it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and the scheme of the special law exclude their operation."

Cases in High courts.

29.7. In view of the pronouncement of the Supreme Court mentioned above, Courts enter upon a comparative study of the scheme of the special or local law and the Limitation Act, 1963, with a view to finding out whether an exclusion is suggested, even though the exclusion does not appear in so many words in the text of the special or local law.

29.8. For example, a Full Bench of the Madhya Pradesh High Court[6] has applied section 5 of the Limitation Act to an objection petition filed under section 11(3) of the Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960,

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[1]*Kaushalya Rani* v. *Gopal Singh*, A.I.R. 1964 S.C. 480.
[2]*Mangu Ram* v. *Municipal Corporation of Delhi*, A.I.R. 1976 S.C. 105.
[3]*J. A. De Piedade* v. *A. V. De Fonseca*, A.I.R. 1979 S.C. 984
[4]*Mangu Ram* v. *Delhi Municipality*, A.I.R. 1976 S.C. 105.
[5]*Hukumdev* v. *Lalit Narain*, A.I.R. 1974 S.C. 480.
[6]*Vijay Singh* v. *Competent Authority*, A.I.R. 1978 M.P. 72

with a terse observation:—

> "The provisions contained in the Ceiling Act do not specifically exclude the application of section 5 of the Limitation Act. Consequently, it cannot be doubted that to an objection application as provided for in sub-section (3) of section 11 of the Ceiling Act, section 5 of the Limitation Act will be applicable."

29.9. The Calcutta High Court has held[1] that the appellate Cooperative Tribunal, established by the Bengal Cooperative Societies Act, 1940, would be governed by the provisions of the Limitation Act which are applicable to "courts" and accordingly section 29(2) of the Act would also be applicable. A certified copy is not required to be filled along with the appeal, but even then the Court came to the conclusion that the provisions of section 12(2) of the Limitation Act, 1963 [regarding excluding the period for obtaining copy of the award] would be applicable, because an aggrieved person cannot make up his mind whether to file an appeal or not unless he reads the reasons given by the lower court.

No change needed as to the expression "expressly excluded".

29.10. From the above discussion, it appears that the expression "expressly excluded" occurring in sub-section (2) of section 29 has been construed liberally in determining the question whether sections 4 to 24 are available to proceedings under special or local laws. It may be difficult to devise a verbal formula that will cover the variety of situations, and we do not, in the present state of the case-law, propose to make any verbal change.

III. Local laws—The problem of Portuguese and French laws.

Section 29(2)—Local laws.

29.11. As to the savings effected for "local laws", two cases decided by the Court of the Judicial Commissioner and the Madras High Court regarding Goa and Pondicherry respectively, have brought to surface the anomalous situation prevailing in these two former foreign enclaves.

Portuguese Civil Code.

29.12. In a Goa case[2], it was held that articles 529 and 535 of the Portuguese Civil Code are "special or local law" within the meaning of section 29(2) of the Limitation Act, 1963, and did not, on the coming into force of the Limitation Act 1963, in the Union Territory of Diu, Daman Goa, stand repealed by the corresponding articles 74, 31 and 65 of the Schedule to the Limitation Act, 1963. A reading of the judgment shows that the articles of the Portuguese Civil Code in question are more liberal to the plaintiff than the corresponding provisions of the Act of 1963. So vast was the disparity between these two provisions as regards the prescribed limitation periods that the Counsel for the defendant went to the extent of arguing that articles 529 and 535 of the Portuguese Civil Code (which prescribed a period of 30 years) were demonstrably discriminatory and irrational in nature. The argument was dismissed, but the ruling accentuates the fact that a system substantially different from the Indian Act has been regarded as continuing in force in the Union Territory of Goa.

French Civil Code.

29.13. The Madras High Court (which has jurisdiction over the former French Possession of Pondicherry) has also held in the same refrain[3] that articles of Limitation laid down in the French Civil Code answered the description of "local law" in section 29(2) of the Limitation Act, 1963. The French Civil Code was a "local" law because it applied, and was inforce, in the former French establishments of Pondicherry. It was not in force anywhere else in India. After

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[1] *Nirmal Kumar* v. *Panihati Co-op. Bank*, A.I.R. 1977 Calcutta 246.
[2] *J. A. Da P. Barreto* v. *A. V. De Fonseca*, A.I.R. 1969 Goa 124.
[3] *Chockalinga Mudaliar* v. *Nanivanna Pillai*, (1978) 2 M.L.J. 544.

the *de jure* merger of Pondicherry in the Indian Union on 16th August, 1962, all the laws formerly in force in that territory were continued, by force of section 4(1) of the Pondicherry (Administration) Act, 1962. This meant that the laws so preserved continued to remain "local laws". The law of limitation continued in the French Civil Code had thus to be regarded as "local law", because that was its character at the time when Parliament passed the Limitation Act, 1963.

Long periods of limitation.

29.14. The French Civil Code shares the common trait of liberality to the plaintiff with the Portuguese Civil Code prescribing a period of 30 years for all rights of action whether *in rem* or *in personam*. The arguments advanced—albeit without-success—before the Judicial Commissioner of Goa about the discriminatory nature of the Portuguese Civil Code, vis-a-vis the Indian Limitation Act acquired an added refinement here. The French Civil Code not only prescribed a 30 years limit for actions *in rem* or *in personam* (on the pattern of the Portuguese Civil Code), but also distinguished between actions for the price of goods sold to private persons and those where the purchasers were merchants. In the former case, a very short period of one year has been prescribed.[1]

Understanding of the mercantile community.

29.15. The complexity of the problem can be gauged from the fact that even the plaintiff did not seek to support his case by pleading the continuance of the French Code as regards limitation when he filed the suit on 23rd June, 1971 in the Court of the principal District Munsiff Pondicherry. It was for the first time in the appeal before the Principal District Judge, Pondicherry that a submission was made that the question of limitation must be considered under the French Civil Code, and not under the Limitation Act of 1963. Even at this stage, no attempt was made by the plaintiff to wriggle out of the short period of limitation prescribed by article 2272 of the French Civil Code by pleading that the goods for which the action is based were sold to a merchant. There is, thus, ample justification for concluding that the mercantile community is assuming that the Limitation Act 1963 is now in force in Pondicherry.

29.16. While interpreting section 29(2) of the Limitation Act 1963, the Madras High Court has observed that the sum total of the consequences of section 29(2) is to "preserve unity in diversity in our laws of limitation". The sentiments expressed and the ideals aimed at cannot be faulted, but it will have to be seen whether such a diversity is in keeping with the smooth functioning of the legal system and with the intention of Parliament and the social and political ethos of our country.

Section 29—Recommendation as to French and Portuguese laws relating to limitation.

29.17. No one would have a quarrel with the anxiety of all concerned for preserving the special characteristics and attributes of the system of administration of justice in these erstwhile foreign enclaves. With that end in view, a continuity with the past has been maintained in some areas. However, as regards limitation, the mental orientations of the business community of Pondicherry towards the Indian laws as reflected in the judgment of *Chockalinga Mudaliar's case*[2] persuades us to recommend to the Central Government that the provisions in the erstwhile French and Portuguese Civil Codes governing limitation in force in the Union Territories of Pondicherry and Goa respectively, should be expressly repealed, after ensuring that no legal hiatus is created by such a repeal[2].

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[1]Article 2272, French Civil Code contrasted with Article 2262 of the same Code.

[2]For implementation in connection with French and Portuguese Laws relating to limitation.

(Chapter 29—Section 29 to 32—Savings, Transitional Provisions and Repeal.)

Supreme Court case.

29.18. It may be mentioned in this context that the question whether the provisions of the Portuguese Civil Procedure Code as to limitation still survive in the Union Territory of Goa, Daman and Diu came up before the Supreme Court, where the point at issue was whether the appeal in question was governed by the Portuguese Code by article 116 of the Limitation Act, 1963. If it was the former, the appeal was out of time. If it was the latter, the appeal was in time. The court of Judicial Commissioner, Goa had held (in the case under appeal) that the Portuguese Civil Procedure Code was still applicable and that section 32 of the Limitation Act, 1963 had repealed only the Indian Limitation Act of 1908 and not the Portuguese Code. Moreover, section 29(2) of the Act of 1963 saved a "local" law and hence the provisions contained in the Protuguese Civil Procedure Code still applied, so that the appeal was out of time. However, on appeal to the Supreme Court, the Supreme Court, after posing the question, considered it unnecessary to decide it, since it held that in the circumstances of the case, the delay (if any) should be condoned. It is sufficient to quote the following passage from the last paragraph of the judgment of the Supreme Court:

> "However, the other preliminary objection upheld by the learned Additional Judicial Commissioner is more important and the question that really arises for our consideration is, what was the law of limitation applicable in the Union Territories of Goa, Daman and Diu to proceedings launched therein prior to and pending at the date of liberation?
>
> "In other words, whether the period of limitation for the appeal in question was the one prescribed by the Portuguese Code or by Article 116 of the Limitation Act 1963? It was not disputed that if it was the former, the appeal was out of time and if it was the latter, the appeal was well within time. It is really unnecessary for us to decide this question in view of the application for condonation of delay for filing the said appeal in the Judicial Commissioner's Court at Goa, that has been made by the appellants before us which we are inclined to grant. *It cannot be gainsaid that the aforesaid question of limitation is a complex one and not free from doubt,*[2] and if in such a situation the appellants, *bona fide* believing that the appeal could be filed within 90 days as provided by article 116 of the Limitation Act 1963, filed their appeal within that period, it would be a clear case of sufficient cause which could be said to have prevented them from filing the appeal within the time prescribed by the Portuguese Code. Where two views are equally possible on this complex question and where a party, being guided by one of such views, adopts a course consistent with that view, it would equally be a case of 'just impediment' within the meaning of article 145 of the Portuguese Code, which could be said to have prevented the party from filing the appeal within limitation prescribed by the Portuguese Code."

The above passage indicates that the position as regards the limitation law in force in the area in question is still uncertain.

IV. Local Laws

The Travancore Limitation Act

Travancore Act.

29.19. Another question of a similar character pertains to the Travancore Act. The areas at present comprising the Kanyakumari District and Shen-

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[1] *Maria, Christine* v. *Maria Zurna*, A.I.R. 1979 S.C. 1352, 1354, 1355, para 3-5.
[2] Emphasis added.

cottah Taluk of Tirunelveli District of Tamil Nadu and the southern portion of Kerala together formed erstwhile the Travancore State where the Travancore Limitation Act (IV of 1100 N.E.) was in force. Section 20(1) of the Act read:

> "If before the expiration of the period prescribed for redemption of a mortgage, the mortgagee accepts from the mortgagor a puravaippu or purakkadam deed creating a further charge on the mortgaged property and duly registered, the prescribed period of limitation shall be computed from the date of such puravaippu or purakkadam deed."

The Part B States (Laws) Act, 1951 extended the Indian Limitation Act, 1908 (which was the Central Act then extent) to the erstwhile Travancore-Cochin State, with effect from 1st April, 1951, with the result that the above provisions of the Travancore Limitation Act were repealed.

Case Law on the Travancore Act.

29.20. Two judgments of the Madras High Court, however, appear to have created certain difficulties in the matter of computation of limitation in situations envisaged[1] by section 20(1) of the Travancore Act, which relates to *puravaippu* or purakkadam deeds (deeds of further charge). A provision similar to this was not found in the Indian Limitation Act 1908, and does not appear in the Act of 1963. Briefly, this section provides that if, before the expiration of the period prescribed for redemption, the mortgagee accepts a deed of further charge, then a fresh period starts running.

29.21. The first judgment[2] on the subject (delivered by Mohan J.) held that a mortgagor ought to consolidate both the mortgages and a piecemeal redemption was impossible. Mohan J. held that in spite of the repeal of Travancore Limitation Act, the suits are not barred by limitation and the period had to be counted from the *purakkadam deed* (deed of further charge).

29.22. A somewhat contrary view[3] was expressed by the same High Court (in a judgment by Varadarajan J.) holding that *puravaippu* or *purakkadam* cannot be used to get fresh period of limitation after the extension of the Indian Limitation Act, 1908 to Travancore-Cochin and that the doctrine of consolidation cannot be applied at all. The earlier Madras ruling does not appear to have been cited before him.

Conclusion as to Travancore Act.

29.23. As the period of limitation under the Travancore Act was 50 years, suits based on *puravaippu* or *purakkadam* can technically continue till first April, 2001 A.D. No doubt, in all probability, in view of the State laws regarding the liquidation of rural indebtedness, the incidence of such suits would be negligible. All the same, we have made a brief note of this matter and trust that the State Governments of Tamil Nadu and Kerala would examine the points raised in the judgment, with a view to ensuring that no hardship is caused by such an extended period of limitation.[4]

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[1]Section 20, Travancore Limitation Act (IV of 1100 M.E.).

[2]*Thomas* v. *Victor*, A.I.R. 1976 Madras 273; (1976) 2 M.L.J. 5.

[3]*Parameswaran Thampy* v. *Kanakama Thankach* (1977) 90 L.W. 258 quoted by P. Mohana Chandran, Advocate, Kuzhithurai "Limitation when mortgagee gets puravaippu or purakkadam from mortgagors" (1977) 2 M.L.J. 78.

[4]For consideration in connection with the Travancore Limitation Act by State Governments of Tamil Nadu and Kerala.

V. Section 29(3)—Position regarding suit for dower

Suits for dower.

29.24. At this stage, it is necessary to refer to the part of section 29(3), which excludes the applicability of the Limitation Act in regard to "a suit or proceeding under any law for the time being in force relating to marriage and divorce." In view of an Allahabad ruling[1] on this sub-section, an amendment of section 29(3) seems to be needed. According to the Allahabad ruling, the Limitation Act, 1963, does not apply to a claim for dower made by a Muslim woman under the Muslim law of marriage and divorce, and is, by section 29(3), excluded from the purview of the Limitation Act. The reasoning underlying the judgment, is as under. In the Indian Limitation Act, 1908, the exception was only in respect of proceedings under the Indian Divorce Act, and there were specific articles 103-104 which prescribed the limitation period for a suit for dower. In the present Act, there are (the High Court has observed) *no corresponding articles* prescribing the period of limitation for a suit for dower. According to the Allahabad ruling, in view of the express provisions of section 29(3), nothing in the Limitation Act can bar the suit for dower.

Need for clarification.

29.25. This ruling raises an important point that needs clarification. So far as we could ascertain, it was not the intention of the Legislature that the Limitation Act 1963, should not apply to claims for dower. The exclusion clause in section 29(3) is not really intended to exclude such claims from the purview of the Act. Its object is to exclude matrimonial litigation proper commenced under some statute, i.e. statutory proceedings for divorce, judicial separation and the like, which themselves terminate or suspend the legal bond of marriage. The reason for not making the Limitation Act applicable to matrimonial causes was presumably that these statutes themselves have their own in-built doctrines such as condonation, laches, and the like, which can be taken into account by the court. Subject to these doctrines, the court has a discretion as to the grant of matrimonial relief, in the exercise of which it can take into account the conduct of the parties, the interests of the children and other relevant factors. These considerations have no application, however, to a Muslim wife's claim for dower, which is a purely monetary claim that can be decided on fairly precise rules. It, therefore, stands on a different footing from, say, a petition for divorce or judicial separation is regard to which (as stated above) special considerations of laches, discretion and the like apply.

29.26. We need not, pause to discuss if the Allahabad ruling mentioned above is correct, on the present wording of section 29(3). But obviously the position resulting therefrom needs to be set right. The point being one of recurring frequency, some step needs to be taken to ensure that a claim for dower does not remain totally outside the Act.

Law Commission recommendation departed from.

29.27. A few words appear to be needed about the changed wording in the present Act (in contrast with the earlier Act). The difficulty seems to have been created because the Act goes beyond what the Law Commission recommended. Section 29(3) of the Act of 1908 made the Act inapplicable to suits under the Indian Divorce Act, 1869. Commenting on this, the Law Commission, in its earlier Report, observed as under[2]:—

> "There are other Acts like the Parsi Marriage Act and the Special Marriage Act dealing with marriage and divorce. The reason for excluding proceedings under the Divorce Act, 1869, are equally applicable to proceedings

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[1] *Ahmadi Bibi* v. *Muhamed Maboob*, A.I.R. 1979 All. 374 (Deoki Nandan, J.).
[2] Law Commission of India, 3rd Report (Limitation Act, 1908), page 24, para 60.

under these other Acts. We recommend that the sub-section may be amplified to include all Acts relating to matrimonial causes. *The Acts to be included may be specified when drafting the amendment to the section.*"

29.28. The draft provision suggested in the Report of the Law Commission to give shape to its recommendation as regards the relevant part of section 29 of the Act of 1908 was as under[1]:—

"25. **Savings.**—(1) Nothing in this Act—

(a) ....

(b) shall apply to proceedings under any law for the time being in force relating to marriage and divorce (*Acts to be specified in the Bill*)."

Thus, the Commission's proposal (i) was confined to *Acts* and (ii) further was confined to *Acts to be specified*. However, the section as enacted, provides as under[2]:—

"(3) Save as otherwise provided in any law for the time being in force to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law."

29.29. The section, as enacted, does not specify the enactments which are to be excluded. Presumably, it was thought that it would be too cumbersome to enumerate the various enactments—there were at least six Central Acts on the subject and there might be State or Provincial Acts, including even some enactments of princely States.[3]

29.30. Incidentally, it may be useful to mention here that the Law Commission (in the earlier Report) contemplated that suits for dower would fall under the residuary article. [i.e. article 38 as proposed in the 3rd Report to replace article 120 of the Act of 1908 corresponding to article 113 of the present Act]. The Report observed[4]:— **Residuary article.**

"....."Articles 103 and 104 which relate to suit for dower might be left to be governed by the *residuary article*. All these articles may therefore be deleted."

29.31. The Law Commission did not contemplate that a suit for dower should be totally outside the purview of the Limitation Act.

29.32. Now that the point has arisen, it seems proper to revise section 29(3), so as to define its scope more precisely than at present. We recommend that the following possible redraft should be considered:— **Recommendation.**

"29(3). Save as otherwise provided in any *enactment* for the time being in force *providing for the dissolution of a marriage by a decree of divorce, or for the grant of other matrimonial relief*, nothing in this Act shall apply to any suit or other proceeding under *any such enactment*."

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[1]Law Commission of India, 3rd Report, (Limitation Act, 1908), page 82, clause 25 (1)(b).

[2]Section 29(3), Limitation Act, 1963.

[3]*Cf. Maniben* v. *Ramanbhai*, (1979) 20 Guj. L.R. 924. (Baroda Hindu Nibandh Act, 1937, section 152).

[4]Law Commission of India, 3rd Report (Limitation Act, 1963), page 60, para 157, See also ibid, page 87, article 38.

(Chapter 29—Sections 29 to 32—Savings, Transitional Provisions and Repeal.)
(Chapter 30—Limitation and the Amendment of pleadings.)

As to French and Portuguese laws, see above.[1] As to Travancore Act also, see above.[2]

Section 30—transitional provisions.

29.33. Section 30 makes transitional provisions for cases where the period of limitation prescribed by the present Act is shorter than that prescribed by the earlier Act of 1908, which stands repealed by the present Act. The section needs no change.

Section 31—Pending suits.

29.34. Section 31 makes certain provisions for proceedings for which the period of limitation prescribed by the earlier Act has already expired, and also for proceedings pending at the commencement of the present Act. The section needs no change.

Section 32—Repeal.

29.35. Section 32 repeals the Act of 1908, and needs no change.

CHAPTER 30

LIMITATION AND THE AMENDMENT OF PLEADINGS

I. Position in India

Scope of the Chapter.

30.1. It is proposed in this Chapter to deal with the subject of amendment of pleadings in so far as it is relevant to the question of limitation.

O. 6, R. 17, C.P.C.

30.2. The most important provision on the subject is in the Code of Civil Procedure, O.6, R. 17. That rule, being intended primarily to confer a general power on the court to allow amendment of the pleadings (in the interests of justice), naturally does not deal in detail with the ramification of the exercise of that power in the varieties of situations that occur in life. It does not, for that reason, deal with the question in what circumstances the power may be exercised.

Amendment by adding a party is primarily taken care of by a specific provision in the Limitation Act.[3]

Privy Council cases.

30.3. The leading case in India on the subject of amendment of pleadings is a Privy Council one.[4] The plaintiff's object in that suit was to exercise his right of pre-emption, but, while drafting the plaint the plaintiff (who had asked for declaration of pre-emption rights) forgot to include a prayer for possession of the property. Later, he sought to amend the plaint to include the prayer for possession. Allowing the amendment, and dealing with the aspect of limitation, the Privy Council observed:—

> "That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant *a legal right which has accrued to him by lapse of time*, yet there are cases (see for example, *Mohummed Zahoor Ali Khan* v. *Mussumut Thakooranee Rutta Koer*, (1867) 11 M.I.A. 468 (P.C.), where such considerations are outweighed by the special circumstances of the case.
>
> "If this be so, all that happened was that the plaintiffs, through some clumsy blundering, attempted to assert rights that they undoubtedly possessed under the statute in a form which the statute did not permit. But if

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[1] Para 29.17, *supra*.
[2] Para 29.23, *supra*.
[3] Section 21, Limitation Act, 1963; Chapter 21, *supra*.
[4] *Charan Das* v. *Amir Khan*, A.I.R. 1921 Privy Council 50, 51, 52.

once it be accepted that they were attempting to establish those rights, there is no sufficient reason shown for disturbing the judgment of the Judicial Commissioner, who thinks they should be at liberty to express their intention in a plainer and less ambiguous manner."

30.4. The earlier case[1] cited by the Privy Council arose out of a suit to recover a stated sum due on a bond alleged to have been executed by Mussumat Thakooranee Rutta Koer. After the institution of the suit some more defendants were added on the allegation that they had combined with the obligor and had "colorably"[2] procured her estate to be transferred to them in order to deprive the plaintiff of his remedy against the property. The main defence was that on the date of the execution of the bond in question, the property of Mussumat Thakooranee Rutta Koer was in charge of the Court of wards and hence the Thakooranee was not competent to incur any debt.

The Privy Council found that as the bond was a simple money bond to which the other defendants were not parties and as the bond did not purport to be a mortgage, no case was made out against the other defendants. But, as regards the obligor, i.e. Mussumat Thakooranee Rutta Koer, the Privy Council did not agree with the findings that she was incompetent to incur a debt. However, they were averse to pronouncing in favour of the appellant without an amendment of the pleadings and a full trial. The Privy Council observed as under:—

"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, *yet this liberality of construction must have some limit.* A plaintiff cannot be entitled to relief upon *facts or documents not stated or referred to by him in his pleadings*.....They have, however, felt some doubt as to the Order which it will be their duty to recommend Her Majesty to make on this appeal. They have already intimated that the appeal must be dismissed against all the Respondents except Rutta Koer; and they have felt some doubt whether, inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the rights of the appellant to bring a new suit against Rutta Koer upon this Bond, treating it as a mere money Bond. Considering, however, that such a suit would probably be met by a plea of the Act of Limitation; *that in the circumstances of this case such a defence would be inequitable;* and that, the Respondent not having appeared, their Lordships are not in a condition to put her on terms as to her defence to a fresh suit; they have come to the conclusion that the fairer course is to do what the judge of the Court of First Instance might, under the Code of Procedure, have done at an earlier stage of the course,—namely, allow the appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of money due on a Bond."

30.5. Even in the later case[3] the Privy Council cautioned that such a power should not, as a rule, be exercised where its effect is to take away from a defendant a legal right which had accrued to him by lapse of time. These general observations have also been repeated by the Supreme Court[4]:— **Power to advance the interest of justice.**

[1] *Mohummud Zahoor Ali Khan*, v. *Mussumat Thakooranee Rutta Koer*, (1862) 11 M.I.A. 468 (P.C.).
[2] This looks like an American spelling but has been taken verbatim from the Report.
[3] *Charan Das* v. *Amir Khan*, A.I.R. 1921 P.C. 50.
[4] *Ganga Bai* v. *Vijay Kumar*, A.I.R. 1974 S.C. 1126.

(*Chapter 30—Limitation and the Amendment of Pleadings.*)

"The power to allow an amendment is un-doubtedly wide and may at any stage be appropriately exercised in the interest of justice, *the law of limitation notwithstanding.* But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court."

Overbroad argument.

30.6. At the same time, an overbroad argument that no matter whether a right to property has been extinguished under statute, an amendment of the pleadings should be allowed, was rejected by the Supreme Court in the very case cited above. Nevertheless, it continues to be pressed now and then, with a gloss. So was it done in an Allahabad case[1], in which the question was whether the execution application could be amended even after the expiry of the period of limitation. The application was filed by a person other than the decree holder and the amendment was disallowed.

30.7. On the other hand, in Madhya Pradesh case,[2] reliance was placed on the observations of the Supreme Court[3] in *Leach & Co. Ltd.* v. *Jardine Skinner & Co.* and an amendment was allowed at the second appellate stage, in a suit for partition and separate possession of property, to implead a person for the first time. The court observed:—

"Even assuming that the amendment might be barred by time, this would eminently be a case to allow time barred amendment."

30.8. In this case the Supreme Court had allowed the plaintiff to raise an alternative claim for damages for breach of contract for non-delivery of goods when ordinarily the suit was for damages for conversion of goods as an action in trover. The Court found that *all the allegations which are necessary for sustaining a claim for damages for breach of contract were already in the plaint* and all that was lacking was only the allegation that the plaintiffs were in the alternative entitled to claim damages.

30.9. In this context the Supreme Court referred to the leading case of *Charan Das*[4] and observed:—

"It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice."

Such verbal amendment has always been allowed by courts.[5]

Amendment not to introduce new case.

30.10. Where the plaintiff in a suit for recovery of money which was instituted on the basis of a chit acknowledging receipt of money borrowed and also a promissory note executed on the same day, sought to amend the plaint by introducing a relief on the basis of the promisory note alone, such an amendment which was based entirely on facts stated in the original plaint itself, could be permitted despite the fact that the suit would have been time barred had it been

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[1] *Kishore Joo* v. *Guman Behari Joo Deo,* A.I.R. 1978 Allahabad 1.
[2] *Anandibai* v. *Sundarbai,* A.I.R. 1965 M.P. 85, 88.
[3] *Leach & Co. Ltd.* v. *Jardine Skinner & Co.* A.I.R. 1957 S.C. 357.
[4] *Charan Das* v. *Amir Khan,* A.I.R. 1921 P.C. 50 *supra.*
[5] *Leach & Co. Ltd.* v. *Jardine Skinner & Co.,* A.I.R. 1957 S.C. 357, 362.

instituted on the date when the amendment was sought for.[1] But when the plaintiff originally based his pre-emptive claim on the basis of relationship, he was not allowed to plead co-shareship as an additional ground when such an amendment based on new ground would have been time barred.[2] A pre-emption suit filed on behalf of a major, showing him to be a minor, was not allowed to be amended in a Punjab case.[3] The Supreme Court has in one case,[4] touched on the question of limitation in a contract containing an escalation clause of labour rates. The plaintiff had originally claimed only a declaration about the enhancement of the tendered rate. Subsequently, the plaintiff sought to amend the plaint by adding an extra relief for a decree for the contract money. The amendment was allowed, on the ground that the amendment sought to introduce a claim based on the same cause of action. However, the Supreme Court observed:—

> "No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

Summary of the position in India.

30.10A. The dictum of the Supreme Court that the power can be appropriately exercised in the interests of justice, the law of limitation notwithstanding,[5] shows that the power has been regarded as a wide one. All the same, one can discern from the judgments certain guiding lights that indicate the proper approach to be adopted in exercising the judicial discretion in the matter.

A review of the judicial pronouncements in India on the subject of amendment of pleadings brings to surface the following broad principles:

(1) The courts have a plenary power to permit amendment of pleadings at any stage of the proceedings. But the power can be exercised appropriately only in the interests of justice and the discretion should be exercised with due care and circumspection.

(2) When all the allegations which are necessarily for sustaining a claim already exist in the plaint, the court should exercise its discretion to allow a technical amendment, even though the claim would be barred by limitation on the date of the application.

(3) A suitor should not suffer on account of merely technicality or clumsly blundering.[6]

(4) A suitor should not suffer because he failed to amend his plaint at any early stage of the proceedings.[7]

(5) When all the allegations which are necessary for sustaining a claim were already in the plaint and what was lacking is only a prayer for an alternative claim, the amendment should be allowed.[8]

(6) Amendment should be allowed if no prejudice is caused to any party and the amendment is based entirely on facts stated in the original plaint.[9]

(7) Except in special circumstances, an amendment should not be allowed to introduce a set of ideas to the prejudice of any right acquired by any party by lapse of time.

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[1] *Govinda Chetti* v. *M. V. Chinnappa*, A.I.R. 1973 Mad. 400.
[2] *Gurmukh Singh* v. *Dalip Singh*, A.I.R. 1971 Punjab & Haryana 419.
[3] *Suraj Bhan* v. *Balwant Singh*, A.I.R. 1972 Punjab & Haryana 276.
[4] *A.K. Gupta* v. *Damodar Valley Corp.*, A.I.R. 1967 S.C. 96, 98.
[5] *Gangabai* v. *Vijay Kumar*, *A.I.R.* 1974 S.C. 2216 (*supra*).
[6] *Charan Das* v. *Amir Khan*. A.I.R. 1921 P.C. 50.
[7] *Mohmmud Zahoor Ali Khan*, v. *Mussumat Thakooranee Rutta Koer*, (1807) Moore's Indian Appeals 468.
[8] *Leach & Co.* v. *Jardine Skinner & Co.*, A.I.R. 1957 S.C. 357.
[9] *A. K. Gupta* v. *Damodar Valley Corporation*, A.I.R. 1967 S.C. 96.

II. Position in England

Developments in England.

30.11. Developments in certain other countries are also of interest. In England, as long back as 1887, Lord Esher refused[1] to a plaintiff leave to amend to add to her action for slander (after the expiry of the period limitation), claims for assault and false imprinsonment. But, while doing so, he made certain general observations which were, until recently considered almost an immutable guideline in practice:—

> "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."

Even though Lord Esher (in the last sentence of the above passage) had made reservations for "every peculiar circumstances", it has been generally assumed that whenever an amendment sought would change the cause of action after the expiration of the period of limitation, allowing the same could cause injustice to the defendant which cannot be compensated for by cost.

Rules of the Supreme Court in England.

30.12. This position practically, held the field in the England till the coming in force of the Rules of the Supreme Court, 1966. Order 20, Rule 4 of these Rules provide as under:—

> "S (1) Subject to Order 18, rules 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any), as it may direct.
>
> (2) Where an application to the court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstaning that it is alleged that the "effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
>
> (4) A amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counter-claim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counter claim, as the case may be, he might have sued.

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[1] *Weldon* v. *Neal* (1887) 19 Q.B.D. 394, 395; 56 L.J. Q.B. 621 (C.A.)

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts, or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

Doubts expressed as to vires.

30.13. Doubts were expressed by a writer[1] that such a sweeping provision,[2] which in a sense, qualifies the limitation Acts might be argued to be *ultra vires* the statutory authority for making the rules of the Supreme Court. However, the point has not come up for judicial decision.

Lord Denning's view.

30.14. The rule came to be considered by Lord Denning in one case[3] wherein he boldly stated that the above rule has "specifically over-ruled a series of cases which worked injustice. Since the new rule, I think we should discard the strict rule practice in *Weldon* v. *Neal.*" "The court should allow an amendment whenever it is just to do, even though it may deprive the defendant of a defence under the Statute of Limitations."

30.15. These observations were not approved in a later case,[4] but when the question came up again[5] before Lord Denning, he reiterated his earlier statement.

Address by Bowen L.J.

30.16. About a hundred years ago, Bowen L.J., while addressing American Judges and lawyers emphatically gave his assurance[6]. "It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."

By and large, this proposition seems to be true of the amendment of pleadings also by provisions giving the court a general discretion to allow an amendment. notwithstanding that it raises a barred cause of action, whenever justice so requires."[7]

The author, at the end of above article, has prepared a chart giving a list of about 20 cases showing the nature of the original action and nature of the amendments sought and whether the amendment was allowed or refused. The chart graphically brings home the point that the law on the subjects is in a fluid state and firm guidelines should be incorporated in the statutory rules to enable the courts to exericse their discretion in such matters predicated upon certain principles.

III. Australia and Canada

Hardship of the rule in *Weldon* v. *Neal* being realised in Australia.

30.17. The position in Australia may now be dealt with. In a recent article in the Australian Law Journal,[8] the writer has listed the hardships which the rule in *Weldon* v. *Neal* creates for a plaintiff who desires to amend the statement of claim after the expiry of the limitation period. He observes :—

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[1]Michael J Goodman "Problems of Limitation" 119 New Law Journal 814.

[2]Virtually identical provisions appear in the rules of the Federal Court of Canada (General Orders and Rules GORS) and in the Nova Scotia Civil Procedure Rules).

[3]*Chatworth Investments Ltd.* v. *Cussins (Contractors) Ltd.*, (1969) 1 All E. Reports 143.

[4]*Braniff* v *Holland and Hennad & Cubitts (Southern) Lt. Another*, (1969) 3 A.E.R. 959.

[5]*Starman* v. *E.W. & W.J. Moore Ltd.* (1970 1 All E.R. 581.

[6]Address by Bowen L.J. quoted in *Potin* v. *Wood*, (1962) 1 Q.B. 609 (C.A.) (Pearce L.J.).

[7]Per Glass J.A. in Megee v. *Yeomans* (1977) 1 N.S.W.L. R. 273 (C.A.).

[8]Susan Campbell, "Amendment and Limitations: The Rule in *Weldon* v. *Neal*" (Nov. 80)-54 Australian Law Journal, p. 643, 644 Footnotes given in the original article are omitted, except a few.

"Although the relevant provisions of the Supreme Court Rules have been amended in England[1] and in some Australian jurisdictions[2] to displace (at least partially) this 'settled rule of practice', the rule in *Weldon* v. *Neal* still applies in Victoria, Tasmania, the Australian Capital Territory, the Northern Territory and in actions governed by the present High Court Rules. It is the purpose of this article to discuss the difficulties experienced by the courts in defining the exact scope of the rule with particular reference to a line of decisions of the Victorian Supreme Court and to argue that, in the light of the present interpretation of the rule, it should be replaced.....

A comparison of the position in England and New South Wales is found in an English case.[3]

30.18. In Canada, Lord Denning's observations in the later case[4] have been followed by the Federal Court of Canada,[5] in a case in which an amendment was allowed alleging a different voyage and different bills of lading, though originally the claim for damage to goods carried was based on a specific voyage and no specific bills of lading of a particular case.

Saskatchewan Law.

30.19. In Canada, the Saskatchewan, jurisdiction has gone a step further. The Queen's Bench Act[6] provides as under :—

"Where an action is brought to enforce any right, legal or equitable, the court may permit the amendment of any pleading or other proceeding therein upon such terms as to costs or otherwise as it deems just, notwithstanding that, between the time of the issue of the writ and the application for amendment, the right of action would, by reason of action brought, have been barred by the provision of any statute; provided that such amendment does not involve a change of parties other than a change caused by the death of one of the parties."

Unfettered discretion given by the Saskatchewan law to the courts to permit amendments has been severally criticised[7] as going too far, because it is pointed out that the primary consideration underlying the Limitation Act is that the defendant ought not to be called on to resist a claim when evidence has been lost, memories have faded and witnesses have disappeared.

Alberta Act.

30.20. If the Saskatchewan law grants blanket power of amendment to the court the Alberta Limitation of Actions Act, (R.S.A. 1970 Chapter 209) in its section 61, gives a long list of various 'types' of situations which have given rise to difficulties in the past such as misnomers, cases involving dead persons, etc., in which the courts may allow amendments to the pleadings notwithstanding the expiration of the period of limitation.

Ontario Law Reform Commission's Report.

30.21. In 1969 the Ontario Law Reform Commission in its Report on the Limitation of Actions, recommended that:

"In any action, the court should be able to allow the amendment of any pleading or other proceedings, or an application for a change of party,

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[1]R.S.C.O. 20, r. 5.
[2]N.S.W.: Pt. 20 r. 4: Queensland: 0.32, r.l: South Australia, 0.28, r.l; Western Australia: 0.21, r. 5.
[3]*Brickfield Properties Ltd.* vs. *Newton* (1971) 1 W.L.R. 862 (C.A.).
[4]*Chatsworth Investment Ltd.* v. *Cussins (Contractors) Ltd.* (1969) 1 All E.R. 143, 145.
[5]*Can Motor Sales Corp. Ltd.* vs. *Madonna*, 24 D.L.R. (3rd) 593.
[6]Section 44(11), Saskatchewan Queens Secret Act (1965) (Ch. 73).
[7]Cary D. Watson, "Amendment of proceedings after limitation periods", 53 Canadian Bar Review 237.

upon such terms as to costs or otherwise as the court deems just, notwithstanding that, between time of the issue of the writ and the application for amendment or change of party, a fresh cause of action disclosed by the amendment or the cause of action against the new party would have been barred by a limitation provision."[1]

IV. Position in U.S.A.

U.S. Federal Rules.

30.22. The U.S. Federal Rules of Civil Procedure read as under:—

"(c) *Relation Back of Amendments.*—Whenever the claim or defence asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defence on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

VI. Summary of developments elsewhere

Diverse approaches.

30.23. The developments elsewhere outlined above show a certain amount of diversity of approach. The Saskatchewan Act,[2] which is at the one end of the spectrum, confers a very wide power on the court—an approach also favoured by the Ontario Law Reform Commission. However, this approach has not escaped criticism. At the other end of the spectrum is the Alberta Limitation of Actions Act, 1970 which defines certain types of situations in which an amendment could be allowed. The English Rules of the Supreme Court, 1960 stand between the two. According to Lord Denning, "the Court can allow an amendment whenever it is just so to do." But the position in English law should be regarded still as fluid.

CHAPTER 31

ARTICLES 1 to 5 : SUITS RELATING TO ACCOUNTS

Article 1.

31.1. We now proceed to a consideration of the articles contained in the Schedule to the Act laying down various time limits. Article 1 reads as follows:—

"For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account."

It is identical with article 85 of the Act of 1908 and 1877.

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[1]Ontario Law Reform Commission Report on the Limitation of Actions, 1969.
[2]Para 30.19, *supra*.

This article made its first appearance as article 87 of the Act of 1871, where it read as under:—

"For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties.	Three years.	The time of the last item admitted or proved in the account."

The phrase "mutual account", which is the crucial expression in the article, has come to acquire a well established meaning.[1] No difficulties at present exist as to the other words used in the article. It therefore needs no change.

Article 2.

31.2. Article 2 reads as under:—

"Against a factor for an account.	Three years.	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates."

It is identical with article 88 of the Acts of 1908 and 1877. It corresponds to article 64 of the Act of 1871, with slight verbal changes in the last column.

No change is needed in the article.

Article 3.

31.3. Article 3 reads as under:—

"By a principal against his agent for movable property received by the latter and not accounted for.	Three years.	When the account is, during the continuance of the agency, demanded and refused or, when no such demand is made, when the agency terminates."

It is identical with article 89 of the Acts of 1908 and 1877. It corresponds to article 90 of 1871, with slight verbal changes. The last column in the Act of 1871 read—"When the account is demanded and refused."

Suit against legal representative of the agent.

31.4. Article 3, during its development from 1871, has given rise to three types of problems. The first was—

> Does the article apply to a case when the principal sues, not the original agent but the legal representatives of the agent?

The High Courts of Madya Pradesh,[2] Punjab,[3] Nagpur,[4] Calcutta,[5] Madras[6] and Allahabad[7] have held that the article has application to such a case. The Privy Council has held article 89 of the Act of 1908 to be applicable in a suit for accounts instituted by the sons for an account against their deceased father's agent.[8]

31.5. In an earlier Allahabad case[9] which was a suit under the Act of 1877, it was held that a suit to recover, from the sons of the deceased as representative of his father, money which had been received by the deceased as pleader in his professional capacity on behalf of a client was governed by article 120 of the Act

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[1] *See Hindustan Forest Co.* v. *Lal Chand*, A.I.R. 1959 S.C. 1349.
[2] *Kashiram* v. *Santokbhai*, A.I.R. 1968 M.P. 91.
[3] *Jagir Singh* v. *Dheru*, A.I.R. 1958 Punj. 487.
[4] *Deorao Zolba* v. *Laxmansingh*, A.I.R. 1943, Nagpur 227.
[5] *Bikram Kishore* v. *Jadab Chandra*, A.I.R. 1935 Cal. 817.
[6] *Appa Rao* v. *Subba Rao*, A.I.R. 1927 Madras 157.
[7] *Ramrup Goshain* v. *Ramdhari Bhagat*, A.I.R. 1925 All. 683.
[8] *Nobin Chandra* v. *Chandra Madhah*, A.I.R. 1916 P.C. 148.
[9] *Bindraban Behari* v. *Jamuna Kunvar*, (1903) I.L.R. 25 Allahabad 55.

of 1877 (residuary article) and a period of 6 years was allowed. When article 89 of the Act of 1877 was pressed during the arguments, the court observed:

> "Article 89, which is suggested as the article applicable to this case, has clearly no application, because the suit is not against the agent, *but against the legal representative of the agent.* It has been held by the Punjab Chief Court, in a case undistinguishable from the present one, that under such circumstances article 120 applies, and that the *terminus a quo* is the time when the right to sue accrues. The right of the plaintiff to sue the present defendant could not have accrued until he (the defendant) had received the money from his father on his father's decease."

Similar observations appear in another Allahabad case,[1] which was a suit against the heirs of an agent and, on the facts of the case, instead of article 89, the Court held that article 116 of the Act of 1908 applied.

No change needed as to legal representative.

31.6. In view of the definition of the word "defendant" occurring in section 2(e) of the Act of 1908 and the later decisions mentioned above,[2] the controversy could be said to have been put at rest, and no amendment of the text of the article on this point is called for.

Refusal whether express or implied.

31.7. The second question that arose under article[3] was whether the demand and refusal contemplated by the third column of the Schedule should be an express one?

Whitley Stokes' view and later caselaw.

31.8. Whitley Stokes,[3] while dealing with this article, has added a footnote against the word "refused", which runs as under:—

> "That is, expressly refused—but see III C.L.R. 446."

Coming as it did from the pen of one who was also a Legislative Secretary to the Government of India, this comment was noticed by the Calcutta High Court[4] and the Court observed as under :—

> "The mere failure of the agent to render accounts on demand does not amount to refusal to render accounts within the meaning of article 89. The question whether the failure of the agent to render accounts amounts to refusal within the meaning of article 89, depends upon the circumstances of each case."

This point was again argued in a Bombay case[5] by Mr. Setalvad and the court observed:—

> "Mr. Setalvad refers to one or two decided cases in which it seems it was held that the refusal to render an account within the meaning of Col. 3, article 89, must be express. With all respect I differ from this view. In my opinion, whether an account was demanded and refused or not must depend upon the circumstances of each case, and I see no reason why a refusal may not be inferred or implied from the facts of the case."

No change needed as to scope of "refusal".

31.9. This reasoning appears to have been followed by the Calcutta High Court[6-7] and the Chief Court of Sind[8].

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[1] *Mathura Nath* v. *Chheddu*, A.I.R. 1917 All. 14.
[2] Paragraph 31.4, *supra*.
[3] Stokes Anglo-India Codes (1888), Vol. 2, page 987.
[4] *Bhabatarini Debi* v. *Sheikh Bhahadur Sarkar*, A.I.R. 1919 Cal. 458.
[5] *Karsondas Dhunjibhoy* v. *Surajbhan Ramrijnal*, A.I.R. 1933 Bombay 450, 457.
[6] *Abdul Latiff* v. *Gopeswar Chattoraj*, A.I.R. 1933 Cal. 204.
[7] *Pran Ram Mookerjee* v. *Jagadish Nath Ray*, A.I.R. 1922 Cal. 355.
[8] *Ganeshdas Lokuram* v. *Gangaram Dhingar*, A.I.R. 1930 Smd. 142.

(Chapter 31—Articles 1 to 5: Suits Relating to Accounts.)

31.10. As the judicial view now seems to have been fairly well settled, we do not think it necessary to add any Explanation to indicate that the "refusal" could be an implied one.

Termination of agency—Comments of Sir Richard Garth and Mr. Hobhouse.

31.11. The third point that arises under article 3 is: what should be taken as the point of time 'when the agency terminates', within the meaning of the third column of the schedule?

This was also a doubt lingering in the mind of Sir Richard Garth,[1] when he commented on the draft Bill that led to the Act of 1877.

> "I now proceed to clause 90, by which the period of limitation fixed for a principal to bring his action against his agent for moveable property received, and not accounted for, is three years from the time when the account is demanded and refused."

> "This clause would virtually give the principal an almost indefinite time for bringing his action. He may wait for ten, twenty or thirty years after the agent has left his service, when the latter may have lost every means of explaining or refuting any demands made upon him, and then at the end of that time the principal may demand money or any other property he thinks proper, and place the agent in the unfair position of having to discharge himself at that distance of time from the claim."

Upon this, Hon'ble Arthur Hobhouse Q.C., commented:—

> "Surely if the relation of principal and agent comes to an end, there must be a time at which it is reasonable to presume that all accounts have been settled, and it is those reasonable presumptions which we are translating into definite rules in framing a statute of limitations. I think the time should run from the demand, or the close of the relation, whichever first happens. But then section 20 ought to extend to acknowledgements given in answer to such demands, whereas it appears to be confined to debts and legacies."

Views of various High Courts.

31.12. The Madras High Court[2] held that the agency terminated with the selling of goods, and did not continue till the accounts were settled and money remitted. A contrary view was expressed by the Calcutta High Court in an early case,[3] its decision being to the effect that the agents continue to be liable to the plaintiff till they accounted to him.

31.13. The Sind[4] and Allahabad[5] view is that the question of termination depends on the circumstances of each case.

No change.

31.14. It appears that the pharaseology used in the article will have to be applied and interpreted in the facts of each case. A change in the pharaseology would be no improvement in practice. In the result, article 3 needs no change.

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[1]Hon'ble Sir Richard Garth D.O. letter to the Hon'ble Arthur Hobhouse, Q.C., dated 8th March, 1876—National Archives File pertaining to papers of 1877.
[2]*Nagayya and another* v. *Thommandra Yerrikalappa*, A.I.R. 1934 Mad. 691 (1).
[3]*Fink* v. *Buldeo Dass*, (1899) I.L.R. 26 Cal. 715.
[4]*Gordhandas* v. *Firm of Gokal Khataoo*, A.I.R. 1926 Sind 264.
[5]*Babu Ram* v. *Ram Dayal*, (1890) I.L.R. 12 All 541.

(Chapter 31—Articles 1 to 5: Suits Relating to Accounts.)
(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

31.15. Article 4 reads as under.— Article 4.

"Other suits by principles against agents for neglect or misconduct.	Three years.	When the neglect or misconduct becomes known to the plaintiff."

It is identical with article 90 of the Acts of 1908 and 1877.

Under Article 91 of the Act of 1871, the starting point was—

"When the neglect or misconduct occurs."

The present provision is sound in principle, and has created no difficulties. No change is therefore recommended.

31.16. It would be seen from the genesis of the present article that a very serious defect in article 91 of the 1871 Act, namely, the omission of a reference to the time when the neglect or misconduct *becomes known to the plaintiff*, has been cured by adding the words "becomes known to the plaintiff" after the word "misconduct". In fact, the draft of the 1877 Act which was circulated for comments contained the clause "when the neglect or misconduct occurs or becomes known to the plaintiff", but the words "occurs or" were omitted in the final draft.

On this reasoning, the High Courts of Allahabad[1], Calcutta[2] and Madras[3] have also brought, under the purview of article 4, cases involving movable property entrusted to the agent, whenever there was an allegation of neglect or misconduct against the agent though article 3 deals with recovery of movable property.

We do not deem it necessary to express any final view on this matter, except saying that the applicability of the article would depend upon the facts and circumstances of each case.

No change is, therefore, needed in this article.

31.17. Article 5 reads as under :— Article 5.

"For an account and a share of the profits of a dissolved partnership.	Three years.	The date of the dissolution."

It is identical with article 106 of the Acts of 1908 and 1877, and with article 106 of the Act of 1871.

The article needs no change.

CHAPTER 32

ARTICLES 6 TO 55 : SUITS RELATING TO CONTRACTS

32.1. Article 6 prescribes a limitation period of 3 years for a suit for a seaman's wages. The starting point is the end of the voyage during which the wages are earned—thus differing from the starting point under the general article relating to wages (article 7), where limitation starts running as soon as the wages accrue due. Article 6.

The article needs no change.

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[1] *Jaganji* v. *Bandan*, A.I.R. 1930, All. 397.
[2] *Saktiprasanna Bhattacharya* v. *Naliniranjan Bhattacharya*, A.I.R. 1931 Cal. 738.
[3] *Sankaranarayana Ayyar and another*, v. *Trichondur Dharmanarinalam Sakthithara Bhajana Sobha through A. Sivaramakrishna Iyer*, A.I.R. 1939 Mad. 114.

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

32.2. Article 7 reads as under :—

Article 7.

"7. For wages in the case of any other person.	Three years.	When the wages accrue due".

The subject was covered in the Act of 1908 by two articles.

There was no parallel provision in the Acts of 1871 and 1877. The two articles on the subject occurring in the 1908 Act have been combined, on the recommendation of the Law Commission in its Report on the Act of 1908.

Salary.

32.3. Some questions need to be discussed in connection with the article. The first is—Does the expression 'wages' include 'salary'? Arguments have been addressed before the Courts time and again that the salary of a Government servant cannot be called "wages". In a case before the Supreme Court, where the appellant was a clerk in the Accounts Department of the Railways, the Supreme Court observed[1] :—

> "..... a good deal can be said of the contention that a claim for arrears of salary is distinguishable from a claim for wages. But, our difficulty is that the question appears to us to be no longer open for consideration afresh by us, or, at any rate, it is not advisable to review the authorities of this Court, after such a lapse of time when, despite the view taken by this Court that Article 102 of the Limitation Act of 1908 was applicable to such cases, the Limitation Act of 1963 had been passed repeating the law, contained in Articles 102 and 120 of the Limitation Act of 1908, in identical terms without any modification. The Legislature must be presumed to be cognizant of the view of this Court that a claim of the nature before us, for arrears of salary falls within the purview of Article 102 of the Limitation Act of 1908."

In a later case,[2] the Supreme Court, relying on a judgment of the Federal Court[3], held that the term "wages" appearing in article 102 of the 1908 Act includes salary and a suit for the recovery of pay is covered by this article. It has also been held to include pension.[4]

It is proper that the judicial interpretation should be codified by amending the article.[5] The clarification can apply to article 6 as well.

Suits for arrears of salary on reinstatement in service.

32.4. The second question in connection with article 7 relates to the situation where the dismissal of a Government servant is set aside and, on re-instatement, he sues for arrears of salary. The Supreme Court has dealt with the matter thus[6].

> "When the order of dismissal or removal is set aside by the Court on the ground of failure to afford the constitutional protection, the order is declared invalid *ab initio*, i.e., as if it, in law, never existed, and the public servant concerned was unlawfully prevented from rendering service. If that be the correct view, *salary due to the public servant concerned must be deemed to have accrued month after month because he had been wrongfully prevented from rendering service. The period of limitation under Article* 102

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[1] *S. D. S. Srivastava* v. *Union of India*, A.I.R. 1974 S.C. 338, 341; (1974) 2 SCR 485.
[2] *Maimoona Khatun* v. *State of U.P.* (1980) 3 S.C.C. 578.
[3] *Punjab Province* v. *Tarachand*, A.I.R. 1947 F.C. 23, para 28, 33 (1947) F.C. 89.
[4] *Anand Swarup* v. *Punjab* A.I.R. 1972 S.C. 2638.
[5] See paragraph 32.8, *infra*.
[6] *Jai Chand Sawhney* v. *Union of India*, (1970) 2 S.C.J. 288, 289.

to run when the wages accrue due', and wages accrue due when in law the servant becomes entitled to wages."

32.5. These observations gave rise to a view that a period of three years for filing the suit for arrears of salary would be computed from month to month, irrespective of the date when the dismissal is held to be invalid.

However, considering the fact that courts may take a longer time than three years to pronounce upon the validity or otherwise of the dismissal of a Government servant, some High Courts have been referring to the service conditions to enable such a Government servant to compute the period of limitation from the date when his dismissal was set aside by the court. The Bombay[1] High Court referred to the effect of Fundamental Rules 52 and 53 upon the Government servant's salary, which ceases upon his suspension when he becomes entitled only to get subsistence allowance, and ceases altogether upon his dismissal. As a result of the Fundamental Rules, the Government servant cannot even ostensibly put a claim to salary so long as the orders of suspension and dismissal stand. On this basis, the Bombay High Court held that the right of a suspended or dismissed Government servant to claim arrears of salary can arise only when the order of suspension or dismissal is quashed and set aside, either by the department or by the order of a civil court. On this reasoning, the Court held the date of quashing of the order to be the starting point of limitation for a suit by such a Government servant for salary.

The Gujarat High Court[2]—like the Bombay High Court—has made the statutory rules as the plank upon which to base its judgment in this regard.

32.6. The Cuttack High Court[3], on the facts of a case before it, held that the Government servant was illegally prevented from performing his duties, although he was ready and willing to perform those duties, and hence the cause of action arose only on the day when the court quashed the impugned order of transfer.

The Madras High Court[4] had, before it, a case of an employee who was informed that the period during which he was off from service would be treated as if he was on duty. The Court observed:

"In the light of our observations as above, the third column in article 7, 'when the wages accrue due', in a case like the one with which we are faced, has to be interpreted, as we said, liberally and equitably. When an employee whose services have been illegally terminated has been reinstated and when he is informed that the period during which he was off from service would be treated as if he was on duty, then a fresh cause of action would arise on the date when he was reinstated and on the date when a communication to that effect was issued to him."

The Calcutta High Court[5] also held that a claim for arrears of salary of a public servant who had been wrongfully prevented from attending to his duties followed from the declaration that the relevant order was void and a nullity.

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[1]*State of Bombay* v. *Sarjoo Prasad Gumasta*, I.L.R. (1968) Bom. 1024.
[2]*Laxmiben* v. *State of Gujarat*, (1970) 11 Gujarat Law Reporter 51.
[3]*Baikunthanath Pratihari* v. *State of Orissa*, (1974) Cuttack Law Times, 532.
[4]*Union of India* v. *Venkatarama Naidu*, (1975) 1 M.L.J. 345, 350.
[5]*Umasankar Das* v. *State of West Bengal*, (1972-73) 77 C.W.N. 899.

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

Later Judgment of the Supreme Court.

32.7. It is now no longer necessary to cull out niceties from the facts peculiar to each case, because the Supreme Court has itself, in a recent judgment[1], distinguished its earlier case[2]. The Supreme Court has observed:

> "We are clearly of the opinion that in cases where an employee is dismissed or removed from service and is reinstated either by the appointing authority or by virtue of the order of dismissal or removal being set aside by a civil court, the starting point of limitation would be not the date of the order of dismissal or removal, but the date when the right actually accrues, that is to say, the date of the reinstatement, by the appointing authority where no suit is filed or the date of the decree where a suit is filed and decree."

The earlier case[3] having not been overruled, the observations made therein that even if the dismissal or removal is declared *ab initio* invalid, the salary due to the public servant must be deemed to have accrued month after month, may be construed as still holding the field. The result is, that except in cases where the Government servant has been suspended and thereafter reinstated, the ratio of the earlier case may disentitle a Government servant from claiming arrears of salary for a period three years prior to the institution of the suit for such arrears.

Recommendation as to article 7.

32.8. In this position, we think that the matter should be put beyond doubt by amending the third column of article 7 as follows:—

> "When the wages accrue due *or, where the suit is for relief consequential on the setting aside of an order of dismissal or removal, when the order of dismissal or removal is aside.*"

Further, as already recommended[4], an Explanation should be inserted below article 7, as under:—

> *"Explanation.—In this article and in article* 6, *the expression "wages" includes salary and pension."*

Article 8.

32.9. We now proceed to article 8. It reads as under:—

"For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	Three years.	When the food or drink is delivered."

It corresponds to article 8 of the Act of 1908, quoted below:—

"For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	One year.	When the food or drink is delivered."

This was identical with article 8 in the Acts of 1877 and 1871.

The Law Commission recommended in its Report on the Act of 1908 that the period of limitation should be increased from one year to three years[5]. This has been implemented in the Act of 1963. No further change is needed in the article.

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[1] *Maimoona Khatun* v. *State of U.P.* (1980) 3 S.C.C. 578, 586.
[2] *Jaichand Sawhney's case,* (1970) 3 S.C.R. 222; (1969) 3 S.C.C. 642; (1970) 2 S.C.J. 288 See paragraph 32.4, *supra.*
[3] *Jaichand Sawhney* v. *Union of India,* (1970) 3 S.C.R. 222; (1970) 2 S.C.J. 288. See paragraph 32.4, *supra.*
[4] Paragraph 32.3, *supra.*
[5] Law Commission of India, 3rd Report (Limitation Act, 1908), page 30, para 71.

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

Article 9

32.10. Article 9 reads as under :—

"For the price of lodging.	Three years.	When the price becomes payable."

Article 9 in the Act of 1908 was as under:—

"For the price of lodging	One year.	When the price becomes payable."

Article 9 in the Act of 1908 was as under:—

"For the price of lodging	One year.	When the price becomes payable"

This was identical with article 9 of the Acts of 1877 and 1871.

In the Act of 1963 (the present Act), the period of limitation has been raised from one year to three years, as recommended by the Law Commission in its Report on the Act of 1908.[1]

No further change is needed in the article.

Articles 10 and 11.

32.11. (a) Article 10 reads as under :—

"Against a carrier for compensation for losing or injuring goods.	Three years.	When the loss or injury occurs."

Article 30 of the Act of 1908 reads as under:—

"Against a carrier for compensation for losing or injuring goods.	One year.	When the loss or injury occurs."

Article 30 of the Act of 1877 and article 36 of the Act of 1871 were identical, except that the period was two years.

(b) Article 11 reads as under:—

"Against a carrier for compensation for non-delivery of, or delay in delivering, goods.	Three years.	When the goods ought to be delivered."

Article 31 of the Act of 1908 reads as under:—

"Against a carrier for compensation for non-delivery of, or delay in delivering goods.	One year.	When the goods ought to be delivered."

Article 31 of the Act of 1877 and article 37 of the Act of 1871 were identical, except that the period was two years.

Acting upon the recommendations of the Law Commission,[2] the period of limitation has been raised from one year (Act of 1908) to three years, in both the articles.

Compensation-Railways Act, 1890.

32.12 Articles 10-11 came to be noticed by the Supreme Court[3] in a case in which it was argued that because articles 30 and 31 of the Limitation Act, 1908 (corresponding to articles 10 and 11 of the present Act), provided different points of time from which the period of limitation was to run, the claim covered by those articles is not for compensation for loss, destruction or deterioration of the goods within the meaning of sections 72 and 77 of the Indian Railways Act, 1890. This argument was, however, repelled by the Court, overruling a full bench judgment of the Allahabad High Court"[4] to the contrary. Even though the Supreme Court has noticed the different starting points of limitation in articles 10 and 11, it has not commented adversely upon it, nor has it made any suggestion for improvement.

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 30, para 71.
[2]Law Commission of India, 3rd Report (Limitation Act, 1908), page 30 para 72.
[3]*Governor General in Council* v. *Musadi Lal* A.I.R. 1967 S.C. 725.
[4]*Governor General in Council* v. *Mahabir Ram* A.I.R. 1952, All. 891 (F.B.).

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

Misdelivery. Recommendation.

32.13. A single Judge of the Madras High Court[1] has held that article 31 of the Act of 1908 (now article 11) applies to a suit against a carrier for compensation for misdelivery of goods, and not article 30 of the Act of 1908 (now article 10). The High Court placed reliance on Supreme Court case[2] which, though not exactly on the point, contains observations interpreting the expression "goods ought to be delivered". The Delhi High Court[3] also relying on a Supreme Court case[4], has ruled otherwise. In the case relied upon by the Delhi High Court, however, the Supreme Court had not decided the question at all, as would appear from the following excerpt from the judgment[5] of the Supreme Court:

> "The learned Counsel for the appellant argued that article 30 would apply to the suit claim, whereas the learned Counsel for the respondent contended that Article 31 would be more appropriate to the suit claim. We shall assume that Article 30 governed the suit claim and proceed to consider the question on that basis."

On an examination of the matter, we see considerable force in the reasoning of the Madras High Court that *misdelivery* should be included in non-delivery (article 11), because, in such a case, the carrier has neither lost nor injured the goods (article 10). To put the matter beyond doubt, we recommend that the first column of article 11 should be revised so as to cover misdelivery.[6]

Starting point under article 10.

32.14. The third column of article 10, which prescribes as the starting point the time "when the loss or injury occurs", has created difficulties in the minds of consignors. They argue that if the goods have been lost by the Railways somewhere in transit, it is impossible for them to know the date of such loss. Dealing with the subject, the Madras High Court[7] has held that the period runs from the date of knowledge, and not the date of quantification of the damage, and has observed that the article ought to be grammatically interpreted while applying "the commonsense rule" that the period begins to run from the knowledge of damage or injury. However, observations in another Madras case[8] indicate that the starting point would be the date of actual loss. The Allahabad High Court[9] has observed :—

> "The period of limitation runs from the actual date of loss and not from the date when it comes to the notice of the plaintiff; the date when he comes to know of the loss is utterly irrelevant, not being an ingredient of the cause of action. It is axiomatic that the date of the happening of an event is different from the date of knowledge of the happening. A consignee may not know of loss of the consignment as soon as it takes place and if the law of limitation contained in article 30 operates harshly upon the consignee, *the remedy is with the Legislature and not in distorting the language used in article* 30."

Recommendation as to articles 10-11.

32.15. Whenever open delivery of goods is taken, the courts have been holding that limitation would begin to run from the date of open delivery which

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[1] *Union of India* v. *Ramchand Kishanchand & Co.*, A.I.R. 1974 Mad. 335, 337.
[2] *Bottamai* v. *Union of India*, A.I.R. 1962 S.C. 1716.
[3] (1972) 74 Punjab Law Reporter 101.
[4] *Union of India* v. *Amar Singh*, A.I.R. 1960 S.C. 233.
[5] *Union of India* v. *Amar Singh*, A.I.R. 1960 S.C. 233 para 18 (1960) 2 S.C.R. 75.
[6] See para 32.17, *infra* for a draft.
[7] *M. K. R. Chattiar & Co.* v. *Union of India*, A.I.R. 1971 Mad. 34.
[8] *Union of India* v. *Ramchand Kishanchand & Co.*, A.I.R. 1974 Mad. 335.
[9] *Oudh and Tirhut Rly.* v. *Mrs. Karam Chand*, A.I.R. 1958 All. 234, 243.

brought to surface the damage to the goods.[1] But the problem still survives when open delivery of goods is not given. In order to avoid hardship to consignors, we recommend that the third column *in both* the articles (articles 10-11) should be amended so as to make knowledge of the loss, injury, delay, mis-delivery, non-delivery or delay the starting point of limitation.[2]

IV. Short-Delivery

Short—delivery

32.16. There was previously some conflict of opinion on the question whether short delivery amounted to "loss" within the meaning of article 10 or whether it amounted to "non-delivery" within the meaning of article 11. But the conflict has now been set at rest by the Supreme Court,[3] which has held that where a part of the consignment has been delivered, that should be taken to be the date when the goods ought to have been delivered as a whole within the meaning of these words in article 31 of the Act of 1908 (now article 11). Consequently, no amendment of the article on this count is called for.

V. Recommendation

Recommendation as to articles 10-11.

32.17. In the light of the above discussion[4], we recommend that articles 10 and 11 should be revised as under:

"10. Against a carrier for compensation for losing or injuring goods.	Three years.	When the *plaintiff has knowledge of the* loss or injury."
"11. Against a carrier for compensation for non-delivery of, or delay in delivery of, goods.	Three years.	When the plaintiff *has knowledge of the non-delivery, mis-delivery or delay* as the case may be."

Article 12.

32.18. This takes us to article 12, which reads as under ;—

"For the hire of animals, vehicles, boats or household furniture.	Three years.	When the hire becomes payable."

It is identical with article 50 of the Acts of 1908 and 1877, and with article 49 of the Act of 1871.

In the original Bill of 1871, the starting point of limitation (as mentioned in the third column) was "the date of the hiring". The Select Committee changed this to "when the hire becomes payable[5]."

The article needs no change.

Article 13.

32.19. Article 13 reads as under :—

'For the balance of money advanced in payment of goods to be delivered.	Three years.	When the goods ought to be delivered."

It is identical with article 51 of the Acts of 1908 and 1877, and with article 50 of the Act of 1871.

Articles 51 to 54 of the Act of 1908 formed the subject matter of discussion in the Report of the Law Commission on the Act of 1908. The Commission

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[1] *Union of India* v. *Kewal Parkash*, A.I.R. 1977 Delhi 146

[2] As to article 11, First column, see also paragraph 32.14, *supra*.

[3] *Boota Mal* v. *Union of India*, A.I.R. 1962 S.C. 1716.

[4] Paragraphs 32.13 and 32.15, *supra*.

[5] National Archives File No. LEG. Act IX-XVI of 1871, pages, 15, 63.

recommended[1] that these should all be replaced by one article for suits based on contract or on tort. However, no change has been effected in the Act of 1963 in this regard.

We also do not recommend any change in the article.

Article 14.

32.20. Article 14 reads as under :—

"For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Three years.	The date of the delivery of the goods."

It is identical with article 52 of the Acts of 1908 and 1877, and with article 51 of the Act of 1871.

Starting point of limitation-goods delivered from time to time.

32.21. A question that needs to be considered is what should be the starting point for limitation under article 14, when the goods are delivered at different times? The view of the Madras High Court[2] is that when goods are supplied from time to time and the payment is also made from time to time, article 52 of the Limitation Act, 1908 (corresponding to article 14 of the present Act) would apply after the payments are appropriated under sections 60 and 61 of the Indian Contract Act, 1877. The result would be, that if the date corresponding to the delivery that is unadjusted falls beyond three years from the date of institution of the suit, the claim would be time-barred.

The Rajasthan High Court[3] has, on the other hand, regarded a payment in such case of goods sold at different dates as "payment" within the meaning of section 20 of the Limitation Act, 1908 (section 19 of the present Act), so as to give a fresh period of limitation to the items which are not barried by limitation on the date of that payment. The Kerala High Court[4] has held that even though some payments by cheque were made by the defendant towards the price of goods supplied from time to time on account, such a payment cannot be construed as amounting to an acknowledgement of the debt under section 19 of the Limitation Act, 1963.

No change needed.

32.22. The manner in which payments are to be applied by the creditor has been codified in sections 59 to 61 of the Contract Act. The applicability of article 14 to such a situation would primarily depend upon the facts of each case, and on the mode of agreement between the purchaser and the seller.

Consequently, no amendment of the article is called for, to deal specifically with cases of delivery of goods from time to time.

Articles 15-16.

32.23. (a) Article 15 reads as under :—

"For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years.	When the period of credit expires."

It is identical with article 53 of the Acts of 1908 and 1877. In the Act of 1871, article 52 was in the same terms but the starting point was—"The expiry of the period of credit".

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908) pages 31-32, para 74, and page 83, Article 1.
[2]*Md. Sultan & Co.* v. *Manickam*, A.I.R. 1961 Mad. 388.
[3]*Chandra Nath* v. *Prahlad Narain*, A.I.R. 1961 Raj. 154.
[4]*Charunni* v. *Purushothama*, A.I.R. 1973 Ker. 174.

(b) Article 16 reads as under:—

"For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years.	When the period of the proposed bill elapses."

It is identical with article 54 of the Acts of 1908 and 1877, and with article 53 of the Act of 1871.

The recommendation of the Law Commission[1] in its Report on the Act of 1908, to consolidate articles 51 to 54 of the Act 1908, has not been accepted.

(c) On a consideration of the articles and the cases thereon we do not consider it necessary to recommend any change.

32.24. Article 17 reads as under :— Article 17.

"For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years.	The date of the sale."

It is identical with article 55 of the Acts of 1908 and 1877, and with article 54 of the Act of 1871.

The article needs no change.

32.25. Article 18 reads as under :— Article 18.

"For the price of work done by the plaintiff for the defendant at his request where no time has been fixed for payment.	Three years.	When the work is done."

It is identical with article 56 of the Acts of 1908 and 1877, and with article 55 of the Act of 1871.

32.26. The Patna High Court[2] has held that when a contractor executes a work for the Government under a contract which is finalised after the invitation of tenders, it cannot be said that the work was done at the "request of the Government" (article 56 of the Act of 1908). Hence, the case is outside article 56, and is governed by the residuary article (article 120 of the Act of 1908, now article 113). Article 10 and Government contracts.

A contrary view has been taken by the Andhra High Court,[3] which has held that such a suit is one for claiming price for work done and not "for compensation for breach of any contract". A similar view has been taken by a Full Bench of the Allahabad High Court.[4]

Now that the period of Limitation under article 120 of the 1908 Act (residuary article) has been reduced to three years in article 113 of the 1963 Act, the plaintiff is not likely to get any advantage whether article 18 or article 113 applies to the facts of his case.

Consequently, no change is recommended in article 18.

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), pages 31-32, paragraph 74.

[2]*State of Bihar* v. *Rama Bhushan*, A.I.R. 1964 Pat. 326.

[3]*Subbaraju* v. *Village Panchayat*, A.I.R. 1965 A.P. 186.

[4]*Zila Parishad* v. *Shanti Devi*, A.I.R. 1965 All. 590 (F.B.).

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

Article 19.

32.27. Article 19 reads as under :—

"For money payable for money lent.	Three years.	When the loan is made."

The article is identical with article 57 of the Acts of 1908 and 1877 and with article 56 of the Act of 1871.

The article needs no change.

Article 20.

32.28. Article 20 reads as under :—

"Like suit when the lender has given a cheque for the money.	Three years.	When the cheque is paid."

It is identical with article 58 of the Acts of 1908 and 1877, and with article 57 of the Act of 1871. No change is needed in this article.

Article 21

32.29. Article 21 reads as under :

"For money lent under an agreement that it shall be payable on demand.	Three years.	When the loan is made."

It is identical with article 59 of the Acts of 1908 and 1877.

Article 58 of the Act of 1871 reads as under:

"For money lent under an agreement that it shall be payable on demand.	Three years.	When the demand is made."

No change is needed in the article.

Article 22.

32.30. Article 22 reads as under :

"For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	Three years.	When the demand is made."

It is identical with article 60 of the Act of 1908.

Article 60 of the Act of 1877 was as under:—

"For money deposited under an agreement that it shall be payable on demand.	Three. years.	When the demand is made."

There was no corresponding provision in the Act of 1871.

Deposits.

32.31. Controversies often arise as to period of limitation applicable where a transaction is on the border-line between deposit and loan. The Supreme Court has observed[1] as under, regarding such border-line cases :—

> "Further, as this was a deposit, limitation would run at the earliest from the refusal and not from the date of demand. It was contended that the plaintiff had made a demand as far back as 1948 and therefore the period of limitation would run from that date, and hence the suit was hopelessly barred by limitation, because six years expired some time in the year 1954."

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[1] *Abdul Karim* v. *Dy. Custodian General*, A.I.R. 1964 S.C. 1256, 1259.

Earlier also, the Court[1] had made general observations indicating the guidelines to be followed for determining whether a transaction is one of deposit or a loan:

> "Even though the transaction was a transaction of deposit as above stated, the deposit could be coupled with an agreement that it would be payable on demand."
>
> "Such an agreement could be expressed or implied and if an express agreement in that behalf was recorded in the document in the terms above, the transaction of deposit could not be thereby converted into a transaction of loan and the words 'we shall pay the said sum' could not convert the document into a promissory note."
>
> "The promise to pay would be involved in a promissory note as well as in a deposit within the meaning of Article 60. Limitation Act and the court would have regard to the intention of the parties and the circumstances of the case in order to arrive at the conclusion whether document was a promissory note."

No change needed.

32.32. In this position, it does not seem necessary to suggest any amendment in the article. The question of fixed deposits (deposits for a specified period) will be dealt with separately.[2]

Article 32A (proposed)-suits to recover money placed in fixed deposit.

32.33. Although the Limitation Act contains fairly elaborate provisions regarding suits for the recovery of money, it does not deal specifically with claims for the recovery of money which is placed in fixed deposits with banks or other companies. As a result, one cannot immediately locate the article that is applicable to suits which are instituted for getting back money deposited for a stipulated period. It appears to us that the law of limitation should contain a specific provision on the subject, since the placing of money in fixed deposits with companies and banks is now a very common practice. The articles of the Act which might possibly become applicable to such transactions—article 27 or article 55 are not specifically meant for fixed deposits. If the law is to be easy of understanding, it is necessary that a specific article should be inserted in the Act to cover such suits. This will help in removing the obscurity of position which has been referred to above.

According to a Supreme Court judgment, the period of limitation in the case of money deposited for a specified period would start running on the expiry of the period of deposit and a demand, as such, is not a condition precedent to the starting of the period of limitation.[3] According to the Allahabad High Court[4] and the Nagpur High Court[5], article 60 of the Act of 1908 (present article 22) does not apply to fixed deposits.

According to the High Court of Patna,[6] article 22 applies where a demand after the termination of the period is necessary.

According to the High Court of Jammu and Kashmir[7] and the High Court of Punjab and Haryana[8], a demand is required before money placed in fixed deposit

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[1] *Annamalai* v. *Veerappa*, A.I.R. 1956 S.C. 12.
[2] See discussion relating to article 22A, *infra*.
[3] *K. S. Wani* v. *New Akola Cotton Ginning Press*, A.I.R. 1958 S.C. 437, 438, 439.
[4] *Bank of Upper India* v. *Arif Hussain*, A.I.R. 1931 All. 59(2), 62.
[5] *Kashinath* v. *N.A.C.G. & Co.*, A.I.R. 1951 Nag. 255.
[6] *Nokhlal Sarjunrasad* v. *Mojiban*, A.I.R. 1939 Pat. 261.
[7] *Jammu and Kashmir Bank* v. *Nirmal Devi*, A.I.R. 1959 J&K 95.
[8] *Hindustan Commercial Bank* v. *Jograr Singh* A.I.R. 1974 P&H 211, 212, paragraphs 6—9.

in bank can be claimed and, therefore, limitation starts from the date of demand. The Jammu and Kashmir ruling referred to above seeks to distinguish the Supreme Court judgment of 1958 (mentioned above)[1] on the ground that the Supreme Court case was a case of "debt", but, with respect, this does not appear to be a correct reading of the facts to which the Supreme Court judgment relates. The Punjab decision (referred to above) seeks to distinguish the Supreme Court ruling of 1958 on the ground that that was not a case of *deposit with a* bank.

The difficulty seems to have arisen because the distinction between money payable on demand and money payable without demand does not seem to have been given its due prominence.

Where money is deposited with a bank, no doubt, the question whether it is to be paid only on demand depends on the intention of the parties and the terms of the agreement. Where money is payable only on a demand being made, limitation does not commence until the demand is made.[2] However, the case is different where the period of deposit is fixed. It should be noted that banks and companies accepting deposits do not, in general, pay interest for the period after expiry of the term of deposit. This shows that on expiry of the term of deposit the money becomes payable.

From the case law on the subject, it appears that there is considerable obscurity as to the position concerning the computation of the period of limitation for money placed in fixed deposits. In the absence of a specific provision on the subject, courts have had to hunt out the article to be applied and to take resort to some provision or other which was not perhaps specifically intended for a fixed deposit (*i.e.*, deposit for a stipulted period). For example, in an Orissa case,[3] it was held that the deposit of money was covered by article 145 of the Act of 1908, corresponding to article 70 of the present Act (Deposit of "movable property"), and that the limitation for a suit to recover money so deposited started not on the date of demand, but from the date of the refusal following the demand.

Position under earlier Act.

32.34. By way of a statement of the legal position under the earlier Act (Act of 1908), it may be mentioned that the situation was not unambiguous under the Act also. Article 59 of that Act, for example, applied to a suit "for money lent under an agreement that it shall be payable on demand." Again, article 60 covered certain other suits for money. But none of these articles was specifically applicable to a suit for the recovery of money deposited for a fixed term. Sometimes, the residuary article as to "compensation for the breach of any contract[4] was resorted to[5]. It is to be remembered that generally where money is placed for a definite term, the liability to repay commences as soon as the term expires—which is the reason why articles dealing with money payable "on demand" do not take within their fold fixed deposits. The result of this position is that both under the earlier Act and under the present Act, the courts have to fall back upon the residuary article governing a suit for "compensation for breach of any contract" (article 115 of the Act of 1908, corresponding to article 55 of the present Act) or on some article not specifically intended for fixed deposits.

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[1] *K. S. Wani* v. *New Akola Cotton Ginning Press*, A.I.R. 1958 S.C. 437, 438, 439.
[2] *Annamalai* v. *Veerappa* A.I.R. 1956 S.C. 12, 15.
[3] *Gouri Shankar Misra* v. *Bannamali Babu*, I.L.R. (1979) 2 Cut. 108.
[4] Article 115, 1908 Act, article 55, 1963 Act.
[5] *I. S. Seema* v. *R. K. Banerjee*, A.I.R. 1936 Rang. 338.

Recommendation to insert article 22A.

32.35. This is hardly a satisfactory situation. Once the deposit becomes payable, limitation should start running and there is need for a specific provision on the subject. For these reasons, we recommend that a specific article on the subject, to be numbered as article 22-A should be inserted in the Limitation Act, after article 22. It should run somewhat on the following lines:—

"22A"	*For money deposited under an agreement that it shall be payable on the expiry of a stipulated period, including money of a customer in the hands of is banker so payable.*	*Three Years*	*When the stipulated period expires.*"

Article 23.

32.36. This takes us to article 23, which reads as under:

"For money payable to the plaintiff for money paid for the defendant.	Three years.	When the money is paid."

It is identical with article 61 of the Acts of 1908 and 1877, and with article 59 of the Act of 1871.

Voluntary payments.

32.37. A question may arise whether the payment contemplated by the article should be voluntary payment or one in lieu of the coercive process of law. The following observations[1] of Anson (in the context of the substantive law of contracts) may be of interest in this connection, though they do not deal with limitation as such:

> "The payment made by the plaintiff may be purely voluntary. It need not be the result of any legal liability, or compulsion. Nor need it operate so as to relieve the defendant of a liability for the claim to reimbursement is not affected by the fact that payment is not made in discharge of a debt for which the defendant would himself be liable."

The basis of the cause of action for the claim in such cases is a matter of substantive law. There is a Madras judgment[2] from a very distinguished Judge (Bhashyam Ayyangar, J.) to the effect that it is immaterial whether the party seeking contribution made the payment voluntarily or involuntarily. In either case, he is damnified and the parties against whom he seeks contribution have to that extent been benefited. A Calcutta judgment[3] bases the right and duty of contribution on the *doctrine of equity* (and not on contract). When a person's property is sold for a debt where the liability is joint, he does have, even according to the Calcutta view, a claim against his joint debtor for the amount paid in excess of his half share (though he cannot be said to have "paid" the amount). In either view of the matter, the person making payment is not left without a remedy. We would not therefore recommend any amendment in the article under consideration.

Two causes of action for breach of contract.

32.38. It can happen[4] that when the plaintiff pays the money which the defendant is legally bound to pay, the payment will give rise to two causes of action—(i) cause of action for recovery of the money so paid by the plaintiff, governed by article 61 (of the Act of 1908) (corresponding to the present article 23), (ii) cause of action arising on the date when the contract is broken, thus

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[1]Anson's Law of Contract (23rd Ed.), para 594.
[2]*Rajah of Vizianagram* v. *Rajah Setrucherla Somasokhararaz*, (1903) I.L.R. 26 Mad. 686, 693, 696 (F.B.).
[3]*Cope Hath Munshi* v. *Chandra Nath Munshi*, (1896) I.L.R. 21 Cal. 814.
[4]*Vishram* v. *Pannalal*, A.I.R. 1937 Nag. 152.

giving rise to a suit for damages for breach of contract. It is for the plaintiff to elect between the two. No amendment of the article is called for on this count.

Volunteers making payment.

32.39. As to the persons who make payment in a matter in which they have no interest (volunteers), this aspect does not appear to have come to surface in decided cases. But Anson[1] observes :

> "Secondly, the plaintiff have been under a legal liability to pay the money. If he chooses voluntarily to pay money in discharge of the defendant's liability, he will have no claim to reimbursement.....English law does not favour the *negotiorum gestor*, the 'officious bystander', who intervenes, without being requested to do so, on another's behalf."

Though this facet of the matter, namely, that the article applies only when the plaintiff has paid money for the defendant where he has a legal interest has not been brought out in the text of the article, the decided cases do not seem to entertain any doubt that it is so.[2]

In the result, no change is needed in article 23.

Article 24.

32.40. Article 24 reads as under :

"For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received."

The article is identical with article 62 of the Acts of 1908 and 1877, and with article 60 of the Act of 1871.

Case Law on article 24.

32.41. The Supreme Court has ruled[3] that in order to attract article 62 of the Act of 1908 (present article 24), it is not necessary that at the moment of the receipt of money the defendant should have actually intended to receive it for the use of the plaintiff. As the same time, the article cannot apply if the right to refund does not arise immediately on receipt by the defendant, but arises only by reason of facts that transpire subsequently. The philosophy of the article is that the plaintiff has a cause of action for instituting the suit at the very moment of the receipt.

Case law.

32.42. The article in its actual operation has been held to encompass a variety of situations, such as (i) co-shares,[4] (ii) liability[5] of the legal representative of a deceased person who has received the money, (iii) transferee of a decree,[6] (iv) suits[7] by auction-purchaser for the refund of sale price when it is discovered that the judgment-debtor did not have a saleable interest (in the property) and (v) payment[8] to benamidars.

No need to amend.

32.43. The case law on the article, extensive though it is, does not disclose any need for amending the article.

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[1] Anson's Law of Contract (23rd Ed.), page 592.
[2] *Cf.* sections 68 to 70, Indian Contract Act, 1872.
[3] *Venkata Subbarao* v. *State of* A.P., A.I.R. 1965 S.C. 1773.
[4] *Asharfi Kuor* v. *Ram Pearey*, A.I.R. 1939 All. 442.
[5] *Ramheri* v. *Rohini Kanta*, A.I.R. 1922 Cal. 499.
[6] (a) *Shanmughan* v. *Offiial Receiver*, A.I.R. 1938 Mad. 532.
(b) *P. Malliah* v. *Brahmayya*, A.I.R. 1960 A.P. 89.
[7] (a) *Thakur Lal* v. *Nathulal*, A.I.R. 1964 Raj. 140.
(b) *P. Malliah* v. *Brahmayya*, A.I.R. 1960 A.P. 89.
[8] *Karanmurthi* v. *Ramanatha*, A.I.R. 1946 Mad. 248 (F.B.).

32.44. This takes us to article 25 which reads as follows : Article 25.

"For money payable for interest upon money due from the defendant to the plaintiff.	Three years.	When the interest becomes due."

The article is identical with article 63 of the Acts of 1908 and 1877, and with article 61 of the Act of 1871.

No change is needed in the article.

32.45. Article 26 reads as follows : Article 26.

"For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years.	When the accounts are stated in writing signed by the defendant of his agent duly authorised in this behalf unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives."

It is identical with article 64 of the Acts of 1908 and 1877.

In the Act of 1871, article 62 was as follows :—

"For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years.	When the accounts are stated, unless where the debt is made payable at a future time and then when that time arrives."

No change is needed in the present article.

32.46. Article 27 reads as under: Article 27.

"For compensation for breach of a promise to do anything at a specified time or upon the happening of a specified contingency.	Three years.	When the specified time arrives or the contingency happens."

It is identical with article 65 of the Acts of 1908 and 1877.

Article 63 of the Act of 1871 was in the same terms, with slight verbal differences.

The present article seems to need no change.

32.47. Article 28 reads as follows : Article 28.

"On a single bond, where a day is specified for payment.	Three years.	The day so specified."

It is identical with article 66 of the Acts of 1908 and 1877, and with article 65 of the Act of 1871.

No change is needed in the article.

32.48. Article 29 reads as follows: Article 29.

"On a single bond, where no such day is specified.	Three years.	The date of executing the bond."

It is identical with article 67 of the Acts of 1908 and 1877, and with article 66 of the Act of 1871.

No change is needed in the article.

(Chapter 32—Articles 6 to 55—Suits Relating to Contracts.)

Article 30

32.49. Article 30 reads as under:

"On a bond subject to a condition.	Three years.	When the condition is broken.

It is identical with article 68 of the Acts of 1908 and 1877 and with article 67 of the Act of 1871.

The concept of "Single bond.

32.50. Since the group or articles (28, 29 and 30) deals with limitation for suits based on a bond, the use of the expression "single bond" occurring in articles 28 and 29 needs some comment. The simple definition of "single bond" is that it is a bond merely for the payment of a certain sum of money, without any condition annexed to it.

But even Halsbury,[1] while discussing "single bond", to fall back on Shakespeare and quote from "Merchant of Venice" :[2]

> "Go with me to a notary, seal me there *Your single bond*, and, in a merry sport. In such a place, such sum or sums as are Express'd in the condition, let the forfeit Be....."

Halsbury comments that such instruments have become rare and the term "single bond" acquired various meanings, including a bond given by one obligor as distinguished from one given by two or more.

Case law as to bonds.

32.51. Application of articles 28, 29 or 30 would depend upon the terms and conditions of the bond in question. Such being the case, it is not surprising that certain amount of conflict did arise regarding the application of these articles. The conflict was, however, predicated more on the interpretation of the term of the "bond", that on any conditions of interpretation of the text of the articles.[3-7]

Article 27 is a general article covering breaches of promise to do anything at a specified time or upon the happening of a specified contingency. Certain conflict has emerged when the article is applied to breaches arising out of the bonds. For example, in a Madras case[8], where a bond was executed for subscriptions payable to a chit fund in specified instalments, with the condition that the whole amount would become exigible on failure to pay any instalment on demand, the Court laid emphasis on the expression "on demand" contained in the bond and held that the claim for the whole amount due could be based only on the bond itself, and not on the original cause of action. This ruling did not follow an earlier one of the same High Court.[9]

32.52. Liabilities of the principal and surety[10] and computation of the period of limitation based on a promissory note,[11] have also given rise to some conflicting decisions.

No change needed.

32.53. However the conflict regarding the application of these articles to the facts of a particular case turns more on the construction to be put on the particular

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[1]Halsbury's Laws of England (4th Edition), para 1386.
[2]Merchant of Venice, Act I, scene 3, lines 146 *et seq.*
[3]*Balakrishnudu* v. *Narayanaswami*, A.I.R. 1914 Mad. 4, at page 6.
[4]*Hari Lal* v. *Thamman Lal*, A.I.R. 1923 Oudh 19.
[5]*Narain Das* v. *Mannoo Lal*, A.I.R. 1935 All. 405.
[6]*Ramiah* v. *Sankaranarayana*, A.I.R. 1958 Ker. 246.
[7]*Gauri Shankar* v. *Surju*, (1881) I.L.R. 3 All. 276, 279 (D.B.).
[8]*Seetharamayyar* v. *Munisami*, A.I.R. 1919 Mad. 462.
[9]*Surayya* v. *Tirumalandhan Bapirasu*, A.I.R. 1916 Mad. 486.
[10]*Charu Chandra* v. *Faithful*, A.I.R. 1919 Cal. 636.
[11]*Somanath Raju Ramamurty*, A.I.R. 1957 Orissa 106.

document in question, rather than on a defect in the phraseology used in these articles. We therefore recommend no change in the text of these articles on these points.

32.54. Article 31 reads as under:— Article 31.

"On a bill of exchange or promissory note payable at a fixed time after date.	Three years	When the bill or note falls due".

It is identical with article 69 of the Acts of 1908 and 1877, and with article 68 of the Act of 1871.

No change is needed in the article.

32.55. Article 32 reads as under:— Article 32.

"On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years	When the bill is presented."

It is identical with article 70 of the Acts of 1908 and 1877.

Article 69 of the Act of 1871 read as under:—

"On a bill of exchange payable at or after sight.	Three years	When the bill is presented."

No change is needed in the article.

32.56. Article 33 reads as under:— Article 33.

"On a bill of exchange accepted payable at a particular place.	Three years	When the bill is presented at that place"

It is identical with article 71 of the Acts of 1908 and 1877, and with article 70 of the Act of 1871.

No change is needed in the article.

32.57. Article 34 reads as under:— Article 34.

"On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years.	When the fixed time expires."

It is identical with article 72 of the Acts of 1908 and 1877, and with article 71 of the Act of 1871.

No change is needed in the article.

32.58. Article 35 reads as under:— Article 35.

"On a bill of exchange of promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years.	The date of the bill or note."

The article has not undergone any change in the phraseology used, except that article 72 of the Limitation Act of 1871 had provided the starting point of limitation as the date of demand, which, in the Act of 1877, was changed to the date of the bill or note. This brought the law of limitation in line with the technical meaning of "on demand".[1]

[1] *Cf. Rowe* v. *Young*, (1820) 2 Brod & B. 165, 180; 21 R.R. 91.

(Chapter 32—Articles 6 to 55—Suits Relating to Contracts.)

32.59. Conflicting views expressed by the Bombay[1] and Allahabad[2] High Courts are sometimes referred to under this article. But the decisions referred to relate to problems of Hindu law and obligations imposed thereunder upon the son for the debts of the deceased father. Recently, this article (along with article 112) came up for consideration in the Allahabad High Court,[3] which held that when the claim of a private person was barred by time on the date of his death, the devolution of his property on the Government by escheat would not enable the Government to take advantage of the extended period of article 112, so as to bring the cause of action within limitation. Herein also, the text of article 35 has not presented any difficulty and we recommend no change therein.

Article 36—Introductory.

32.60. Article 36 reads as under :—

"On a promissory note or bond payable by instalments.	Three years	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment."

It is identical with article 74 of the Acts of 1908 and 1877 and article 74 of the Act of 1871.

State Acts for the relief of indebtedness.

32.61. With the increased solicitude for the welfare of the oppressed villagers and landless labourers, the Legislature has stepped in to relieve the borrower of the hardship inherent in the unpleasant prospect of facing a decree, when, owing to natural calamities or failure of crops, he is unable to discharge his obligations. One such Act is the Madras indebted Agriculturist (Repayment of Debts) Act, 1955, which defines a "debt" as including even a decree or order of a court. Section 3 of the Act provides that no suit for the recovery of a debt shall be instituted, and no application for execution of a decree in respect of a debt shall be made, against any agriculturist in any civil or revenue court before the expiry of four months from the commencement of the Act. Section 4 prescribes a mode of payment of debt in instalments, while section 8 excludes the time during which the institution of the suit was barred from computation of the period of limitation.

Similar provisions exist in other State laws, like the Bengal Agricultural Debtors Act, 1936 and C.P. & Berar Relief of Indebtedness Act, 1939.

Instalments by statute.

32.62. There was previously some difference of opinion as to whether article 36 of the Limitation Act could apply to cases where the debt had been made payable in instalments *as a result of statute.* This controversy was resolved, as regards the Madras High Court, by the case of *Bichal Naidu* v. *Muthuramanlingam.*[4] As was observed in another case[5] :

> "It is ordinarily not open to the parties to plead that the debt was divisible, unless the contract had expressly stipulated therefor. But where a special enactment, which is invested with a overriding power with regard to any other law, creates this effect of liability to pay the debt only in instalments, it is reasonable interpretation to hold that each instalment will furnish

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[1] *Narottamdas* v. *Chitta,* A.I.R. 1939 Bom. 464, 465.
[2] *Narsingh Misra* v. *Lalji Misra,* (1901) I.L.R. 23 All. 206, 208, 209.
[3] *Roop Kishore Seth* v. *State of U.P.,* 1978 A.W.C. 162, referred to in (1978) Yearly Digest column 2555.
[4] *Bichal Naidu* v. *Muthuramalingam,* I.L.R. (1962) Mad. 1144.
[5] *Gopal Udayar* v. *Mangala Udayar,* (1961) 74 L.W. 601.

a distinct cause of action. At least for the purpose of limitation, and the right to sue, the integrality of the debt must thus be held severed into distinct parts."

No change needed.

32.63. It is axiomatic that where a contract undergoes a change owing to statutory intervention, the original contract is not the only document to be scanned for on identification of the cause of action. In determining the nature of the cause of action, one will have to take into account the statute also. Having taken all these aspects into consideration, we do not think that the article needs any change.

Article 37-Introductory.

32.64. Article 37 reads as under :

"On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years.	When the default is made, unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver."

It is identical with article 75 of the Act of 1908. In the Act of 1877, in article 75 the wording was slightly different. Article 75 of the Act of 1871 reads as under:

"On a promissory note or bond payable by instalments, which provides that if default be made in payment of one instalment, the whole shall be due.	Three years.	The time of the first default unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made."

The law under the earlier Acts, is discussed in three cases of different High Courts.[1-3]

No change in the relevant article was recommended by the Law Commisison in its Report on the Limitation Act, 1908.[4]

Conflict as to instalment bonds.

32.65. In spite of the changes effected in the first and third columns of the article as detailed above, certain amount of conflict did arise in the application of this article to practical situations. It has been held by the Patna High Court[5] that in the case of an ordinary money instalment bond with a default clause which provides that if any instalment is not paid the whole sum would be due, the limitation for a claim to recover money due under the bond runs from the date of the first default that is not waived. The creditor cannot stop the period of limitation from running by waiting till the whole of the sum becomes due. Therefore, in such cases, it was no longer at the option of the creditor (unless he had waived the default) to stop the period of limitation from running.

32.66. However, a different view has been taken by a single Judge of the Madras High Court,[6] holding that the creditor in such a case may sue (at his option) either for the instalments that have become overdue or for the whole amount. Article 75 (of the Act of 1908), it was held, was no bar to a suit on the instalment bond itself filed after or before the expiry of the instalment period, for the recovery of the instalments which the debtor had contracted to

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[1] *Sarat Lakshi* v. *Narendra*, (1928) 33 C.W.N. 250; A.I.R. 1929 Cal. 292.
[2] *Hurropath* v. *Maheroolab Moolih*, (1876) I.L.R. 1 Bom. 125.
[3] *Ahmed Ali* v. *Hafiza* (1881) I.L.R. 2 All. 514.
[4] Law Commission of India, 3rd Report (Limitation Act, 1908) page 36 para 92.
[5] *Gokul Mahton* v. *Sheoprasad*, A.I.R. 1939 Pat. 433, 442, I.L.R. 18 Pat 459 (F.B.).
[6] *Ayyathurai* v. *Ibramsa Rowthar*, A.I.R. 1949 Mad. 592, paragraph 4-5.

pay and which had not become themselves time-barred under article 74 of the Act of 1908 (now article 36). The two remedies are co-existent, and both are open to the creditor. The creditor has his choice either to wait and sue for the instalments in default under article 74, or to enforce the default clause in a suit contemplated by article 75 (both of the Act of 1908). A suit filed under article 75 may be dismissed on the debtor proving waiver by the creditor of the default that entitled the creditor to file such a suit, in which case the creditor can, of course, still fall back on his right to sue for instalments within the time limits prescribed by article 74. The creditor has also the other alternative of suing to enforce the default clause for a subsequent default which he has not waived within the period prescribed by article 75. Reading the two articles together, the contention that because the whole amount becomes payable on default, the creditor must sue on the whole bond within three years of such a default could not be accepted. Thus the plaintiff has the option of enforcing the default clause in article 75, and if he does not do so, he must be deemed to have waived the benefit of the provision, and he then can fall back on his ordinary right of suit on the covenant to pay by instalments under article 74 (present article 36).

32.67. In one case before the Kerala High Court,[1] an argument was addressed that once a default has taken place in the payment of instalments, time starts running from the date of default and a suit filed three years after the first default is also barred by time. But the High Court held that default in each instalment creates a separate cause of action and causes of action within three years before the suit are not barred.

No change Needed.

32.68. It seems that the applicability of article 37 to a particular case depends largely on the terms of the bond and on any statute which may govern or modify the terms of the bond as a matter of substantive law. The words "creditor shall have liberty" may, for example, create an option, while more stringent words may rule out an option. Waiver, again, is a mixed question of law and fact, and whether the waiver was express or implied will have to be discerned from the facts of each case[2]. This is evident from numerous rulings of High Courts, involving different facts situations.[3-5]

In this position, no amendment is recommended in the article.

32.69. This takes us to article 38. Article 38 reads as under :

Article 38.	"On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years.	The date of the delivery to the payee."

It is identical with article 76 of Acts of 1908 and 1877.

Article 76 of the Act of 1871 read as under:

"On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years.	The time of the delivery to the payee."

No change is needed in the article.

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[1] *Kochappan* v. *Palmland Corporation*, A.I.R. 1977 Ker. 201.
[2] *Deviddas* v. *Parma Gokalia*, A.I.R. 1959 M.P. 413, 414.
[3] *Ajudhia* v. *Kunjal*, I.L.R. 30 All. 123, 125.
[4] *Mohan Lal* v. *Tika Ram*, I.L.R. 41 All 104, 106.
[5] *Lalta Prasad* v. *Gajadhar*, A.I.R. 235-241.

(Chapter 32—Articles 6 to 55: Suits-Relating to Contracts.)

32.70. Article 39 reads as under:— Article 39.

"On a dishonoured foreign bill where protest has been made and notice given.	Three years.	When the notice is given."

It corresponds to article 77 of the Act of 1908, which was as under:

"On a dishonoured foreign bill where protest has been made and notice given.	Three years.	When the notice is given."

Article 77 of the Act of 1877 was in the same terms. So was article 77 of the Act of 1871.

The article needs no change.

32.71. Article 40 reads as under:— Article 40.

"By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance.	Three years.	The date of the refusal to accept."

It is identical with article 78 of the Acts of 1908, 1877 and 1871.

No change is needed in the article.

32.72. Article 41 reads as under :— Article 41.

"By the acceptor of an accommodation-bill against the drawer.	Three years.	When the acceptor pays the amoung of the bill."

It is identical with article 79 of the Acts of 1908 and 1877.

Article 81 of the Act of 1871 was as follows:—

"By the acceptor of an accommodation-bill against the drawer.	Three years.	When the acceptor pays the amount."

No change is needed in the article.

32.73. Article 42 reads as under :— Article 42.

"By a surety against the principal debtor.	Three years.	When the surety pays the creditor."

It is identical with article 81 of the Acts of 1908 and 1877, and with article 82 of the Act of 1871.

32.74. A resume of the case law under this article shows that while differences of opinion do arise in regard to the rights and liabilities of the surety under the general law of contract and the terms of the surety bond, the wording of the article, alone and by itself, has not given rise to any serious difference of opinion and hence no textual change is recommended in the article. Case law.

32.75. We now proceed to article 43. It reads as under:— Article 43.

"By a surety against a co-surety.	Three years.	When the surety pays anything in excess.

It is dentical with article 82 of the Acts of 1908 and 1877, and with article 83 of the Act of 1871.

No change is needed in the article.

(Chapter 32- Articles 6 to 55: Suits Relating to Contracts.)

Article 44.

32.76. Article 44 reads as under :—

"(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years.	The date of the death of the deceased, or where the claim on the policy is denied, either partly or wholly, the date of such denial."
"(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years.	The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial."

Article 86 of the Act og 1877 read as under:—

"(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years.	The date of the death of the deceased.
"(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years.	The date of the occurrence causing the loss."

Article 86 of the Act of 1877 read as under:—

"On a policy of insurance when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers.	Three years.	When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff or any other person."

This was identical with article 88 of the Act of 1871.

Article 86, as quoted above from the Act of 1908, was substituted in it by the Insurance (Amendment) Act, 1941, section 68. Previously, the time ran from "when proof of the death or loss was given to or received by the insurer."

In the Act of 1963, the words "or where the claim on the policy is denied, either partly or wholly, the date of such denial" in the third column of both the clauses of the article are new and were brought in at the Joint Committee stage. They provide an alternative starting point of limitation with reference to life insurance policies and other policies.

The article needs no change.

Article 45.

32.77. Article 45 reads as under :—

"By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years.	When the insurers elect to avoid the policy."

It is identical with article 87 of the Acts of 1908 and 1877, and with article 89 of the Act of 1871.

The article needs no change.

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

Article 46—History

32.78. Article 46 reads as under :—

"Under the Indian Succession Act, 1925 (XXXIX of 1925), section 360 or section 361, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed asse s.	Three years.	The date of the payment or distribution."

It corresponds to article 43 of the Acts of 1908 and 1877. In the Limitation Act, 1871, this article found no place. The phraseology of the article has consistently remained the same except that the Repealing and Amending Act, 1930 substituted the words "Indian Succession Act, 1925 (XXXIX of 1925), section 360 or section 361," in place of the words "Indian Succession Act, 1865, section 320 and section 321 or under the Probate and Administration Act, 1881, section 139 and section 140."

The article needs no change.

Article 47

32.79. Article 47 reads as under :

"For money paid upon an existing consideration which afterwards fails.	Three years.	The date of the failure."

It is identical with article 97 of the Acts of 1908 and 1877, and with article 98 of the Act of 1871.

The Law Commission in its Report[1] on the Act of 1908, recommended a proper placement of the article under the category of contracts, and this recommendation has been accepted.

Conflict regarding failure of consideration in full or in part.

32.80. Though the article has not evoked any controversy in its application, a solitary judgment of the Judicial Commissioner[2], Oudh, held that when the plaintiffs were in possession of some portion of the property transferred to them by the defendant, it would not amount to "failure of existing consideration," as a part of the consideration is in the hands of the plaintiffs.

This view (for which no authority was cited) has not gained currency and has not been followed in any subsequent cases. In a Bombay case[3], it was conceded by both the parties that article 97 of the Act of 1908 applied even when there was partial failure of the consideration. In a Madras case[4], a feeble attempt was made to contend that article 97 (of the Act of 1908) did not apply where there was partial failure of consideration, which was brushed aside by the court:

> "I can find no authority for such a proposition and I am not prepared to accept as there is no reason why the words 'an existing consideration' in article 97 should be read as meaning 'the whole consideration for the contract'."

To the same effect is a Punjab case.[5]

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 38, para 101.
[2]*Karim Bux and another* v. *Abdul Wahid Khan*, A.I.R. 1924 Oudh 377.
[3]*Bapu* v. *Kashiram*, A.I.R. 1929 Bom. 361.
[4]*Meenakshi* v. *Krishna Royar*, A.I.R. 1917 Mad. 296.
[5]*Gillu Teekan* v. *Damodar Dass*, A.I.R. 1972 Punj. 23.

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts.)

No change needed.

32.81. In this position, no clarificatory amendment of the article is called for.

Article 48.

32.82. Article 48 runs as under :—

"For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.	Three years.	The date of the payment in excess of the plaintiff's own share."

It corresponds to article 99 of the Acts of 1908, 1877, and to article 100 of the Act of 1871. In the course of its evolution, it has undergone certain verbal changes, but there is no surviving controversy on the article and no change is needed in the article.

Article 49.

32.83. Article 49 reads as under :—

"By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years.	When the right to contribution accrues."

It is identical with article 100 of the Acts of 1908 and 1877, and with article 101 of the Act of 1871.

No change is needed in the article.

Article 50.

32.84. Article 50 reads as under :—

"By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years.	The date of the payment."

It is identical with article 107 of the Acts of 1908 and 1877.

In the Act of 1871, article 107 read as under:—

"By a Hindu Manager of a joint estate for contribution in respect of a payment made by him on account of the estate.	Three years.	The date of the payment."

32.85. When the 1871 Act and other Limitation Acts were sought to be consolidated by the Indian Limitation Bill of 1877, the Government Pleader of Dacca commented[1]:

> "Why should a different rule obtain when a manager of a joint estate is a Muhammadan and not a Hindu? It is well known that Muhammadans in Lower Bengal recognise the joint family system almost as much as the Hindus."

When the variegated nuances of prevalence of the joint family system extending from Dacca to Malebar were explained to the members of the Select Committee, they decided to omit the word "Hindu" from the article, and the article without the word "Hindu" appeared as article 107 of the Act of 1877. This is the present position also.

[1] Mr. O. N. Mitter, Government Pleader, Dacca, Letter No. 1, dated 2nd March, 1877, National Archieves File 1877, Paper No. 1, page 3.

(Chapter 32—Articles 6 to 55: Suits Relating to Contracts,)

32.86. As the article has not given rise to any recent controversies, no change is recommended therein. Change not needed.

32.87. Article 51 reads as under:— Article 51.

"For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years.	When the profits are received."

It is identical with article 109 of the Act of 1908.

Article 109 of the Act of 1877 differed in some particulars and read as under:—

"For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years.	When the profits are received, or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal; when he recovers possession."

Article 109 of the Act of 1871 was as under:—

"For the profits of immovable property belonging to the plaintiff wrongfully received by the defendant.	Three years.	When the profits are received, or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, the date of the decree of the appellate court."

32.88. Cases of wrongful dispossession of property and recovery of profits arising out of that property wrongfully received by the defendant can broadly be classified under two types: Classification—Cases of profits wrongfully received.

(a) The first is the case of the rank trespasser, against whom the rightful owner files a suit for recovery of possession and profits wrongfully received by the defendant. In such a case no previous litigation is involved and no problems would present themselves, because the real owner would ordinarily couple a prayer for *mesne profits* along with a prayer for ejectment and possession of the property in question while filing a suit.

(b) The second type of cases would arise when the wrongful nature of the possession of the defendant and the consequential receipt of profits by him is declared to be so by a judgment or decree of an appellate court. In such a case, the possession and receipt of profits would have been lawful, but for the reversal of the judgment appealed against and it is in the fitness of things that a department of the court should take upon itself the responsibility of restitution so has it been done by section 144, C.P.C.

32.89. The second situation[1] merits detailed discussion. It would be interesting to take a stock of the comments which were received when the draft bill of 1871 leading to the Act was circulated Mr. N. H. Thomson,[2] Esq. referred to some High Court judgments[3] and observed : Comments from Small Causes Court Judge—Calcutta.

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[1]Paragraph 32.88 (b) *supra.*

[2]Officiating First Judge, Small Causes Court Calcutta. Letter dated 19th December, 1870; National Archives File 1871, Paper No. 1.

[3](a) *Joykurun* v. *Ranee Ashmudh Koer*, 5 W.R. 125.
(b) *Mashook Ali Khan* v. *Jowala Bukhs*, I.L.R. 2 All. 290.

"But what should be the rule when the party suing for the mesne profits has been dispossessed of the land in respect of which mesne profits are claimed, by a decree of court afterwards set aside on appeal."

Restitution.

32.90. From the legislative history[1] of article 51, it would be seen that the clause pertaining to recovery of possession consequent upon a decree being set aside an appeal (obtaining in the third column of article 109 of the 1871 Act and the 1877 Act) has been omitted in the 1908 Act. Commenting on this omission, the Mysore High Court[2] after comparing the phraseology of the two Acts, observed:

"In my opinion, this deletion indicates the intention of the legislature that article 109 (article 51 in the Act of 1963) would not be applicable to a suit for restitution."

This reasoning has been adopted by the Allahabad[3] and Andhra Pradesh[4] High Courts.

32.91. Earlier, the High Courts of Lahore[5], Allahabad[6] and Bombay[7] had held otherwise.

The change in the phraseology of the third column was noticed by the Madras High Court[8]:

"The reason for omission was probably the change which section 144, clause (2), C.P.C. 1908 introduced, as a separate suit for recovery of such profits was barred by that section."

Supreme Court judgment as to restitution.

32.92. The Supreme[9] Court has since held that an application for restitution under section 144, C.P.C. is an application for execution of a decree and is therefore governed by article 182, Limitation Act, 1908 (present article 136) —and not by article 181 of the Limitation Act, 1908 (present article 137)—a residuary article of limitation for applications. This position needs no change.

32.93. The Calcutta High Court[10] has held that the true test for determining when a cause of action has accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful conclusion. Carrying on this analogy of "cause of action" to the Limitation Act, the Court held that a plaintiff who could sue for mesne profits for the period from 1913 to 1918 only on 22nd June, 1918 is not debarred from maintaining the suit which was instituted on 28th April, 1921.

32.94. However, the general trend is represented by an earlier Allahabad judgement[11] which ruled that the period of limitation cannot be suspended once it has begun to run (unless that suspension is itself provided for in the Limitation Act) and that the plaintiffs are not entitled to get a decree for mesne profits for more than three years prior to the date of the suit:

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[1]Para 32.87 *supra.*
[2]*Balappa* v. *Waman*, A.I.R. 1962 Mys. 235, 237.
[3]*Ram Krishna Kapoor* v. *Behari Lal*, A.I.R. 1963 All. 44.
[4]*Venkata Ramanayya* v. *Singayya*, A.I.R. 1967 A.P. 78.
[5]*Basheshar Das* v. *Diwan Chand*, A.I.R. 1933 Lah. 615.
[6]*Ubaid-Ullah Khan* v. *Abdul Jalil Khan*, A.I.R. 1937 All. 481.
[7]*Dullabhbhai Hansji* v. *Gulabbhai Morarji*, A.I.R. 1938 Bom. 158.
[8]*Rangaswami* v. *Alagayammal*, A.I.R. 1915 Mad. 1133.
[9]*Mahijibhai* v. *Manibhai*, A.I.R. 1965 S.C. 1477.
[10]*Dwijendra Narain Roy* v. *Joges Chandra De*, A.I.R. 1924 Cal. 600.
[11]*Ram Charan Sahu* v. *Mata Prasad*, (1927) I.L.R. 49 All. 565, 573.

(Chapter 32 Articles 6 to 55: Suits Relating to Contracts.)

"It would be dangerous to lay down generally that there is some principle outside the Indian Limitation Act under which Limitation can be suspended. Such a conclusion would be quite contrary to the intention of the legislature."

32.95. "Their Lordships of the Privy Council in the case of Soni Ram v. Kanihaiya Lal,[1] themselves remarked that there was nothing in the Indian Limitation Act which would justify the Board in holding that once the period of limitation had begun to run it could be suspended. Their Lordship considered that if they were to hold that by some reason the period of limitation was suspended. they would be deciding contrary to the express enactment of section 9 that 'when once time has begun to run, no subsequent disability or inability to sue stops it'. This remark of their Lordships clearly indicates that the period of limitation cannot be suspended once it has begun to run, unless that suspension is itself provided for in the Act. We are, therefore, unable to accept any universal principle of suspension of limitation outside the Limitation Act".

32.96. The Calcutta High Court[2] ruled in 1908 that the words "when the profits are received" mean "when the profits are *actually* received". As the point has not recurred in recent cases, there appears to be no need to suggest any amendment on that score.

No change as to starting point.

32.97. Most of the suits under this article coming from the mofussil relate to agricultural property and the point of time from which limitation should be deemed to be running (in regard to mesne profits of agricultural land) became a matter of controversy. Unlike the occupant of a tenement or a building (the rent whereof is payable on a fixed date of a month), a person in possession of an agricultural farm would be cutting the crops, drying them and selling them in the Mandi at various times of the year, and, depending upon the fertility of the soil, might reap two or three crops a year. When the Draft Bill of the 1877 Act was circulated for comments, two views were expressed. The National Archives file for the 1877 Indian Limitation Bill contains a summary of the various opinions:

Starting point in regard to agricultural land.

"Balu Opendro Nath Mitra, Government Pleader, Dacca is of the opinion—and in this opinion the judge of that District by whom he was consulted, concurs—that the time allowed (three years) should be at least six years, if not twelve,—the time allowed for a suit for the recovery of the land from the wrongful holder: and that the cause of action for profits receivable in each year, should be, held to accrue on the first of the following year. In any case the judge thinks that time should begin from when the profits were "receivable", not "received", whatever the number of years the legislature may allow."

"Mr. W. J. Money, Officiating Judge of Maimansingh, said the clause is very generally worded and it is not clear whether it is applicable to suits for mesne profits. Added that it would seem, from the time when the period begins to run being fixed to be "when the profits are received", that the clause is not applicable to cases of dispossession and suits for mesne profits thereon; inasmuch as the rule for the calculation of the latter is that their determination is not limited to the amount actually received, but to that which, according to the assets, might with due care and diligence, have been realised, and the period of limitation dates from the time of dispossession."

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[1] *Soni Ram* v. *Kanithaiya Lal*, (1913) I.L.R. 35 All. 227, 237. (R.C.).
[2] *Peary Mohan Roy* v. *Khelaram Sarkar*, (1908) I.L.R. 35 Cal. 996.

(Chapter 32 Articles 6 to 55: Suits Relating to Contracts.)

32.98. "Mr. Charles D. Field,[1] a practising Barrister of Calcutta, commented in 1877 as under:

> "I think the time in the third column ought to be, in respect of each year's profits, the close of the year in which they were collected. It would be extremely inconvenient to count the time for each instalment of profits received on the gale days within the year."

The Judicial Commissioner, Central Provinces also wrote in the same breath:

> "Profits (as for example, rents from the ryots) might be received in small sums and on various dates, and it would be a matter of no small difficulty to determine when they actually reached the wrong doer. Mesne profits as a general rule, cannot be ascertained until after the end of the year, and time ought to run from the date when they become annually due according to the custom obtaining in the place."

32.99. The Nagpur Judicial Commissioner's Court[2] held that the appropriation of crops commences from the date when the crops began to be cut and limitation runs from that date, notwithstanding the fact that the standing crops were sold without the knowledge of plaintiff much earlier. This was a case under the C. P. Tenancy Act, 1920. But earlier the same court, while dealing with a case[3] under article 109 of the Limitation Act, 1908, had held that the actual receipt of profits gives the starting point for limitation. In this judgment, the earlier views of Calcutta High Court, to the effect that the cause of action does not arise till the end of an agricultural year, were not followed.

Points arising from earlier comments—how far they survive.

32.100. For reasons not appearing from the Archives file, no attempt was made to pin-point the starting point of limitation with any exactitude. The problems posed in the comments were two-fold : the first was, whether the article applied at all to the cases of mesne profits and second, whether the starting point of limitation should be taken to coincide with the actual cutting of the crops.

(i) As regards the first point (applicability to mesne profits), it can be said that the definition of "mesne profits" in section 2(12) of the Code of Civil Procedure, 1908 and the elaborate manner in which section 144 of that Code deals with an application for restitution makes it clear that the article is inapplicable to cases of mesne profits to which the plaintiff is entitled, as a result of reversal of a lower court's order or decree. This has now been finally settled by the judgment of the Supreme Court.[4]

(ii) Coming to the second question (starting point) raised in 1877, it appears to us that in these days of advanced methods of agriculture and crop rearing, when as many as three crops can be taken from the same land within a year, it would be impracticable to stipulate a particular day of the year, (such as the end of the agricultural year under the Land Revenue Codes), as the starting point of limitation. It could happen in some cases that the farmland in question has been leased out by the defendant to a third party and the lease deed contains detailed stipulations about the mode of payment of the lease money. In such a case, it would be open to the plaintiff to compute the running of time from such dates

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[1]Letter dated 19th April, 1877, National Archives File 1877, Paper 8, page 9.
[2]***Nathulasa*** **v.** ***Shankerlal***, A.I.R. 1924 Nag. 87.
[3]***Ganpatrao*** **v.** ***Jangaia***, A.I.R. 1914 Nag 65.
[4]***Mahijibhai*** v. ***Patel Manbhai***, A.I.R. 1965 S.C. 1477.

stipulated in the lease deed. But amending the third column of the article under discussion would be no answer for meeting such a contingency, because the phraseology even now is adequate enough to take care of such cases.

32.101. As a result, no change is needed in article 51. No change needed in article 51.

32.102. Article 52 reads as under:— Article 52.

"For arrears of rent.	Three years.	When the arrears become due."

It is identical with article 110 of the Acts of 1908, 1877 and 1871.

The article needs no change.

32.103. Article 53 reads as under:— Article 53.

"By a vendor of immovable property for personal payment of unpaid purchase money.	Three years.	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance."

It is identical with article 11 of the Act of 1908.

In the Act of 1877, the corresponding article was article 111, which read as under:—

"By a vendor of immovable property to enforce his lien for unpaid purchase money.	Three years.	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance."

This was identical with article 111 of the Act of 1871.

32.104. The stages through which article 111 of the Act of 1871 has passed[1] show that in 1908 there was a shift from the concept of *enforcement of lien* for unpaid purchase money to a contract *for personal payment* of unpaid purchase money. The earlier position about treating the suit as based on the lien gave rise to considerable difficulties, as is apparent from the statement of objects and reasons annexed to the Bill[2] which became the Act of 1908. History.

> "The amendment proposed will make it clear that this article is applicable only to suits to enforce the personal liability of the purchaser."
>
> "It has been held by the High Courts of Bombay, Madras and Allahabad that a suit by an unpaid vendor to enforce his charge on the land for the unpaid purchase-money is governed by article 132 and not by this article: *Chunilal* v. *Bai Fetha,* I.L.R. 22 Bombay 846; *Virchand* v. *Kamaji,* I.L.R. 18 Bombay 48; *Har* v. *Muhamdi,* I.L.R. 21 Allahabad 454; *Ramakrishna* v. *Subrahmania,* I.L.R. 29 Madras 305 F. B., overruling *Natesan* v. *Soundra,* I.L.R. 21 Madras 141 and *Avuthala* v. *Dayumma,* I.L.R. 24 Madras 233."

32.105. The Draft Bill which was circulated for comments evoked two suggestions. The Advocate-General, Madras[3] wrote :—

> "In article 110, in the first column, the words 'as a personal claim' may be added to make (the) meaning quite clear."

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[1]Paragraph 32.103, *supra.*
[2]National Archives File, 1908, page 6.
[3]Mr. P. S. Sivaswamy Aiyer, Acting Advocate General Madras, letter dated 26th December, 1907, National Archives File 1908, paper 5, page 1.

(Chapter 32—Articles 6 to 55: Suits relating to Contracts.)

And the Chief Justice of Bombay[1] suggested that:—

> "This amendment is capable of improvement as it stands, it would cover a bit to enforce a lien for unpaid purchase money. I would suggest some such words as these 'for personal payment of unpaid purchase money'."

That is how the present emphasis on "personal payment" came to be incorporated in the article.

The starting point of limitation.

32.106. The third column of the article does not specifically refer to the date of registration of the sale deed, probably because the draftsman intended to cover cases of sale of immovable property worth Rs. 100/- or less, which can be conveyed by delivery of possession without any writing.

All the same, the tenor of the text of third column points out to the date of registration of the sale deed as the starting point, and the Patna High Court[2] has held that a suit for recovery of unpaid consideration would be time-barred if not filed within three years from the date of the accrual of the cause of action, which was the date of compulsory registration of the document.

32.107. There is suggesion in a Madras case[3] to the effect that time should start running from the date when the vendor suffers some damage by the purchaser's default in not honouring promises to pay a part of the consideration of the transaction to a third party. Such a contingency cannot, however, be generalised and put in the language of the article. Depending on the facts of the case, the vendor may not take recourse to this article at all, but to the agreement to pay a part of the consideration to a third party at a future date incorporated in the deed of conveyance.

No change needed.

32.108. In the result, no change is recommended in article 53.

Article 54.

32.109. Article 54 reads as under :

"For specific performance of a contract.	Three years.	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

It is identical with article 113 of the Acts of 1908 and 1877.

Article 113 of the Act of 1871 was as under:

"For specific performance of a contract.	Three years.	When the plaintiff has notice that his right is denied".

Comment on the Bill of 1877.

32.110. The history given above shows that the language in 1871 was different. When the draft Bill of 1877 Act was circulated for comments, the Secretary, Legislative Department commented:[4]

> "No. 113—Specific performance—'When the plaintiff has notice that his right is denied'. This is from Angell on Limitation, 5th ed., p. 73, citing

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[1]Chief Justice L. Jenkins letter No. 2469, dated 18th December, 1907 from Acting Registrar, Bombay National Archives File, 1908, paper 6, page 13.

[2]*Kazim Sher* v. *Jaswant Devi* (1969) B.L.J.R. 500.

[3]*Navamani Nadar* v. *Vedamanicka Nadar*, A.I.R. 1933 Mad. 424.

[4]Note by the Secretary, Legislative Department on Sir Richard Garth's remarks (on the Limitation Act) dated 22-10-1876, National Archives File 1877, page 7.

Brown v. *Tillson*, 25 N.Y. 194, and seems in substance correct. But after 'night' insert 'to have the contract specifically performed."

Further, Mr. Charles D. Field[1] suggested the following improvements:

"I would add in the last column as to all these articles 'or might with due diligence have become known'."

The expression "right is denied" in third column was replaced in 1877 by words referring to refusal of performance.

Arbitration awards.

32.111. The article has not given rise to any conflict of views. There was a suggestion in earlier cases of the Allahabad High Court[2] (though not followed later on)[3], that an award can be equated as a "contract" and a suit to claim specific performance on the basis of the award comes within the purview of this article. The point has lost its practical importance, because, in view of section 32 of the Arbitration Act, 1940, no suit can be filed to enforce an award.

No change needed.

32.112. However, even now it is possible to envisage certain awards saved from the purview of the Arbitration Act by virtue of sections 46 and 47 of that Act, but in such cases, the statute setting up the machinery of arbitration would usually itself provide for the enforcement of the award. If not, the residuary article in the Limitation Act can apply. Consequently, we recommend no change in article 54.

Article 55.

32.113. Article 55 reads as under :

"For compensation for the breach of any contract express or implied not herein specially provided for.	Three years.	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases."

Articles 115 and 116 of the Act of 1908 were as follows:

"115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	Three years.	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
"116. For compensation for the breach of a contract in writing registered.	Three years.	When the period of limitation would begin to run against a suit brought on a similar contract not registered."

This was identical with articles 115 and 116 of the Act of 1877. In the Act of 1871, articles 115 and 117 were in the same terms.

Law Commission's Report.

32.114. In the Act of 1908, article 115 dealt with *unregistered* contract, either oral or in writing, while article 116 provided for registered written con-

[1] Letter dated 19th April, 1877; National Archives File 1877, page 9.
[2] (a) *Talewar Singh & Ors.* v. *Baheri Singh*, (1904) I.L.R. 26 All. 497.
(b) *Raghubar Dial* v. *Madan Mohan Lal*, (1893) I.L.R. 16 All. 3.
(c) *Sukho Bihi & Ors.* v. *Ram Sukh Das*, (1883) I.L.R. 5 All. 263.
[3] (a) *Surat Singh & Ors.* v. *Umrao Singh & Ors.*, A.I.R. 1922 All. 410.
(b) *Sheo Narain* v. *Reni Madho*, (1910) I.L.R. 23 All. 285.

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tract. This dichotomy was found unnecessary by the Law Commission which[1], in its Report on the Act of 1908, recommended as under:

> "If simplification is desirable, as undoubtedly it is, all the above-mentioned articles may be omitted and a provision may be made as in the English Act, that in case of suits founded on contract, time runs from the date on which the cause of action accrues and a uniform period of three years may be prescribed. It is not necessary to retain the period of six years in case of registered contracts on the analogy of speciality debts under English law."

The change has put an end to many of the earlier controversies which had centered on the difference between the two articles. No further comments are needed on article 55.

CHAPTER 33

ARTICLES 56 TO 58: SUITS RELATING TO DECLARATIONS

Article 56.

33.1. Article 56 runs as follows:—

"To declare the forgery of an instrument issued or registered.	Three years.	When the issue or registration becomes known to the plaintiff."

Originally a single article 93 appeared in the Act of 1871, which ran as under:—

"To declare the forgery of an instrument issued, or registered, or attempted to be enforced.	Three years.	The date of the issue, registration or attempt."

When the Act was proposed to be replaced in 1877, a Draft Bill containing the article in the following revised form was circulated for comments:—

"To declare the forgery of an instrument issued, or registered, or attempted to be enforced against the plaintiff.	Three years.	The date of the issue, registration or attempt, whichever last happens."

33.2. Sir Richard Garth[2] found fault with the last paragraph of the proposed article and wanted that discovery of the forgery should be made the starting point:

> "I do not understand this. Suppose an instrument is first forged and a month afterwards registered, and three years afterwards attempted to be enforced. From what time does the limitation run? I should have thought the time ought to run from the discovery of the forgery."

On these comments of Chief Justice Garth, the Legislative Secretary, Arthur Hobhouse, noted:[3]

No. 93. Declaration of forgery of instrument—The mere forgery of an instrument is not a cause of action, it is the issuing of it, or the attempt to enforce it, that is the important matter. I think the number is right as it stands.	Does it not want the addition, "whichever last happens," and attempt to enforce against the plaintiff ?"

[1]Law Commission, 3rd Report (Limitation Act, 1908), page 39, para 107.
[2]D.O. from the Hon'ble Sir Richard Garth (Chief Justice of Calcutta High Court) to the Hon'ble Arthur Hobhouse, Q.C., dated 24th July, 1876.
[3]Noted by the Secretary Mr. Arthur Hobhouse, Legislative Department on Sir Richard Garth's remarks on Limitation Act dated 12-12-1876; National Archives File 1877, Paper I, page 7.

(Chapter 33– Articles 56 to 58: Suits Relating to Declarations.)

33.3. In addition to the point taken by Sir Richard Garth the draftsman had also to consider the opinion given by the Judicial Commissioner, Central Provinces, Nagpur, who made out a case for splitting up of article 93 into two articles, one when the plaintiff seeks to declare that an instrument is a forgery and another when a person attempts to base a claim on such instrument. He commented:—

> "Art. 91, Col. 3, "WHICHEVER LAST HAPPENS". Better "as the case may be," otherwise, it might be pleaded in the case of an instrument issued only that as the period of limitation begins to run from the date of the attempt to enforce it, and as no such attempt had been made, the period of limitation had not begun to run, and a suit could therefore be brought though more than three years had elapsed since the issue. If this is the intention of the Article had better stand:

Col. 1	Col. 2	Col. 3
To declare the forgery of an instrument.	Three years.	When the instrument is attempted to be enforced.

> "But, if not, it would seem better to divide the article into two parts thus:—

To declare the forgery of an instrument issued or registered.	Three years.	When the issue of registration becomes known to the plaintiff (See Arts. 89, 90, 92, 93, 94).
To declare the forgery of an instrument attempted to be enforced.	Three years.	When the instrument is attempted to be enforced against the plaintiff."

33.4. One can recapitulate that the draftsman also aware of the provisions of section 42 of the Specific Relief Act, 1877 which had been just passed and hence the suggestion of the Judicial Commissioner, Nagpur, regarding declaration *simpliciter* was accepted readily. Section 42, Specific Relief Act, 1877.

33.5. As a result of that article 93 was split up into the following two articles in the 1877 Act: Act of 1877.

"92. To declare the forgery of an instrument issued or registered.	Three years.	When the issue or registration becomes known to the plaintiff.
93. To declare the forgery of an instrument to be enforced against the plaintiff.	Three years.	The date of the attempt".

This scheme was continued in the 1908 Act and the present article 56 and the general article 58 cover the old articles 92 and 93.

33.6. It would be of interest to note that the shift from the date of issue or registration to the date when such issue or registration becomes known to the plaintiff only brought the statute book in harmony with a pronouncement of the Calcutta High Court[1] which had interpreted old article 93 of the 1871 Act as under:—

> "The time when the period begins to run in such suits is 'the date of the issue, registration or attempt'. I should be disposed to hold that these dates were applicable respectively to the circumstances in which the instrument has been published,—that is to say, where it has been issued, the time begins to run from the date of the issue, where it has been registered, the

[1]Fakharooddeen v. Pogose, (1879) I.L.R. 4 Cal 209, 212.

time runs from the date of registration, and so on. But it is clear that the suit at any rate would be barred at the expiration of three years from some one or other of the acts described in the third column,—that is to say, the issue, registration, or attempt. The acts or matters specified in the third column of that schedule are acts which, according to the intention of the legislature, put the plaintiff upon the assertion of his rights, and in the case of an instrument which is said to be forged, and which prejudices the plaintiff, the legislature apparently[1] thought that he ought to commence the suit as he has notice of the instrument by the issue, registration, or attempt to enforce it."

No change needed.

33.7. As the present article has not given rise to any controversies, no change is recommended.

Article 57.

33.8. Article 57 reads as under :—

"To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Three years.	When the alleged adoption becomes known to the plaintiff."

This is identical with article 118 of the Acts of 1908 and 1877.

In the earlier Act of 1871, the corresponding provision was in article 129:

"To establish or set aside an adoption.	Twelve years.	The date of the adoption, or (at the option of the plaintiff) the date of the death of adoptive father."

33.9. The expression "to establish or set aside an adoption" in the first column (1877 Act) was found to be a curious one by the Privy Council:[1]

> "It must be confessed that the words of the article are not such as to prevent doubt or difficulty in its construction. The expression 'suit to set aside an adoption' is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all."

And further:

> "It thus appears that the expression 'set aside an adoption' is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature."

33.10. Article 129 of the Act of 1871 was in 1877 split into two articles, viz., articles 118 and 119. The expressions 'set aside' and 'establish' were also dropped and the starting point was altered. This scheme continued in the Act of 1908 and the Act of 1963. This change of expression is discussed in a Privy Council[2] judgment, thus:

"In the Act of 1871, as observed in the judgment in Jagadamba Chowdhrani's case, the words used had no technical meaning, and they were treated as expressing popular language to which in popular reasoning the meaning which prevailed could attach. In the Act of 1877 and 1908, the matter is otherwise. The words 'a suit to obtain a declaration' are terms of art. They relate back to

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[1] *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*, (1886) I.L.R. 13 Cal. 308, 319, 320 (P.C.).

[2] *Kalyandappa* v. *Chanbasappa*, I.L.R. 48 Bombay 411, 425 (P.C.).

the Specific Relief Act passed in the same year 1877, being Act No. 1 of that year, whereas the Limitation Act is No. XV.

Section 42 of the Specific Relief Act deals with declaratory decrees, and the illustration (Letter f) is much in point:—

> "A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid."

It is to this class of suit that this particular limitation applies. The date from which the time begins to run is a subjective or personal date; and the condition of obtaining the particular relief which is sought in a declaratory suit is that the plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as six years.

33.11. The alternative starting point of 'death of adoptive' father in the Act of 1871 was criticised by Mr. A. B. Falcon[1] thus:— 1871 Act criticised.

> "With reference to No. 139, Mr. A. B. Falcon, officiating Judge of Rangpur, raises the question whether the time allowed should not be extended to twelve years from the death of the adopting parent; otherwise suits might, he observes, lie to recover possession from an adopted son many years after a suit to set aside the adoption was barred."

33.12. The Limitation Bill 1877 reproduced article 129 of the older Act in corresponding article 125 of the Bill[2]. When this Bill was circulated for comments and opinions, Babu Opendro Nath Mitter, Government Pleader, Dacca wrote[3]:—

> "The cases of adoption which come before the Court are generally cases of adoption made by a Hindu widow, after the death of her husband. Suits to set aside adoption are therefore generally brought by reversionary heirs, who might or might not be in existence at the date of the adoption or the death of the adopting father. It need hardly be said that they must be in existence at the date of the death of the adoptive mother or her daughter."
>
> "The clause in column 3 is wholly insufficient to meet the necessities of the case. The suit should be allowed to be brought (during the life of the adoptive mother) at any time within twelve years of the date when the plaintiff's right to sue accrued, or after her death, within twelve years of the time when the plaintiff acquires a vested right in the property left by her husband."
>
> "The wording of No. 125 is likely to induce a son illegally adopted by a Hindu widow to believe that after twelve years from the date of his adoption, his title as adopted son of the widow's husband will be unimpeachable. But under No. 138 a Hindu reversionary heir may bring suit for possession at any time within twelve years of the death of the widow or other female heir of the last male owner."
>
> "*Suit to set aside an adoption should be expressly limited to declaratory suits*[4]. In suits to establish an adoption, the period of limitation should run from the denial of the adoption by the adoptive father, if the adoption took place during his lifetime. In other cases, it should run from the time when the plaintiff's right as adoptive son are interfered with, on the allegation that he has not been legally adopted."

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[1]Letter No. 416 dated 2nd February 1871 National Archives File 1871 paper 5, page 21.
[2]National Archives File 1877, page 19.
[3]Letter dated 2nd March 1877, National Archives File 1877 Paper No. 1, page 4.
[4]Emphasis added.

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"In declaratory suits to set aside an adoption, the period should run from *the time when the plaintiff knows of the adoption;* while suits for possession by setting aside an adoption, should be allowed to be brought within twelve years of the time when the plaintiff's right to possession accrued."

Suit for declaration simpliciter—doubted.

33.13. Another point of view, expressed in 1877, as summarised by Mr. N. H. Thomson was as follows[1]:—

"There seems to be a doubt whether a suit to set aside an adoption will lie unless consequential relief be asked, I.L.R. 1 Bombay, 248 and see L.R. 3 Ind. Ap. 72, 84."

Comments as to adoption.

33.14. Adoption offered a fertile ground for litigation and evoked comments from many quarters:—

Mr. O. Kinealy's note is instructive.

"The period of limitation given for these suits seems intended to meet two cases of adoption, in the lifetime of the adoptive father, and adoption after his death by a widow under a power. The time fixed from which the period of limitation begins to run seems open to objection as giving an option to the plaintiff. Since, as far as possible, this period should commence at the time the cause of action arises, except in cases of fraud or concealment, and these are provided for by section 19, would it not be better if the third column ran thus: (where the adoption has taken place in the lifetime of the adoptive father) the death of the adoptive father, (where the adoption has not taken place in the lifetime of the adoptive father) the date of the adoption?[2]

Another comment on this point was as under:—

"The adoptive mother's death should also be added to the third column. Having reference to article 138, a reversioner can sue for possession within twelve years from the death of the widow (adoptive mother) by proving the invalidity of the adoption set up by her."[3]

Yet another comment was as under:—

"These sections provide for suits to obtain a declaration that an adoption is valid or that it is invalid. They do not provide, however, for a third class of cases, namely, those where a declaration is sought that an alleged adoption which is set up by the opposite party *never in point of fact* took place."[4]

Draft article-1908.

33.15. The draft article in the Bill[5] that led to the Act of 1908 read:

"To obtain a declaration that an alleged adoption is invalid, or never in fact, took place.	Six years.	When the alleged adoption becomes known to the plaintiff, or to some person who is a nearer reversionary heir to the person to whom the adoption is alleged to have been made than the plaintiff."

[1]Note by Mr. N. H. Thomson, National Archives File, 1877 paper No. 2, page 3.
[2]Note by J.O. Kinealy, Additional Judge, 24-Parganas National Archives File 1877, paper No. 5, page 3.
[3]Letter dated 22nd May 1877 from Babu Ramdas Sen for the members of Committee of the Murshidabad Association, National Archives File 1877 paper No. 18, page 2.
[4]Letter No. 233 D.A. dated 14th May, 1877 from Mr. W. H. Rattigan, Officiating Government Advocate, National Archives File 1877, paper No. 24, page 12.
[5]National Archives File, 1908

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The necessity of this amendment was brought out in the statement of Objects and Reasons[1] annexed to the Bill that led to the Act of 1908, in the following words:—

> "The amendment is proposed to remove a conflict of authority, and it adopts the view taken by Bhashyam Ayyanger, J., in *Chiruvolu* v. *Chiruvolu*, I.L.R. 29 Madras 390."

In a suit to set aside an adoption where, but for the adoption, the estate would be in a Hindu female, remote reversioner has been held to claim through the presumptive reversioner in the following cases:—

Ayyadore v. *Solai*, I.L.R. 24 Mad. 405;

Chiruvolu v. *Chiruvolu*, I.L.R. 29 Mad. 390 F.B;

Harnath v. *Mandil*, I.L.R. 27 Cal. 379, at page 403;

Srinivasa v. *Hanmant*, I.L.R. 24 Bom. 260 at page 266;

Siddeswar v. *Sham Chand*, 23 W.R. 285 (decided under Act IX of 1971);

Mrinomovee v. *Bhoobun*, 23 W.R. 42 (decided under Act XIV of 1859)."

The contrary view has been taken in the following cases:—

Abinash v. *Harinath*, I.L.R. 32 Cal. 62, at page 71;

Bagwanta v. *Sukhi*, I.L.R. 22 Cal. 33, at pages 44, 45.

In the case of *Chiruvolu* v. *Chiruvolu*, I.L.R. 29 Mad. 390 F.B., however, the Court observed that in suits relating to the alienations by a qualified owner (such as a Hindu widow) the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners (at page 411). The conflict therefore is limited to suits relating to adoption."

33.16. On this darft, Sir B. K. Bose, Government Advocate, Nagpur[2], made the following comment: Comment-Government Advocate, Nagpur.

> "The High Courts are in disagreement as to the scope of these articles, whether they apply to *suits where consequential relief in the shape of possession of property is asked for or to mere suits for declaration without any prayer for possession*[3]. The present opportunity to clear up the matter should not be lost. The legislature waits until the Privy Council happens to settle the existing conflict of opinion."

33.17. Similar arguments were put by Rai Bahadur Sharat Chandra Sanyal, Divisonal Judge, Nagpur[4]:— Comment-Divisional Judge, Nagpur.

> "The proposed amendment introduces a curious state of affairs and it is, that limitation will run against one, when the knowledge of the alleged adoption is in another.

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[1]National Archives File 1908, page 7.
[2]Letter No. 2063/V. 4-5 dated 19th December 1907 National Archives File 1908, Paper No. 2, page 5.
[3]Emphasis added.
[4]Letter No. 2063/V. 4-5 dated 19th December, 1907 National Archives File 1908, Paper No. 2, page 7.

(Chapter 33 Articles 56 to 58: Suits Relating to Declarations.)

Declaratory suits are often availed of as a matter of precaution for perpetuating evidence. The nearer reversionary heir may be an old man who may not care to undergo the worry and expenses of a litigation whose fruits he may not live to enjoy. Why should a remote reversioner (who does not claim through the presumptive reversioner) be deprived of his rights because he hears of the alleged adoption later? Though remote the eventual chance in his favour may be greater by reason of youth. This is after all a kind of suit in which the court has a wide discretion. I would word the amendment thus:—'or to some person who is a nearer reversionary heir to the person to whom the adoption is alleged to have been made, then the plaintiff and through whom the plaintiff claims."

"I have assumed that article 117 (persent article 118) *applies to declaratory suits only.*[1]. But there are judicial authorities holding that it is available against possessory suits where the displacement of the alleged adoption is the substantial dispute, and that the case of *Jagadamba Choudharani* (I.L.R. 13 Cal. 308 P.C.) is still good law; (see I.L.R. 20 Mad. 40, I.L.R. 24 Mad. 405; I.L.R. 26 Mad. 261; I.L.R. 24 Bom. 260 F.B. overruling I.L.R. 21 Bom. 159 and I.L.R. 25 Cal. 354; I.L.R. 27 Cal. 242; I.L.R. 24 All. 195; I.L.R. 26 All. 40).

"In a Privy Council case (I.L.R. 25 Bom. 337) Lord Hobhouse ignored the distinction between a declaratory suit and a suit for possession in which the same issue arises, observing that there was no principle in the 'doctrine of subserviency'. The case came under article 12(a) of the 2nd Schedule of the present Limitation Act. But the opinion, coming from such an eminent authority might be quoted to support the view adverted to.

"It is desirable that the litigant public should know what the law is intended to be on this point by some contrivance in the 'Description of Suit' column whether this article *applies purely to declatory suits or extends to possessory suits as well.*"

Comment-Oudh.

33.18. This uncertainty and conflict of opinion was also pointed out by the Judicial Commissioner and Additional Judicial Commissioner of Oudh[2]:

"Here, again, no one knows what suits will ultimately be held to be governed by this article. Some authorities consider that it applies only to cases in which a declaration is sought by the plaintiff: others held that it applies to a suit for possession of property where the plaintiff became entitled to possession on the death of a Hindu or Muhammadan female. It is needless to elaborate the difficulty, which is well known."

Comment-Vakils Association, N.W.P.

33.19. This argument was supported by Babu Durga Charan Banerji,[4] Honorary Secretary Vakils Association, North-Western Provinces:

"Article 117 (old article 118) is another article upon which there is a great deal of conflict of authority. Cases of adoption are generally cases relating to property of large value and affect very large interests. The first point of controversy is whether the article applies only to declaratory suits, or is also applicable to suits for possession of land in which the defendant in possession sets up an adoption which the plaintiffs must show was invalid or never in fact took place. The Calcutta and Allahabad High Courts

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[1]Emphasis added.

[2]Letter No. 2196/VII-1. dated 16th December 1907 from F.M. Desc. Chamier Judicial Commissioner Oudh. National Archives File 1908, Paper No. 7, page 3.

[3]Letter No. 2196-VII-1. dated 16th December. 1907 from F.M. Desc. Chamier Judicial Commissioner Oudh, National Archives File 1908, Paper No. 7, page 6.

and the Punjab Chief Court takes one view and the Madras and the Bombay High Courts take another."

33.20 Some other aspects of the subject were discussed by Mr. F.D.P. Oldfield,[1] Acting District Judge, Tanjore, whose comments, however, are not material for the present purpose. Comment-District Judge, Tanjore.

33.20(a) The Advocate-General, Madras, Shri P. S. Sivaswami Aiyar, wrote[2]— Comment-P. S. Shivaswamy Iyer—Advocate General, Madras.

"It is to be regretted that these articles have *not been amended so as to exclude from their scope suits for the possession of property in which a question may be raised as to the validity of an adoption*[3]. It may, on the one hand, be urged that questions affecting the status of persons should be set at rest in as short a period as possible. On the other hand, the view adopted by some of the High Courts that these articles govern a suit for possession also has led to very serious hardship and in my opinion much greater than the hardship supposed to arise from the opposite view. The object of declaratory suits being merely to preserve evidence, the omission to bring such a suit ought not to be made to affect substantive rights. The subject is exhaustively discussed in the dissenting judgment of Bhashyam Aiyangar, J., in 26 Mad., 291 and the hardships and anomalies flowing from the view of the majority in that case are fully pointed out by him."

33.21. Sir Lawrence Jenkins, Chief Justice, Bombay High Court, expressed himself this[4] : Comment-Chief Justice L.Jenkins, Bombay.

"It is most necessary to set at rest the question whether these articles apply where the assertion or denial of an adoption is a necessary step towards relief. It is a question of policy which view should be taken. I am strongly in favour of the article being made applicable, as this will tend to diminish litigation and prevent hardship. I think it most undesirable that questions as to adoption should be raised after a long lapse of time when proofs have disappeared and modes of life formed on the assumption that the adoption is good."

33.22. Mr. Justice N. G. Chandaverkar of the Bombay High Court agreed with the Chief Justice,[5] and commented as under[6]. Comment-Mr. Justice N.G. Chandaverkar.

"I concur in all the suggestions made by the Chief Justice in his minute. I too think that the conflict of authority as to the applicability of articles 118 and 119 of Schedule 2 to the Limitation Act should be set at rest and that the shorter period of limitation (6 years) should be definitely prescribed by the Legislature for all suits relating to adoption, whether they are for the recovery of the possession of property or not. The necessity for which a clear pronouncement on the part of the legislature will be taken from a few considerations relating to adoption cases and an adoption is made generally of a minor and it is made either by a sonless Hindu or by his

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[1]Letter No. 11304, dated 9th December 1907, National Archives File 1908, pages 14-15.
[2]Letter No. 352, dated 30th April, 1908 National Archives File 1908 Paper No. 27, page 11.
[3]Emphasis added.
[4]Chief Justice L. Jenkins, Bombay High Court letter No. 2469, dated 18th December, 1907, National Archives File 1908, Paper No. 5, page 13.
[5]Parapragh 33.21, *supra*.
[6]Letter No. 2469, dated 18-12-1907, National Archives file 1908, Paper No. 5, page 14.

widow on his death. When it is by the former, generally again, in fact in 99 cases of a hundred, he adopts when he is about to die. On his death, if the widow is favourable to the adoption, there are the so-called reversionaries of the deceased who are ready to take advantage of her position and involve her and the boy in litigation. In such cases it is adding to the difficulties of the widow and the minor to prescribe a longer period than 6 years for a suit attacking the adoption either on the ground of its factum or invalidity. It is the same if the widow is not favourable to the adoption or where the widow herself has adopted a boy. In advocating the shorter period of limitation I am relying upon what I believe has been the beneficial result of the Full Bench decision of the Bombay High Court in *Hanmanth* v. *Srinivas*. Before the decision, litigation relating to adoption had been much more ripe in this residency than it has since been now. The shortness of the period has made it more difficult for the party to fabricate evidence, because genuine evidence is more available to the other side and perjury and forgery can be more easily exposed than was the case formerly."

Comment-Bar Association, Amroati.

33.23. In addition to the opinions above quoted, there were some suggestions regarding the drafting of the article. The Honorary Secretary, Bar Association, Amroati[1], gave following suggestions:—

"Articles 118 and 119.—The words 'merely' should be added after the word 'declaration' in both these articles."

Comment-District Judge, Vizagapatnam.

33.24. The other drafting suggestion was from Mr. V. A. Brodie, District Judge, Vizagapatnam,[2] as follows :—

"It is better to make it clear that this article is applicable only to suits brought for such *declarations without* consequential relief for the sake of perpetuation of testimony (vide XVII, Allahabad 167, XIV Allahabad 156 and XIII Bombay 160). In both I would insert the words 'without consequential relief' after the word 'declaration'. This would leave it free from doubt that where consequential relief is sought, and the declaration only asked for as an ancillary relief, limitation is governed by the article applicable to the main relief prayed for."

Alternatives open to presumptive reversioner

33.25. A presumptive reversioner who seeks to challenge an adoption made by a Hindu female has two courses open to him. In the first place, he can straightaway file a suit for declaration (governed by this article) without claiming any consequential relief, because, as on the date of the suit, his right is merely a *spes successionis* liable to be defeated by subsequent events taking place till the succession opens upon the death of the Hindu woman. Or in the alternative, he may wait till the succession opens upon the death of the Hindu female and file a suit within twelve years from the opening of the succession.

Such was the view of the Privy Council[3], which relied on illustration (f) to section 42 of the Specific Relief Act, 1877 as being indicative of the fact that the legislature intended a *period of six years* prescribed under article 118 of the Limitation Act, 1908 as a reasonable period beyond which a plaintiff seeking a declaratory relief would be deemed to be guilty of laches.

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[1]Letter No. 5/8-V. 4-5, dated 21st March, 1908, National Archives File 1908, Paper No. 25, page 2.

[2]Letter No. 264, dated 3rd February 1908, National Archives File 1908, Paper No. 27, page 9.

[3]*Kalyandappa* v. *Chanbasappa*, A.I.R. 1924 P.C. 137.

(Chapter 33—Articles 56 to 58: Suits Relating to Declarations.)

Privy Council case considered by Andhra Pradesh High Court.

33.26. This case came up for consideration before a Full Bench of the Andhra Pradesh High Court[1] and Subba Rao Chief Justice, (as he was then) had to write a separate concurring judgment to make the point that a presumptive reversioner, in his representative capacity, can file a suit for a declaration that an alienation, either by the widow or by the alleged adopted son or even by a third party, is invalid and is not binding on the reversioner. Viswanatha Sastri, J. stressed the fact that a failure to bring a declaratory suit under article 118 of the Limitation Act, 1908 would not bar the plaintiff from filing a regular title suit under article 141 of that Act (now article 65). The dissenting judge Umamaheswaram, J. was, however, emphatic that a declaratory suit of the nature does not lie under section 42 of the Specific Relief Act, nor does any alienation effected by a trespasser during the widow's life-term afford a cause of action to the reversioner.

Bombay view.

33.27. The Bombay High Court[2] drew a distinction between (i) suit for declaration *simpliciter* and (ii) a suit to recover possession after the death of the Hindu widow and held that the question whether article 118 (now article 57) or article 141 of the Limitation Act, 1908 (now article 65) applied, depended upon whether the plaintiff was seeking, in substance, to escape the period of limitation by ignoring the adoption and basing his right on some other act consequential on the adoption.

Recommendation.

33.28. In view of the dissenting opinion expressed in the Andhra Predesh case,[3] and the dichotomy introduced in the judgment of the Bombay High Court[2], we are of the view that the matter deserves to be cleared once and for all, because such suits generally involve claims to large properties. The necessity of clarification acquires an added edge when one appreciates that the illustration (f) to the old section 42 of Specific Relief Act, 1877 has now been omitted in the new section 34 of the Specific Relief Act, 1963.

Recommendation.

33.29. Consequently, we recommend that article 57 should be revised as follows:—

"57. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place, *where no further relief is sought.*	Three years.	When the alleged adoption becomes known to the plaintiff".

Article 58.

33.30. This takes us to Article 58 which reads as under:

"To obtain any other declaration .	Three years.	When the right to sue first accrues.

The corresponding articles 93, 119 and 129 of the Act of 1908 were as follows:—

"93. To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years.	The date of the attempt.
119. To obtain a declaration that an adoption is valid.	Six years.	When the rights of the adopted son, as such are interfered with.
129. By a Hindu for a declaration of his right to maintenance.	Twelve years.	When the right is denied."

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[1] *N. Janikamma* v. *Mattareddi*, A.I.R. 1956 A.P. 141.
[2] *Vithoba Bhanji* v. *Vithal Sakroo*, A.I.R. 1958 Bom. 270.
[3] *N. Janikamma* v. *Mattareddi*, A.I.R. 1956 A.P. 141. (supra).

(Chapter 33- Articles 56 to 58: Suits Relating to Declarations.)

Articles 93, 128 and 129 of the Act of 1871 were as under:—

"93. To declare the forgery of an instrument issued, or registered, or attempted to be enforced.	Three years.	The date of the issue, registration or attempt.
128. By a Hindu for maintenance.	Twelve years.	When the maintenance sued for is claimed and refused.
129. To establish or set aside an adoption.	Twelve years.	The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father."

Law Commission Report.

33.31. The present article applies only to suits for declaration *simpliciter* and combines articles 93, 119 and 129 of the Act of 1908. The different periods of limitation in the earlier Act are, now made uniform (three years) in the Act. This amalgamation of articles follows the recommendation of the Law Commission.[1]

Comment in 1877.

33.32. Some comments received at the time of drafting of the 1877 Act have been discussed earlier[2], but one additional comment deserves notice. One Mr. N. H. Thomson[3] expressed the following view on the subject matter of articles 119 and 129 of the Act of 1877 :— (the gist whereof is now combined in article 58).

> **"No. 124.**—Where no maintenance has been received I would make the period begin to run from the time when the right to maintenance accrued. Where the suit is for arrears, from the time they were payable.
>
> **"No. 125.**—There seems to be a doubt whether a suit to set aside an adoption will lie unless consequential relief be asked."

Applicability—Suits for declaration with consequential relief.

33.33. The doubts expressed by Mr. N. H. Thomson about the applicability of the article to suits for a declaration coupled with consequential relief persist even now. In a case which went upto the Supreme Court[4] (though not directly concerned with the implications of this article) it was observed as under :—

> "A suit for *declaration with a consequential relief for injunction*, is not a suit for declaration *simpliciter*: it is a suit for declaration with further relief. Whether the further relief claimed in a particular case is consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case..... A suit for a declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by article 120 of the Limitation Act and in such a suit the right to sue arises when the cause of action accrues."

Calcutta view.

33.34. Though the Supreme Court did not refer pointedly to article 58, the above observations have been interpreted by the Calcutta High Court[5] to mean that a suit for declaration of title and for permanent injunction restraining the defendants from interfering with possession is governed by article 58, when the properties are not trust properties and the plaintiffs are not in possession. However, the Orissa High Court[6] has held that article 58 will apply only to a

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[1]Law Commission of India, 3rd Report (Limitation Act 1908), page 53.
[2]See discussion of articles 56 and 57, *supra*.
[3]Letter in National Archives File 1877, Paper No. 2, page 3.
[4]*Mohd. Yunus* v. *Syedunnissa*, A.I.R. 1961 S.C. 808, 810.
[5]*Radha Gobinda* v. *Kewala Devi*, A.I.R. 1974 Cal. 283.
[6]*Gouranga* v. *Bhaga Sahu*, A.I.R. 1976 Orissa 43.

(Chapter 33—Articles 56 to 58: Suits Relating to Declarations.)
(Chapter 34—Articles 59 to 60: Suits Relating to Decrees and Instruments.)

suit for declaration *simpliciter* and will have no application to a suit seeking a declaration that the plaintiff's adoption, in fact, took place and claiming partition.

33.35. The tenor of the passage from the judgment of the Supreme Court quoted above[1] shows that the court regards this article to be applicable only to a suit for *declaration simpliciter*. We recommend that the matter should be put beyond doubt by revising article 58 as follows:— Recommendation.

"To obtain any other declaration *without seeking further relief.*	Three years.	When the right to sue first accrues."

CHAPTER 34

ARTICLES 59-60: SUITS RELATING TO DECREES AND INSTRUMENTS:

34.1. Article 59 reads as under:— Article 59.

"To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years.	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him."

It combines the substance of articles 91 and 114 of the Act of 1908, which were as follows:—

"91. To cancel or set aside an instrument not otherwise provided for.	Three years.	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him".
"114. For the rescission of a contract.	Three years.	When the facts entitling the plaintiff to have the contract rescinded first become known to him".

Articles 91 and 114 of the Act of 1877 were in the same terms.

Articles 92 and 114 of the Act of 1871 were as under:—

"92. To cancel or set aside an instrument not otherwise provided for.	Three years.	When the instrument is executed.
114. For the rescission of a contract.	Three years.	When the contract is executed by the plaintiff".

Acting on the recommendation of the Law Commission[2], articles 91 and 114 of the Act of 1908 were combined into a single article 59 in the Act of 1963, and the scope of the article was also enlarged so as to make it applicable to the cancellation to decrees as well.

34.2. The expression "set aside" in the article under discussion was adversely commented on by a District Judge[3], in 1907. He suggested that the words "or to declare the inoperative character of" should be added after the words "set aside". The expression "set aside".

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[1] *Mohd. Yunus* v. *Syedunnissa*, A.I.R. 1961 S.C. 808 *supra*.
[2] Law Commission of India, 3rd Report (Limitation Act, 1908), page 53, para 139.
[3] Diwan Bahadur S. Gopalachariar Avergal, District Judge, Guntur, Letter No. 2/55, dated 30th December, 1907, National Archives File (1908, paper No. 11, page 10.

(Chapter 34—Articles 59 to 60: Suits Relating to Decrees and Instrument.)

It may be recalled[1] that the expression "set aside" was also adversely commented upon by the Privy Council in the context of adoption[2]:—

> "It must be confessed that the words of the article are not such as to prevent doubt or difficulty in its construction. The expression "suit to set aside an adoption" is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all."

And further:

> "It thus appears that the expression "set aside an adoption" is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature".

No change needed.

34.3. However, article 59 deals not with adoption as such but with setting aside instruments and decrees, and so does the next following article 60, dealing with the transfer of property. Consequently, though the wording "setting aside an adoption" may be unhappy, there appears to be no reason why the expression cannot be used in article 59 as well as article 60. Hence, no change is needed in the article.

Article 60.

34.4. Article 60 reads as under :—

"60. To set aside a transfer of property made by the guardian of a ward—			
(a)	by the ward who has attained majority;	Three years.	When the ward attains majority.
(b)	by the ward's legal representative—		
	(i) When the ward dies within three years from the date of attaining majority.	Three years.	When the ward attains majority.
	(ii) When the ward dies before attaining majority.	Three years.	When the ward dies."

Article 44 of the Act of 1908 read as under:

"44. By a ward who has attained majority to set aside a transfer of property by his guardian.	Three years.	When the ward attains majority.

Article 44 of the Act of 1877 was as follows:

"44. By ward who has attained majority, to set aside a sale of his guardian.	Three years.	When the ward attains majority.

The Act of 1871 had no corresponding Article.

***De facto* guardian.**

34.5. The courts are sharply divided as to whether the word "guardian" occuring in this article, includes a *"de facto"* guardian. The Madras High Court,[3] the Punjab High Court[4], and the Jammu and Kashmir High Courts,[5]

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[1] See discussion as to article 57, *supra.*
[2] *Chaodhrani* v. *Dakhina Mohun Roy Chaodhri,* (1886) I.L.R. 13 Cal. 308, 320.
[3] (a) *Ramachandran* v. *Rumkangadan,* A.I.R. 1975 Madras 60.
(b) *Sivanmalai Goundan* v. *Arunchala Goundan,* A.I.R. 1938 Madras 822.
[4] *Pran Nath* v. *Bal Kishan,* A.I.R. 1959 Punjab 313.
[5] *Lok Nath* v. *Rohlu Ram,* A.I.R. 1951 J&K 25.

have held that an article takes care of "de facto guardian". On the other hand, the Patna High Court[1] has held that another article (article 144 of the Act of 1908[2]) would apply to a suit to set aside an alienation made by the *de facto* guardian of a Hindu minor.

34.6. We should mention in this context that the Law Commission,[3] in its Report on the Guardians and Wards Act, 1890, has recommended the addition, in section 4(2) of that Act, of a suitable Explanation which would make it clear that a *de facto guardian* is included within the definition of 'guardian' for the purposes of that Act. We are of the view that if this recommendation is accepted, the controversy should not survive in relation to the law of Limitation also. We reiterate the recommendation made with reference to the Guardians and Wards Act,[4] 1890. **Recommendation as to Guardians and Wards Act reiterated.**

CHAPTER 35

ARTICLES 61 TO 67: SUITS RELATING TO IMMOVABLE PROPERTY

35.1. Article 61 reads as under : **Article 61.**

"61. By a mortgagor—

(a) to redeem or recover possession of immovable property mortgaged;	Thirty years.	When the right to redeem or to recover possession accrues.
(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration;	Twelve years.	When the transfer becomes known to the plaintiff.
(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied.	Three years.	When the mortgagor re-enters on the mortgaged property".

This article replaced articles 105, 134 and 148 of the Act of 1908, which were as follows:

"148. Against a mortgagee to redeem or to recover possession of immovable property mortgaged.	Sixty years.	When the right to redeem or to recover possession accrues; provided that all claims to redeem arising under instruments of mortgage of immovable property situate in Lower Burma which had been executed before the first day of May, 1863, shall be governed by the rules of limitation in force in that State immediately before the same day.
"134. To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.

[1] *Kailash Chandra Pradhan v. Rajani Kanta*, A.I.R. 1945 Patna 298.
[2] c.f. Present article 65.
[3] Law Commission of India, 83rd Report (Guardians and Wards Act, 1890), Paragraph 4.13.
[4] To be carried out with reference to the Guardians and Wards Act, 1890.

(Chapter 35—Articles 61 to 67: Suits relating to immovable property.)

105. By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	Three years.	When the mortgagor re-enters on the mortgaged property."

The corresponding provisions in the Act of 1877 were articles 148, 134 and 105, respectively.

Law Commission's Report.

35.2. The Law Commission recommended[1] in its Report on the Act of 1908 that the period of limitation of 60 years allowed for the redemption of a mortgage in article 148 of the Act of 1908 should be cut down to 12 years, on the analogy of the practice available in England. As regards article 105, the Commission recommended the retention of the period, and, as regards article 134, the Commission recommended that it should be split up in so far as it related to mortgages. However, all these articles were clubbed into one article and enacted as article 61 in the Act of 1963, with the reduction of the period of limitation for redemption from 60 years to 30 years only.

Puisne mortgagee.

35.3. The Bombay High Court has held[2] that a suit by a puisne mortgagee who had not been impleaded by a prior mortgagee and who sought to enforce his mortgage rights against his mortgagor was governed not by article 132 of the Act of 1908 (now article 62) but by article 148. The Calcutta High Court has held[3] that where a prior mortgagee obtained a decree on his mortgage without impleading a puisne mortgagee, purchased the property in execution and entered into possession, a suit by the puisne mortgagee (who also purchased the property under his decree without impleading the mortgagee) for redemption and possession against the prior mortgage was governed by article 132 of the Act of 1908 (now article 62) and not by article 148 (now article 61). A puisne mortgagee is an assignee of the equity of redemption and is, therefore, entitled to redeem a prior mortgage in accordance with the provisions of sections 91 and 94 of the Transfer of Property Act which incorporate the familiar rule 'redeem up, foreclose down'. The distinction seems to be this. A suit to redeem is governed by article 61. A suit to enforce payment falls within article 62.

Suit against transferee.

35.4. The Madras High Court has held[4] by majority that article 134 of the Act of 1908 (now article 61) did not apply to a transfer from a trustee or mortgagee, where possession was not taken by the transferee. Wallis, C.J. and Coutts Trotter, JJ, however, dissented from the aforesaid (majority) view and held that the article 134 applied to a transfer from a trustee or mortgagee under which possession was not taken by the transferee. Wallis, C.J. further observed that it could not be held that the intention of the Legislature in enacting article 134 was to make a provision *in favour of* the *cestui que trust* or mortgagor and give him a further period than he would otherwise have had. On the contrary, the intention was clearly restrictive. The Indian Legislature must have been perfectly well aware that in the case of sales and mortgages alike, possession was rarely given on the date of transfer and if the legislature had intended the date of taking possession under the sale or mortgage to be the starting point, nothing would have been easier to say so. It had not done so, and it was not open to the judiciary to effect this by taking out of the article nearly all the cases which would therefore fall within it.

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[1] Law Commission of India, 3rd Report (Limitation Act, 1908), paras 48-49, 129-130.
[2] *Nagu Tukaram* v. *Gopal Ganesh*, A.I.R. 1963 Bom. 405.
[3] *Nil Madhab* v. *Joy Gopal*, A.I.R. 1926 Cal. 560.
[4] *Mulla Vittil Setti Kutti* v. *K. M. K. Kunhi Pathumma*, A.I.R. 1919 Mad. 972; I.L.R. 40 Mad. 1040; 1054 (F.B.).

However, it should be stated that most other High Courts have taken that view that article 134 (now article 61) does not apply where possession is not transferred.[1-2] The Madras High Court has, in a later case,[3] held that for the application of article 61, it was not the intention or belief of the mortgagee who transferred the property that mattered, but the fact that, though he was a mortgagee, he, in fact, purported to transfer absolutely to a third party the property covered by the mortgage in his favour. The fact of his belief that he was transferring some other property could not make any difference, so long as it was ultimately found that the property transferred by the mortgagee was the property which was the subject of the mortgage.

35.5. In the post-1963 period article 61 has not given rise to any serious controversy, and hence needs no amendment. **No change needed.**

35.6. Article 62 reads as under :— **Article 62.**

"62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years.	When the money sued for becomes due".

Article 132 of the Act of 1908 was as under:—

"132. To enforce payment of money charged upon immovable property.	Twelve years.	When the money sued for becomes due.

Explanation:—For the purposes of this article—

(a) the allowance and fees respectively called malikhana and haqqs, and

(b) the value of any agricultural or other produce the right to receive which is secured by a charge upon immovable property, and

(c) advances secured by mortgage by deposit of title deeds shall be deemed to be money charged upon immovable property."[4]

Article 132 of the Act of 1877 was as under:

"132. To enforce payment of money charged upon immovable property.	Twelve years.	When the money sued for becomes due."

Explanation.—The allowance and fees respectively called malikhana and haqqs shall, for the purpose of this clause, be deemed to be money charged upon immovable property."

Article 132 of the Act of 1871 was in identical terms.

35.7. Article 132 of the Limitation Acts of 1871, 1877 and 1908 provided for enforcing payment of money charged upon immovable property. Though the article did not specifically refer to mortgages, the Privy Council held[5] that a suit on a simple mortgage bond to enforce payment was governed by article 132. In the Report on the Act of 1908, the Law Commission recommended[6] amendment of the article to extend it specifically to mortgages. The Commission also recommended deletion of clause (c) of the Explanation to the article. **Law Commission Report.**

In the present Act, not merely clause (c) of the Explanation, but the entire Explanation, has been omitted.

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[1] *Narain Das*, v. *Haji Abdur Rehim*, (1920) I.L.R. 47 Cal. 866, 880.
[2] *Kalidas* v. *Sushila*, A.I.R. 1947 Cal. 461.
[3] *Dhanalakshmi Ammal* v. *G. Anthurai*, A.I.R. 1972 Mad. 186.
[4] The Explanation does not appear in the present Act.
[5] *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1907) ILR 30 Mad. 426(PC).
[6] Law Commission of India; 3rd Report (Limitation Act, 1908) page 48 para 128.

(Chapter 35—Articles 61 to 67: Suits relating to immovable property.)

No change needed.

35.8. Controversies may, in practice, arise as to the applicability of the article to a particular case, where the exact nature of the bond may be in issue, but these do not necessitate any amendment of the article.

Article 61.

35.9. Article 63 reads as under :—

"63. By a mortgagee :

(a) for foreclosure.	Thirty years.	When the money secured by the mortgage becomes due.
(b) for possession of immovable property mortgaged.	Twelve years.	When the mortgagee becomes entitled to possession."

The corresponding provisions in the Act of 1908 were articles 135, 146 and 147, which read as under:—

"135. Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immovable property mortgaged.	Twelve years.	When the mortgagor's right to possession determines."
146. Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immovable property mortgaged.	Thirty years.	When any part of the principal or interest was last paid on account of the mortgage debt.
147. By a mortgagee for foreclosure or sale.	Sixty years.	When the money secured by the mortgage becomes due."

In the Act of 1877, articles 135, 146 and 147 were in identical terms.

In the Act of 1871, Articles 135 and 139 contained the law on the topic in these terms:

"135. Suit instituted in a Court not established by Royal Charter by mortgagee for possession of immovable property mortgaged.	Twelve years.	When the mortgagee is first entitled to possession.
139. Like suit when the purchaser had possession, but afterwards dispossessed.	Twelve years.	The date of the dispossession."

Law Commission's Report.

35.10. The Law Commission, in its Report on the Act of 1908, observed as under on the corresponding article of the Act of 1908[1] :

"125. Before the decision of the Privy Council in *Vasudeva* v. *Srinivasa*[2] the view was taken that a suit by a mortgagee for sale of the property was governed by article 147 which gives a period of 60 years for foreclosure or sale. This view is no longer tenable in view of the decision of the Privy Council, where it was pointed out that article 147 applied only to an English mortgage under which the mortgagee has the alternative of either bringing a suit for foreclosure or for sale and that the proper article to apply in the case of a suit for sale under a simple mortgage was article 132, which provides a period of 12 years from the date when the money sued for becomes due. Under the existing law, the English mortgagee has no right

[1]Law Commission of India, 3rd Report (Limitation Act, 1908) pages 47-48, para 125-127.

[2]*Vasudeva* v. *Srinivasa*, (1907) I.L.R. 30 Mad. 426, 433, 434. (PC).

of foreclosure. Like a simple mortgagee, he has to institute a suit for sale. Whether in view of the definition of English mortgage in the Transfer of Property Act he is entitled to recover possession also is a debatable point."

"126. In the Limitation Act there are two articles, 135 and 146 which provide a period of limitation for recovery of possession by a mortgagee. If the suit is instituted in a court not established by Royal Charter, the period is 12 years (Art. 135) and if the suit is instituted in a court established by a Royal Charter the period is 30 years (Art. 146). In the former case, time begins to run when the mortgagor's right to possession determines while, in the latter, time begins to run when the principal or interest was last paid on account of the mortgage debt. It seems to be unnecessary to maintain this distinction, even assuming that under the present law the English mortgagee is entitled to recover possession of the property. The usufructuary mortgagee is undoubtedly entitled to recover possession of the property, either from the date of mortgage if possession is not delivered or, subsequently, if having been put in possession, his possession is disturbed. It would be sufficient, therefore, to provide only one article for a suit by a mortgagee for possession of immovable property mortgaged to him. A period of 12 years may be allowed. Time should run from the date when his right to possession accrues."

"127. As, under an English mortgage, there is no right of foreclosure or sale in the alternative, article 147 which in view of the Privy Council decision applies only to such mortgages, should be deleted. It is, however, necessary to make a fresh provision for a suit for foreclosure. A period of 12 years for such a suit may be provided, counting limitation from the date when the money secured by the mortgage becomes due, as in the case of a suit for sale."

The legislature has, however, inserted a period of thirty years, in conformity with the period prescribed in the new Act for suits for redemption of mortgages.

35.11. After the passing of the Act of 1963, no controversy has arisen justifying a change in the Act. No change needed.

35.12. This takes us to article 64, which reads as under :— Article 64

"64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years.	The date of dispossession."

Article 142 of the Act of 1908 was as under:

"142. For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years.	The date of dispossession or discontinuance."

This was identical with article 142 of the Act of 1877 and article 143 of the Act of 1871.

(Chapter 35—Articles 61 to 67: Suits relating to immovable property.)

The present article adds the words 'based on previous possession and not on title"[1]. The change, to some extent, follows the scheme suggested by the Law Commission in its Report[2] on the Act of 1908.

This article needs no change.

Article 65.

35.13. Article 65 reads as under :—

"65. For possession of immovable property or any interest therein based on title.	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.

Explanation.—For the purposes of this article—

(a) where the suit is by a remainderman, a revisioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, revisioner or devisee, as the case may be, falls into possession;

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession."

This article has replaced article 144 of the Act of 1908, which was as under:—

"144. For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff."

This was identical with article 144 of the Act of 1877.

Article 145 of the Act of 1871 was as under:

"145. For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years.	When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff."

The position of the illegal occupant.

35.14. The doctrine of acquision of title by adverse possession is deeply rooted in our system of jurisprudence. The doctrine is derived from the Roman Law concept of *usucapio* and *longi temporis praescriptio*, but in Roman Law, there was an added requirement that the possession must be bona fide and for "justa causa". English law has not insisted on the requirement of *justa causa*. The U.K. Law Reform Committee[3] has defended the doctrine by observing that "certainty of title to land is a social need and occupation of land which has long been unchallenged should not be disturbed." Thus, the English version is just the opposite of the Roman concept.

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[1]See para 35.17, *infra*.
[2]Law Commission of India, 3rd Report (Limitation Act), pages 49-52.
[3]Law Reform Committee, 14th Report (on acquisition of easements and profits by prescription), cmnd. 3100, page 12, para 36.

(Chapter 35—Articles 61 to 67: Suits relating to immovable property.)

In the registration systems of certain Commonwealth countries, a distinction is made between the acquisition of title by an adverse possession to registered land and unregistered land, with the result that a rank trespasser or a squatter is not able to extinguish the title of a registered proprietor.[1-2]

Argument of injustice.

35.15. This, however, is not the position in England. A person with evil intentions can usurp somebody else's land, even after forcibly evicting him, and can still perfect his title by adverse possession. On the other hand, if he enters into possession in a *bona fide* manner and with "justa causa", he would not be able to perfect his title. When the inequity of the position resulting from the interpretation of the word "adverse" was argued in England before Harman J.[3], (as he then was), he had interjected as under:

"You are worse off when you enter lawfully"

To this, the reply from the Bar was—"Yes, often; the case is by no means as startling as it sounds, because one has a comparable situation in detinue."

Questions posed as to squatters.

35.16. In view of the possibility of unjust results flowing from the application of this doctrine, one writer[4] poses two questions:

(1) Has "squatter's title" to land, with its undertones of "land-stealing", any place in a civilised society, particularly a society committed ultimately to universal state registration of title to land? (2) If, "squatter's title" can still perform a useful, indeed a necessary, function, ought it to require that the "squatter" should have a particular intention or motive before allowing him to acquire title? However, after an exhaustive discussion of the merits, the same writer proposes the following answers to the questions so posed:

(1) Acquisition of title by adverse possession is not immoral and can have benign influence on the social policy that security should be given to the long possessor of land.

(2) The motive, intention or belief of the allegedly adverse possessor is immaterial. The deliberate evicter and the mistaken encroacher should both be able to acquire title. Long-continued possession should *ipso facto* confet title, unless it is proved that that possession began and continued under a valid transaction with the true owner, i.e. that the possession was purely derivative, adverse possession. But if the defendant trespasser is a person who wishes to oust the plaintiff who was himself a prior trespasser or a person who did not come into possession as a trespasser but continued to hold it as such, in order to enable the plaintiff to continue his wrongful possession without disturbance, the law must undoubtedly step in and give relief to the plaintiff. As against the true owner, a person who is in possession for a length of time short of the statutory period is not entitled to any protection; but the net result of the decisions under article 142 is that the true owner must prove that he had a subsisting title on the date of suit.

We therefore suggest that in order to avoid injustice and inequity to the true owner and to simplify the law, article 142 should be restricted to suits based on *possessory* title and the owner of the property should not lose his right to it unless the defendant in possession is able to establish adverse possession."

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[1]Michael J. "Goodman," Adverse Possession, Morality and Motive (1970) 33 Modern Law Review 281, 282.

[2]Cf. J. S. Williams, "Title by Limitation in a registered conveyancing system" (1968) 6 Alberta Law Rev. 69.

[3]*Bridges* v. *Mees*, (1957) 1 Ch. 475, 481 : (1957) 2 All E.R. 577. See Michael Goodman, "Adverse Possession—Morality and Motive" (1970) 33 Modern Law Rev. 281, 285, 286 and fn. 35.

[4]Michael J, Goodman, "Adverse Possession—Morality and Motive" (1970) 33 Modern Law Review 281 (Questions) 288, (Answers).

(Chapter 35—Articles 61 to 67: Suits Relating to Immovable Property.)

Law Commission's report.

35.17. Reverting to the text of article 65, the articles relating to possession were examined in great detail by the Law Commission[1] in its Report on the Act of 1908. There was a preliminary observation that articles 142 and 144 had introduced a good deal of confusion in the law relating to suit for possession by the owners of property. The law Commission also discussed the Privy Council case[2] on the subject, which had settled the proposition that the rule of prescription should be applied not to cases of want of actual possession by the plaintiff, but to cases where the plaintiff had been out of possession and another person was in possession for the prescribed time. The Commission then made the following recommendation on the subject:

> "In our opinion, article 142 must be restricted in its application only to suits based on possessory title. The plaintiff in such a suit seeks protection of his previous possession which falls short of the statutory period of prescription, to recover possession from another trespasser. The plaintiff's prior possession no doubt entitles him to protection against a trespasser, though not against the true owner. The true owner's entry would be a rightful entry and would interrupt.

Law Commission's Recommendation.

35.18. For these reasons, the Law Commission (in that Report) recommended a re-draft of article 142 as under:—

> "For possession of immovable property based on possessory title where the plaintiff while in possession of the property has been dispossessed—12 years from the date of dispossession."

A new article was to govern suits based on title—the 12 years period to be counted from the time when possession becomes adverse.

Summary of the position in Supreme Court Judgment.

35.19. The amended article, though phrased somewhat differently has not given rise to any serious controversy and the Supreme Court in a recent judgment on the subject, has succintly summarised the law on adverse possession or hostile title thus:[3]

> "Adverse possession or hostile title must be established by a consistent course of conduct and it cannot be shown by a stray or sporadic act of possession. However, all that the law requires is that the possession must be open and without any attempt at concealment. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner. Such a requirement may be insisted on, where an ouster of title is pleaded but that is not the case here. One of the important facts, which clearly proves adverse possession, may be that the possessor had let out the land for cultivatory purposes and used it himself from time to time without any protest from the owner or any serious attempt by the owner to evict the possessor, knowing full well that he was asserting hostile title in respect of the land. If a person asserts a hostile title even to a tank which, as claimed in the present case by the owner, i.e. the municipality, belonged to it and despite the hostile assertion of title no steps were taken by the owner, to evict the trespasser, his title by prescription would be complete after thirty years."

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[1] Law Commission of India, 3rd Report (Limitation Act, 1908), pages 49 to 52, para 131 to 136.
[2] *Agency Company* v. *Short* (1888) 13 A.C. 793 (P.C.).
[3] *Kashitish Chandra Bose* v. *Commissioner of Ranchi* (1981) 2 S.C.C. 103.

(Chapter 35—(Articles 61 to 67: Suits Relating to Immovable Property)

35.20. In England, certain developments in the theory of adverse possession have taken place as regards protecting the real owner of the land (who has reserved the same for development or some specific purpose in mind, to be executed at a future date). In *Wallis's case*[1], Lord Denning M.R. observed as under:[2] Developments in U.K.— *Wallis case.*

> "Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have been dispossessed and another must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor."

35.21. The Law Reform Committee[3] in England (after some discussion) concluded as under, on the subject: Law Reform Committee- Views of.

> "There has now apparently been established a quite general doctrine of an implied licence from the true owner to the would-be adverse possessor permitting him to commit the acts of possession upon which he seeks to rely, without any specific or factual basis for such an implication. The effect of implying such a licence is to prevent time running in favour of the adverse possessor, since time does not run in favour of the licensee. If this doctrine extends as far as it appears to have been extended (by *Gray* v. *Wykoham-Martine*), it amounts, in effect, to a judicial repeal of the statute. The philosophy behind this approach has been expressed by Lord Denning M.R., as follows;

> "The reason behind the doctrine is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather, his user is to be ascribed to the licence or permission of the true owner."

> "We, however, prefer the more traditional approach recently restated by Sir John Ponnycuick, delivering the judgment of the Court of Appeal in *Treloar* v. *Nute*[4] in which he said:

> ".....If a squatter takes possession of land belonging to another and remains in possession for twelve years to the exclusion of the owner, that represents adverse possession and accordingly at the end of the twelve years the title of the owner is extinguished. That is the plain meaning of the statutory provisions.....".

35.22. The Law Reform Committee further considered it clear that the two approaches could not be reconciled. It concluded as under:

> "We consider that the law should be restored to the law as stated in *Treloar* v. *Nute*.[5] There can, in our view, be no justification for implying a licence, or other similar position, in any case where there is no factual basis for such an implication. The precise formula for such a restoration is not easy, since the present law is that if the land is in the possession of some person in whose favour the period of limitation can run, then such possession is 'adverse' (Limitation Act 1939, s.10(1) and this appears to be quite plain. We do not

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[1] *Wallis's Cayton Bay Holiday Camp Ltd.*, v. *Shell Mex and B.P. Ltd.* (1975) Q.B. 94, 103.

[2] See, for further discussion, (1980) Current Law Part 5, page 244.

[3] Law Reform Committee Report, (September 1977) Cmd. 6923, Para 3.50 to 3.52.

[4] *Treloar* v. *Nute*, (1977), All. E.R. (230); (1976) 1 W.L.R. 1295 C.C.A

[5] *Treloar* v. *Nute* (1977) 1 A11 E.R. 230.

consider that the suggestion of the Institute—that there would be a presumption that possession is adverse—would really add anything to this existing provision. Accordingly, we think that it may be necessary for amending legislation expressly to provide that for the purposes of the Limitation Act "possession" is to bear its ordinary meaning in law, so that it is not to be artificially stripped of its character of being adverse by the application of any implication or presumption not grounded upon the actual circumstances of the case".

Limitation Amendment Act 1980(UK).

35.23. As a result of the recommendations of the Law Reforms Committee, the Limitation Amendment Act 1980 was passed in England. The following sub-section has been added as sub-section (4) of section 10 of the Limitation Act 1939, by the Amendment Act of 1980.

"(4) For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that this occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.

This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such finding is justified on the actual facts of the case."

The Commentator of the Current Law Statutes Annotated[1] has observed (with reference to this provision) that this amendment is "another round in the *Legislature* v. *Lord Denning* saga".

No change needed.

35.24. We have made a passing reference to the fact that like many other well established legal doctrines, the doctrine of adverse possession has also attracted the adverse notice of some jurists. However, as stated above, the philosophy underlying the same has become an integral part of our jurisprudence. Both on the merits and on the ground just now mentioned, the doctrine deserves not to be disturbed in its essence.

No change needed in article 65.

We have also referred to the developments in England as a matter of interest. In India, these controversies have not arisen. Accordingly, we do not recommend any change in the article.

Article 66.

35.25. This takes us to article 66, which reads as under :—

"66. For possession of immovable property when the plaintiff has become entitled to possession by reason of any forfeiture or breach of condition.	Twelve years.	When the forfeiture is incurred or the condition is broken."

Article 143 of the Acts of 1908 and 1877 was as under:—

"143. Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve years.	When the forfeiture is incurred or the condition is broken."

In the Act of 1871, article 144 was in identical terms.

[1](1980) Part 5 Current Law page 24/4.

Case-law

35.26. Many of the judicial decisions usually discussed under this article involve matters of substantive law and we need not pause to discuss them. It is enough to mention one important aspect which was in issue in a Madras case.[1] Defedants in that case were in possession of a land on tenancy basis by virtue of a deed executed in 1836. In 1871, the defendants set up a right of permanent tenancy. In 1894, the plaintiff gave notice to the defendants to give up possession of the lands and filed a suit for eviction. The defendants contended that the suit was barred by limitation. The High Court held that the suit was not barred by limitation and that the tenant repudiating the title of land became liable for immediate eviction at the option of the landlord, but until the landlord indicated that he intended to exercise the option, the tenancy subsisted from year to year and article 139 of the Limitation Act of 1908 (present article 67) applied. But the same High Court, in a later case,[2] held that the landlord had got a right to recover possession the moment the forfeiture was incurred, and no overt act (*i.e.* no act or intimation of an election to avoid the lease) was necessary before bringing an action for ejectment. In such a case, article 148 (present article 66) applied and limitation began to run from the date of forfeiture incurred (*i.e.* the date of wrongful alienation of the property), unless the lessor, by a positive act, affirmed the tenancy and thereby waived the forfeiture. These and similar rulings are concerned essentially with the law of landlord and tenant. Depending on the view taken on the question of substantive rights of the parties, there may result a difference as to the precise article of the Limitation Act that would be attracted to the particular situation. For that reason, it seems hardly necessary to pursue the matter further.

Limited importance of the issue of forfeiture.

35.27. It may also be mentioned that tenancies of agricultural lands are now mostly regulated by the Land Reform Laws enacted by various States. As regards non-agricultural land, again, various rent control laws now contain the law in respect of residential buildings in urban areas. The area where the provisions of the general law of landlord and tenant is applicable to tenancies has now considerably shrunk. Thus, the article under discussion has limited utility, which is practicably confined to residual grounds not touched by special legislation.[3]

No change needed.

35.28. In the above position, a change in the article is not considered necessary.

ticle 67.

35.29. Article 67 reads as under:—

"67. By a landlord to recover possession from a tenant.	Twelve years.	When the tenancy is determined."

It is identical with article 139 of the Acts of 1908 and 1877, and with article 140 of the Act of 1871.

Representative of a tenant holding over—Whether a tenant.

35.30. Some controversy seems to exist as regards the legal representatives of a tenant. In one case,[4] the Madras High Court observed that a tenant holding over after the expiry of his term became a tenant on sufferance. The High Court further held that the representatives of a tenant on sufferance were mere trespassers and the lessor could not (by his assent alone) convert such representatives into "tenants" without their concurrence. However, in another case of the same High

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[1] *Srinivas Ayyar* v. *Muthusami Pillai*, (1901) I.L.R. 24 Mad. 246.
[2] *Annamalai* v. *Vythilinga*, A.I.R. 1937 Mad. 295.
[3] See also para 35.32, *infra*.
[4] *Vadapalli Narasimham* v. *Dronamraju*, (1908) I.L.R. 31 Mad. 163.

Court,[1] this view was dissented from and it was held that a suit against the representatives of a tenant after the determination of the tenancy was governed by article 139 of the Act of 1908 (present article 67). The Allahabad High Court[2-3] has also concurred in the latter Madras view. In such a case, the landlord should be able to give his assent to their continuing in the possession,—as he could have done if the deceased had been alive. As the latter view seems to meet the requirements of the provisions of section 116 T.P. Act.

Mortgagee in possession—a landlord.

35.31. In one case,[4] the erstwhile Hyderabad High Court held that where the mortgagee leased the mortgaged property to the mortgagor as his tenant and subsequently sued the mortgagor for ejectment, the claim for possession was not by the mortgagee as such, and would be governed by article 139 of the Act of 1908. But the Lahore High Court has observed[5] that the plaintiff was not suing the defendant merely as a landlord for their ejectment, but he had brought the suit on the basis of his right as a mortgagee with possession.

No change needed.

35.32. Ordinarily, we would have gone into details of such controversies, revealing a disparity of views. However, the general law of landlord and tenant has now very limited application,[6] and the article is now needed only for tenancies not controlled by special legislation. Its utility being so limited, we would leave the matter at that.

In the result no change is needed in the article.

CHAPTER 36

ARTICLES 68 to 71: SUITS RELATING TO MOVABLE PROPERTY

Article 68.

36.1. Article 68 reads as under :—

"68. For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years.	When the person having the righ to possession of the property firs learns in whose possession it is."

This corresponds to the first part of an article 48 of the Act of 1908. The second part of that article forms part of present article 91(a). Article 48 of that Act is reproduced below :—

"48. For specific movable property lost or acquired by theft, or dishonest misappropriation or conversion or for wrongfully taking or detaining the same.	Three years.	When the person having the right to the possession of the property first learns in whose possession it is."

Article 48 and 49 of the Act of 1877 were as under :—

"48. For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years.	When the person having the right to the possession of the property first learns in whose possession it is.

[1] *Subbraveti Ramiah* v. *Gundala Ramanna*, (1910) I.L.R. 33 Mad. 260.
[2] *Sheo Dulare Lal Sah* v. *Anant Ram*, A.I.R. 1954 All. 475.
[3] See also *Sardaraman* v. *Sundar Lal*, A.I.R. 1968 All. 363.
[4] *Ranba* v. *Bansilal*, A.I.R. 1953 Hyd. 231.
[5] *Amru* v. *Santa*, A.I.R. 1936 Lah. 441.
[6] See discussion relating to article 66, para 35.27, *supra*.

"49. For other specific movable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years.	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful."

Articles 26, 33, 34, 35, 47, 48 of the Act of 1871 were as under:—

"26. For taking or damaging movable property.	One year.	When the taking or damage occurs.
33. For wrongfully detaining title deeds.	Two years.	When the title to the property comprised in the deeds is adjudged to the plaintiff, or the detainer's possession otherwise becomes unlawful.
34. For wrongfully detaining any other movable property.	Two years.	When the detainer's possession becomes unlawful.
35. For specific recovery of movable property in cases not provided for by this Schedule numbers 48 and 49.	Two years.	When the property is demanded and refused.
47. For lost movable property not dishonestly misappropriated or converted.	Three years.	When the property is demanded and refused.
48. For movable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion.	Three years.	Ditto."

36.2. The Law Commission, in its Report[1] on the Act of 1908, recommended that in respect of article 48, the period of 3 years might be retained, but the date of accrual of cause of action should be made the starting point of limitation. In the present Act, article 48 of the 1908 Act has been split up. **Law Commission's Report.**

36.3. Some case law has gathered around the expression "movable property" as occurring in the article. However, this is a term of art and we do not wish to change the same. We would not therefore recommend any change in the article. **No change needed.**

36.4. Article 69 reads as under:— **Article 69.**

"69. For other specific movable property.	Three years.	When the property is wrongfully taken."

This corresponds to the first part of article 49 of the Act of 1908. [The second part of that article forms part of present article 91(b)]. The whole article was as under:—

"49. For other specific movable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years.	When the property is wrongfully taken or injured or when the detainer's possession becomes unlawful."

Article 49 of the Act of 1877 was in identical terms.

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 45, para 121.

(Chapter 36—Articles 68 to 71: Suits Relating to Movable Property)

Articles 26, 33, 34, 35, 47 and 48 of the Act of 1871 read as under:—

"26. For taking or damaging movable property.	One year.	When the taking or damage occurs.
33. For wrongfully detaining title deeds.	Two years.	When the title to the property comprised in the deeds is adjudged to the plaintiff, or the detainer's possession otherwise becomes unlawful.
34. For wrongfully detaining any other movable property.	Two years.	When the possession becomes unlawful.
35. For specific recovery of movable property in cases not provided for by this schedule numbers 48 and 49.	Two years.	When the property is demanded and refused.
47. For lost movable property not dishonestly misappropriated or converted.	Three years.	When the property is demanded and refused.
48. For movable property acquired by theft, extortion, cheating or dishonest misappropriation or conversion.	Three years.	Ditto."

No change is needed in the article.

Article 70.

36.5. Article 70 reads as under :—

'70. To recover movable property deposited or pawned from a depositary or pawnee.	Three years.	The date of refusal after demand."

It corresponds to article 145 of the Act of 1908, which was as under:—

"145. Against a depositary or pawnee to recover movable property deposited or pawned.	Thirty years.	The date of the deposit or pawn."

This is identical with article 145 of the 1877 Act. Article 147 of the Act of 1871 was as under :

'147. Against a depository or pawnee to recover movable property deposited or pawned.	Thirty years.	The date of the deposit or pawn unless where an acknowledgement of the title of the depositor or pawner, or of his right of redemption, has before the expiration of the prescribed period been made in writing, signed by the depositary, or pawnee, or some person claiming under him, and in such case, date of the acknowledgement."

In the present Act, the period is three years, but it is to be computed from the date of refusal after demand.

Law Commission's Report.

36.5. The Law Commission, in its Report on the Act of 1908,[1] observed that in article 145 of that Act it would be more appropriate to make the date of refusal after demand as the starting point of limitation and that the period should be fixed as three years from that date. The recommendation has been accepted in article 70 of the present act, enacted in place of article 145 of the Act of 1908.

[1]Law Commission, 3rd Report (Limitation Act, 1908), page 45, para 121.

(Chapter 36—Articles 68 to 71: Suits Relating to Movable property)

Money—whether movable property—conflict.

36.6. There is some diversity of views as to the expression "movable property" as occurring in the article. One view is that money is "movable property"[1] for the purposes of this article. A contrary view has, however, been taken by some High Courts[2]. In an Allahabad case, the main relief claimed by the plaintiffs was the recovery of certain sum which represented the price of goods deposited, and interest on the same. It was held that such a suit could not be described to be a suit for the recovery of "specific movable property deposited or pawned" within article 145 of the Act of 1908.

The expression "movable property" has been defined in various Central Acts. Thus, section 22 of the Indian Penal Code restricts the expression "movable property" to corporeal property, that is, property which might be perceived by the senses. Section 3(36) of the General Clauses Act, 1897, defines "movable property" as meaning property of every description, except immovable property. The Transfer of Property Act, 1882, does not define the term at all. Section 2(9) of the Registration Act, 1908 makes a special provision for including certain items as a species of movable property. Section 82 of the Companies Act, 1956 makes a share or other interest of any member in a company to be a "movable property". None of these Acts, however, specifically provides that money is movable property.

No change needed.

36.7. Ordinarily such a conflict of views would need to be attended to. But we note that in the Andhra Pradesh case, this was only one of the grounds of decision, and the decision was based on a number of alternative grounds. We do not therefore consider it necessary to recommend any change in the wording of the article. We may add that the recent trend is not to include money in this article.

Article 71.

36.8. Article 71 reads as under :—

"71. To recover movable property deposited or pawned, and afterwards bought from the depositary or pawnee for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff."

It corresponds to the latter half of article 48-A of the Act of 1908. This splitting up of the article was done on the recommendation of the Law Commission in its Report on the Act of 1908.[3]

Article 48- A of that act was as under:—

"48-A. To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff."

In article 133 of the Act of 1877, the starting point was the date of the purchase and the period prescribed was 12 years.

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[1] (a) *Central Warehousing Corpn., New Delhi* v. *Central Bank of India, Hyderabad,* A.I.R. 1974 A.P. 8.
(b) *Ahilyamba* v. *Subramania,* A.I.R. 1954 Mad. 101.
(c) *Lala Govind* v. *Chairman,* 6 C.L.J. 535.
[2] (a) *Khairul Basheer* v. *Thanna Lal,* A.I.R. 1957 All. 553.
(b) *Balakrishna* v. *Narayanswami,* I.L.R. 37 Mad. 175.
[3] Law Commission of India, 3rd Report (Limitation Act, 1908), page 45, para 121.

(Chapter 36—Articles 68 to 71: Suits Relating to Movable Property)
Chapter 37—Articles 72 to 91 : Suits Relating to tort)

In the Act of 1871, article 133 reads as under :—

"133. To recover movable property conveyed in trust, deposited or pawned and afterwards bought from the trustee, depositary or pawnee, in good faith and for value.	Twelve years.	The date of the purchase."

The article needs no change.

CHAPTER 37

ARTICLES 72 TO 91: SUITS RELATING TO TORT

Article 72.

37.1. Article 72 reads as under :—

"72. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.	One year.	When the act or omission takes place."

Article 2 of the Act of 1908 was in the same language, but the period was 90 days.

Article 2 of the Act of 1877 was as under:—

"2. For compensation for doing, or for omitting to do, an act alleged to be in pursuance of any enactment in force for the time being in British India.	Ninety days.	When the act or omission takes place."

Article 2 of the Act of 1871 was in identical terms.

Earlier report of the Law Commission.

37.2. The Law Commission,[1] in its Report on the Act of 1908, recommended a period of 3 years for such suits. The reasons given were as under:—

> "Article 2 is for a suit for compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in India. The period of limitation is 90 days and time beings to run when the act or omission takes place. This article is intended to cover the case provided for in England, by section 8 of the Public Authorities (Protection) Act, 1893. The provisions therein are somewhat elaborate and the period of limitation is six months. The object of the Legislature in England and in India seems to be to provide a shorter period of limitation in the case of actions against public authorities for any act done in pursuance or execution or intended execution of any Act, or of public duty, or authority, or in respect of any neglect or default or in the execution of such Act, duty or authority. It protects the public authorities by providing a shorter period of limitation. It has been held that so long as the officer concerned acts honestly and bonafide, he gets the advantage of the shorter period of limitation. If the statute authorises the injury, no action lies. If an officer purporting to act, in pursuance of statute, does something which causes an injury or by reason of his omission to do an act an injury results, the person

[1]Law Commission of India, 3rd Report (Limitation Act), pages 40-41.

so injured is entitled to claim compensation for the neglect or default. If he abuses the power, the shorter period of limitation will not apply and the action will be outside the article. The law in England was altered by the Limitation Act of 1939 (section 21) which "provided a period of one year instead of six months. Time was made to run from the date of the accrual of the cause of action instead of from the act or neglect or default complained of, as under section 8 of the Public Authorities (Protection) Act. Owing to public agitation, the English Limitation Act was amended in 1954 and the period of limitation was increased to three years for actions relating to personal injuries. By the amending Act, section 21 of the Act was repealed and a proviso to sub-section (1) of section 2 was added, cutting down the period of six years, which applies for actions founded on torts, to three years in such cases. The period, therefore, under the English Law for actions on tort as respects personal injury, whether caused by a private individual or by a public authority is now three years instead of six years as in the case of other actions based on tort. This article would come under the general provision for all suits on tort for which we propose to prescribe a period of three years from the date of accrual of the cause of action. There does not seem to be any justification for making a distinction between public authorities and a private citizen except in matters like notice under section 80, C.P.C. Further, if a shorter period for suits against public authorities is prescribed, it will compel parties to rush to a suit without exhausting the possibility of getting redress by negotiations which necessarily take time. One of us, Dr. Sen Gupta, is inclined to take a different view and has added a separate note to this Report on the subject. After a full consideration of his views we think that the consideration mentioned above in favour of a uniform period for suits against public authorities and private citizens should prevail and that no change is needed in the proposals suggested above."

Dr. Sen Gupta's dissent to the earlier Report.

37.3. The dissenting note of Dr. N. C. Sen Gupta,[1] to the Report of the Law Commission on the Act of 1908, was as under:—

"The reasons for the proposed amendments in respect of article 2 are firstly, that there should be no difference between the State and private parties in respect of suit on tort and that a suit for compensation in respect of a thing purported to be done by an officer under some enactment in force is nothing but a tort for which the Government is liable. To the general principle of parity between the Government and private persons in respect of limitation, I have no serious objection. But there are important differences between suits for ordinary torts by private persons and suits under this Article. There may be suits of this character which are purely suits for damages for a particular wrong against a particular person. But most of these cases would be cases in which an officer of the Government has been acting or purporting to act under authority of an enactment and in most of these cases, questions about the validity of the enactment or of the interpretation of it upon which the officer is acting would be in question. In such cases it is by all means necessary that such suits should be disposed of as quickly as possible,—so that if the decision goes against the action of a particular officer, the Government may take early steps that further action may not be taken on the erroneous view of law. Further, it must be remembered that the Government is made vicariously responsible for the acts of its officers and having regard to the extremely large area of Government activities and its responsibility for acts of a multitude of officers, it is neces-

[1]Law Commission of India, 3rd Report (Limitation Act, 1908) pages 69-70.

sary that the courts' decision about the correctness or otherwise of the act of such officers should be made known to the government as soon as possible.

"Public policy requires that acts of government officials purported to have been done under the provisions of some enactments in force should be tested, if necessary, as soon as possible in order that public administration may not be affected by an erroneous course of action based on wrong application of the law for a long time; and if there has been an error, it should be rectified as soon as possible. "

"I am afraid that the principle that this makes a discrimination between the government and a private person does not provide a correct approach to the problem. The difference in the provisions lies not in the character of the person against whom the suit is brought, but in the nature of the claim which justifies a short period."

Need for amendment and recommendation.

37.4. The recommendation made by the majority of the Law Commission in its Report on the Act of 1908 was to increase the period to three years, but the period has been increased (by the Act of 1963) only to one year.

Time taken in preliminary steps.

37.4A. In this connection, an aspect to which attention must be drawn is the fact that where a private person wants to sue the Government or a public officer in respect of an act alleged to have been done under an enactment, considerable time of that private person is taken up in certain preliminary steps. These preliminaries include—

(i) collecting the necessary information;

(ii) getting the necessary copies of documents etc. from the public office concerned;

(iii) taking legal advice; and

(iv) arranging for the payment of court fee and other expenses.

Furthermore, the scope and importance of suits governed by article 72 is daily increasing, as almost every official action affecting the rights of a citizen now takes place under the colour of some enactment or the other. To put the matter in different words, the sphere of common law wrongs is diminishing and the sphere of wrongs taking place under the colour of statute is expanding in volume, day by day. It is, therefore, necessary that the increased importance of such acts should be realised and reflected in the law of limitation. For this important reason, we recommend that the change mentioned above so as to increase the period of limitation to 3 years should be carried out. In reaching this conclusion, we have not overlooked the points that were raised in the dissenting note of Dr. Sen Gupta appended to the report of the Law Commission[1] on the Act of 1908. However, on deep reflection, we have come to the conclusion that the increasing importance of suits falling under article 72 and the difficulties of the litigants (in the shape of time consumed by preliminaries to such litigation) must be given great weight. It is true that there is need to ensure that the validity of an official act is decided without unreasonable delay—which was one of the points made by Dr. Sen Gupta. However, three years would not be too long a period or an unreasonable one, having regard to the considerations that have been mentioned above.

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908). See paragraph 37.3, *supra*.

(Chapter 37—Articles 72 to 91: Suits Relating to Tort)

37.5. We must also state that recently there has been a spate of cases alleging torture of undertrials[1-2] and these were detected after a long time. Thus, the litigant against the Government suing for acts done under alleged statutory authority has to face a serious practical difficulty. In fact, the Judicial Commissioner, Nagpur,[3] had as long back as in 1877, anticipated that damage caused by a public servant may not come to be noticed for quite some time:— **Difficulty of litigants against Government.**

> "The period of limitation provided is very short. In many cases notice of one month has to be given before suits of the kind referred to in this article can be instituted, so that the party injured has only two months after the act or omission takes place, within which he must make up his mind to bring his action. Section 424 (Bill No. IV) Code of Civil Procedure proposes six months as the period of limitation for a suit "against a public officer for compensation for an act alleged to be done in his official capacity." The same period might well be allowed, for actions of the kind referred to in Article 2, especially when it is remembered that material damage would in many cases not have resulted in the short period allowed by the present law".

37.6. We are mentioning this to show that a tort committed by public servant may remain undetected for a considerable time and hence we re-iterate the earlier recommendation of the Law Commission about enlargement of the period of limitation to three years. **Recommendation.**

37.7. This takes us to article 73, reading as under:— **Article 73.**

"73. For compensation for false imprisonment.	One year.	When the imprisonment ends."

It is identical with article 19, of the Acts of 1908 and 1877.

In the Limitation Act of 1871, article 21 was as under:—

"21. For false imprisonment.	One year.	When the imprisonment ends."

The words 'For compensation' were added in the year 1877 in the first column. This, probably, was done as a result of the suggestion received through the Commissioner, Central Provinces, on the draft article of 1877 Act:

"Better say" for damages or compensation "for false imprisonment."[4]

The Law Commission made the following observations on the corresponding article of the Act of 1908, in its Report on that Act:—

> "Article 19 provides for suits for compensation for false imprisonment, a period of one year from the time the imprisonment ends. This is a suit based on tort. It is a continuing wrong within the meaning of section 23 of the Limitation Act and *terminus ad quem* is reached when the imprisonment ends."[5]

As the article has not given rise to any serious controversy, no change is recommended.

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[1] *Khatri* v. *State of Bihar*, (1981) 1 S.C.C. 623, 627.
[2] *Anil* v. *State of Bihar*, (1981) 1 S.C.C. 622.
[3] Judicial Commissioner, Central Provinces, letter No. 461 dated 12th March, 1877, National Archives File, Paper No. 7, page 5.
[4] Letter No. 778 dated 12th April, 1877, Judicial Commissioner, Central Provinces, National Archives File, 1877. Paper 11, page 6.
[5] Law Commision of India, 3rd Report (Limitation Act, 1908), page 41, para 110.

(Chapter 37—Articles 72 to 91 : Suits Relating to Tort)

Article 74.

37.8. Article 74 reads as under :—

"74. For compensation for a malicious prosecution.	One year.	When the plaintiff is acquitted or the prosecution is otherwise terminated."

It is identical with article 23 of the Acts of 1908 and 1877.

Article 23 of the Act of 1871 was as under:

"23. For a malicious prosecution.	One year.	When the plaintiff is acquitted."

History.

37.9. When the draft Bill of 1877 was circulated for comments, the earlier phraseology (Act of 1871) was changed by adding the words "or the prosecution is otherwise terminated".[1] The following comment was received on the proposed change:—

> "When can a prosecution be said to have terminated? Has it terminated if the accused be released on the ground that a conviction was held before a Court which had no jurisdiction, or upon some other technical ground which leaves the accused still liable to be prosecuted? See *Chambers* v. *Robinson*, 2 Str. 691; *Wicks* v. *Pentham* 4 T.R. 247; and *Tippet* v. *Nearn*, 4 B. & Ald. 634. An acquittal upon a technicality is a different thing from a conviction set aside for want of jurisdiction."[2]

The other comment seems to be more pertinent and applauded the proposed change as follows:—

> "The note in '*Thomson*' as to this is quite correct— an acquittal is not necessary for the purpose of bringing an action. The termination of the prosecution is the time from which limitation should run."[3]

The then Secretary, Legislative Department agreed[4] with the latter view and the text of the article was ultimately passed as it was proposed.

Law Commission's earlier recommendation.

37.10. The Law Commission in its Report on the Act of 1908 recommended[5] a uniform period of 3 years for suits founded on tort. [It had no specific comments on the corresponding article of that Act as such].

However, the recommendation to increase the period to three years was not accepted, and the period of limitation has remained the same as before (one year).

Article 74—Controversy as to starting point of limitation.

37.11. A controversy still exists in regard to the starting point of limitation period in the third column. There are two starting points given in the third column. They are—(1) when the plaintiff is acquitted, or (2) when the prosecution is "otherwise terminated."—a test added[6] in 1877. According to the Bombay High Court[7], these two different points are applicable to two dissimilar circumstances. The order of acquittal or of discharge passed by the trial court remains (according to this view) operative for the purposes of limitation and the filing of

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[1]Statement of Objects and Reasons; National Archives File 1877, page 1.
[2]Letter dated 19th April, 1877 from Charles D. Field, National Archives File 1877, Paper No. 8, page 8.
[3]Demi Official letter from the Hon'ble Sir Richard Garth to the Hon'ble Arthur Hobhouse dated 24th July, 1876, National Archives File 1877, Paper 2, page 4.
[4]Note in National Archives File 1877, Paper 1, page 5.
[5]Law Commission of India, 3rd Report (Limitation Act, 1908), page 44, para 116.
[6]Paragraph 37.9 *supra*.
[7](a)*Bhaskar* v. *Kishanlal*, A.I.R. 1968 Bom. 21.
(b) *Purshottam Vithaldas* v. *Ravji Hari*, A.I.R. 1922 Bom. 209.

an appeal or revision in superior courts does not stay its operation so far as limitation is concerned. In one of its more recent cases on the subject, that High Court observed[1] as under:

"The original acquittal is still operative and on the language of the provision, it is the date of acquittal from which time begins to run. The other alternative is that 'the prosecution is otherwise terminated'. Now, whenever a prosecution is started, it may not necessarily end in an acquittal. A prosecution may end, either in acquittal or conviction. If it is the first, then, it is governed by the first part of this provision, and if it is the second, there can be no case for a suit. It may also result in an order of discharge, or in a dismissal of the complaint if the complainant is absent on the date fixed for the hearing of the complaint. The latter part of the provision 'the prosecution is otherwise terminated' is intended to meet such cases, and here again, it is the end of that proceeding which is operative for all intents and purposes and governs the point of time when the period begins to run."

The High Court further pointed out that whenever the Legislature intended that the time should commence to run from the final order, it had expressly said so. The following observations of the Allahabad High Court in its earlier case[2] on the subject reflect the same approach:—

> "A perusal of article 23 of the Limitation Act (of 1908) goes to show that that article deals with two alternative cases: one envisages acquittal and the other termination of the prosecution. So far as the second alternative or the expression 'termination of the prosecution' goes, that is not applicable to the present case. That governs such cases as those of discharge. It is the first alternative which will govern the case of acquittal; and 'acquittal' would mean acquittal from the trial court or if there is conviction from a trial court, then the order of acquittal was passed in appeal or revision. In a case where acquittal has been ordered by the trial court and the complainant has filed revision, the filing of revision cannot affect the order of acquittal already passed. It will remain an order of acquittal till the acquittal is converted into an order of sentence. It would thus appear that under article 23 of the Limitation Act, the limitation would run from the date when the plaintiffs were acquitted by the trial court or in appeal if there was conviction from the trial court. Filing of a revision against an order of acquittal cannot suspend the period of limitation, which started running from the date of the order of acquittal."

On this view, the filing of a revision against acquittal does not suspend the running of limitation which has once started.

Opposite school of thought.

37.12. The opposite view has, however, been taken in a later decision of the Allahabad High Court.[3] A full Bench of the Madras High Court took this view quite a long time back.[4] A Same view has been taken in comparatively more recent judgments of the Mysore[5] and Rajasthan[6] High Courts.

The pivotal objection of the Bombay High Court to the acceptance of the Madras view[7] is contained in these observations in one of its judgments.[8]

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[1] *Bhaskar* v. *Kisanlal*, A.I.R. 1968 Bom. 21, 22, para 3.
[2] *Madho Lal* v. *Hari Shankar*, A.I.R. 1963 All. 547, 548, para 5 (M. Lal J.).
[3] *Madho Lal* v. *Shyam Sundar Vaish*, (1969) All L.J. 587, 589 (See paragraph 37.13, *infra*).
[4] *Kulasekara Chetty* v. *Tholasingam Chetty*, A.I.R. 1938 Mad. 349 (F.B.).
[5] *Basappa Sangappa* v. *Narayanappa Kriyappa*, I.L.R. (1973) Mys. 201, 206 (See *infra*).
[6] *Ramvilas* v. *Gopal Lal*, (1973) Raj. L.W. 92 (See paragraph 37.14 *infra*).
[7] *Kulasekara Chetty* v. *Tholasingam Chetty*, A.I.R. 1938 Mad. 349.
[8] *Bhaskar* v. *Kisanlal*, A.I.R. 1968 Bom. 21, 24.

"In our view, therefore, there can be no justification to add the word 'final' before the word 'acquittal' according to the Madras High Court, and the word 'finally' before the words 'otherwise terminated'."

This objection has been met by the Mysore High Court, which has observed:[1]

"The criticism, therefore, that the Madras view illogically imports the idea of finality or actually adds the word 'finally' or 'final' to the language of the third column is, with respect, not justified. *Finality is actually inherent in the choice of the word 'termination'*. Taking, therefore, the two things together, viz., that one of the essential elements in the cause of action for malicious prosecution is termination of proceedings in favour of the plaintiff and that there can be no termination if proceedings are continued until one reaches the stage where further continuance is not possible, then it follows that if the acquittal entered by the trial court is taken up on appeal, the plaintiff is not in a position to say that the proceedings have terminated in his favour, and that, therefore, the cause of action itself is not complete so as to start the running of time in favour of the defendant."

Allahabad judgment.

37.13. The Allahabad High Court has also, in a later case held[2] as under :—

"The phrase used in article 23 of the Limitation Act fixing the point of time from which the period of limitation begins to run as 'when the plaintiff is acquitted or the prosecution is otherwise terminated', must be construed as equivalent to 'when the prosecution of the plaintiff is terminated by acquittal or otherwise'; and determination of the prosecution by acquittal should be deemed to occur *only when all appeals and revisions that may have been filed against the basic order of acquittal have been finally disposed of*. This interpretation obviates the necessity for making an illogical distinction between cases of acquittal and cases where the prosecution is terminated by discharge, and it has the further merit of avoiding the possibility of hardship for the plaintiff by permitting him to wait until his acquittal has been placed beyond doubt before he files his suit for compensation for malicious prosecution."

Rajasthan view.

37.14. In the Rajasthan judgment,[3] the following passage represents a similar view:—

"The phrase used in article 23 fixing the time from which the period of limitation begins to run as 'when the plaintiff is acquitted or the prosecution is otherwise terminated', must be interpreted as meaning 'when the prosecution of the plaintiff is terminated by acquittal or otherwise' and the termination of the prosecution by acquittal should be deemed to occur only when the appeals and revisions that may have been filed against the order of acquittal have been finally disposed of. I am further of the opinion that the words used in article 23 of the Limitation Act 'when the plaintiff is acquitted' must not be read independently of the words or the prosecution is otherwise terminated'. The illogical distinction pointed out by the Bombay High Court between the cases of acquittal and those where the prosecution is terminated by discharge would only lead to hardship and one will have to incur expenditure of filing the suit even before the order of acquittal

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[1] *Basappa Sangappa* v. *Narayanappa Kariyappa*, I.L.R. (1973) Mys. 201, 206 (Emphasis added).

[2] *Madho Lal* v. *Shyam Sunder Vaish*, (1969) All. L.J. 587. (D.B.) [The earlier case of 1963 does not appear to have been cited].

[3] *Ram Vilas* v. *Gopal Lal*, (1973) Raj. L.W. 92, 94 (Modi J.).

passed in his favour is still sub-judice under appeal or revision filed by the complainant or the State."

American Restatement.

37.15. In this context—though this is a matter of substantive law—it may be worth mentioning that the Restatement of the Law (Second) on Torts[1] has this to say regarding the termination of proceedings for the purpose of the tort of malicious prosecution:—

"658. *General Rule* : To subject a person to liability for malicious prosecution, the criminal proceedings must have terminated in favour of the accused."

"659. *Manner of Termination*: Criminal proceedings are terminated in favour of the accused by

(*a*) a discharge by a magistrate at a preliminary hearing, or

(*b*) the refusal of a grand jury to indict, or

(*c*) the formal abandonment of the proceedings by the public prosecutor, or

(*d*) the quashing of an indictment or information, or

(*e*) an acquittal, or

(*f*) a final order in favour of the accused by a trial or appellate court."

English view as to the aspect of termination of proceedings.

37.16. Street has dealt[2] with this ingrediant of malicious prosecution thus:

"The proceedings must have terminated in favour of the plaintiff[3]. Even though the plaintiff has been convicted of a lesser offence[4], or has had his conviction quashed on appeal, or has been acquitted on a technicality, e.g. a defect in the indictment, this requirement is satisfied. If the conviction of the plaintiff stands, then even though there is no right of appeal from it and although he can satisfy the court in the instant proceedings that the conviction was grossly unjust, there is no cause of action in this tort. The plaintiff seems to satisfy the present requirement if he proves that the defendant has dis-continued the proceedings; *the plaintiff cannot sue, it seems, while the proceedings are still pending.*"

37.16A. It may also be added that Charles D. Field hit the nail on the head in 1877 when he asked the question: "when can a prosecution be said to have terminated"? Even now, the difference of opinion continues. A review of the state of the law made above shows that the majority of the courts would be reluctant to entertain an action for damages for malicious prosecution unless they are satisfied that the judgment may not be rendered infructuous by a subsequent decision in the criminal proceedings.

Recommendation

37.17. The net result of the above discussion is that there is an obvious conflict of views between the Bombay High Court on the one hand and the other High Courts on the other hand. There seems to be a need for clarifying the

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[1]American Law Institute Restatement (Second) on Torts (1977) Vol. 3, Articles 658, 659.

[2]Harry Street, Law of Torts (1976), page 397.

[3]This requirement is not imposed where, for example, an arrest or search warant is procured.

[4]Cases cited in suport of the discussion have been omitted.

position. In conformity with the majority view (that is to say, the later ruling of the Allahabad High Court and the rulings of the High Courts of Madras, Mysore and Rajasthan), we recommend that in article 74, before the word "terminated", the word "finally" should be added. Apart from the fact that such an amendment would be in harmony with the majority view, it will be of considerable practical utility and avoid the difficulty that might be caused if limitation is to start running even where the proceedings constituting the cause of action have every possibility of being re-opened in a higher court.

Articles 75-76.

37.18. The next two articles are concerned with defamation, and may now be taken up.

(a) Article 75 reads as under:—

"75. For compensation for libel.	One year.	When the libel is published."

It is identical with article 24 of the Acts of 1908 and 1877.

Article 24 of the Act of 1871 reads as under :—

"24. For libel.	One year.	When the libel is published."

(b) Article 76 reads as under:—

"For compensation for slander.	One year.	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results."

It is identical with Article 25 of the Act of 1908.

In the Act of 1877, Article 25 was as follows:—

"For compensation for slander.	One year.	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results."

Article 25 of the Act of 1871 was as under:—

"For compensation for slander.	One year.	When the words are spoken."

Though libel and slander fall under the general heading of the tort of defamation, the Limitation Acts, right from 1871, have been treating the causes of action for these two types of torts as distinct,—though the period of limitation is one year in both the cases.

English law.

37.19. Halsbury states the position in England thus[1] :

"In an action of libel time runs from the publication, but where, for example, a blook or newspaper is published and offered for sale, a fresh cause of action arises on each sale, notwithstanding that more than six years have elapsed since the first publication. In an action for slander where the words are actionable without proof of special damage, time runs from the uttering of the slander. Where the words are not actionable without special damage, time does not run until the damage occurs."

[1]Halsbury, 4th Ed, vol. 28, para 689.

(Chapter 37—Articles 72 to 91 : Suits Relating to tort)

37.20. Before 1871, the period of limitation in India probably followed the English practice. The period of one year proposed for suits for libel was explained in the statement of Objects and Reasons annexed to the Bill that lead to the Act of 1871, as follows:— Legislative History.

> "On the other hand, we have diminished to one year the period fixed for suits for false imprisonment, for any other injury to the person, for a malicious prosecution, *for libel, for slander,* for taking or damaging movables, for loss of service occasioned by seduction, for inducing breach of contract, for illegal distress, and for wrongful seizure of movables under legal process[1]."

37.21. When the draft Limitation Bill 1877 was circulated for comments, a plea was made for counting the period from the time when the libel came to the knowledge of the person libelled. One comment, making such a suggestion, may be quoted:—

> "I would suggest an alteration in the period applicable to libel; for I think the term now fixed, namely, one year from publication, may, as I know it has done, work a great hardship on the person libelled. The term should in my opinion, run from the date when the libel became known to him. I do not refer to cases of libel published in newspapers, for there a man reads at once what has been written of him, and can generally bring his action without further delay: but I alude to private communications, or those written under a sense of duty to a public official, where the person libelled, although he may have sustained loss from what he knows has been said of him, still is unable, through obstacles put in the way either by the writer or receiver of the communication, to discover what has been said against him until the year from the date when it was sent has expired, and so, though the statements or charges made against him may have been totally unfounded and grossly calumnious, and he has suffered the greatest loss, still because of the present state of the law, his suit would be barred unless it was brought within a year of the time when it was sent to the post. Section 19 of the Act would not help him, for he may have been kept from the knowledge of his right to sue without any fraud on his libeller's part, but by simple obstructions which he has put in his way. Or if it be said he knew of his right to sue before the time of limitation expired, inasmuch as he had been told he had been libelled, still he might not have been able to bring a suit, because he could not, until it was too late, see or get a copy of the libellous document. A case of this kind occurred some few years ago in Calcutta where great injury resulted to a merchant whose conduct in a certain mercantile transaction had been improperly and falsely represented by his Counsel to the Minister of Foreign Affairs of their country. The High Court was of opinion that the communications were highly libellous, and that the plaintiff would have been entitled to heavy damages, had it not found that the suit had been brought beyond the period allowed from the date of publication, although it was brought at the earliest opportunity. The case is *Charriol* v. *Lombard,* and is reported in 1 Indian Jurist N.S., page 209 at seq."[2]

Another suggestion made by Mr. Field was to combine the two articles dealing with 'libel' and 'slander' into one composite article for defamation[3] :

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[1]Statement of Objects and Reasons ; National Archives File 1871, page 4.

[2]C. J. Wilkinson, Recorder of Rangoon to the Secretary to Chief Commissioner, British Burma, Letter No. 57-33, dated 27th April 1877.
National Archives File 1877, Paper No. 19, p. 3.

[3]Letter No. 19th April 1877, Charles D. Field, National Archives File 1908, paper 6, page 13.

(Chapter 37—Articles 72 to 91: Suits relating to tort.)

"For 'libel' and 'slander' might be substituted "defamation" which includes both, and which is the peculiar term of Indian Law—see section 499 of the Penal Code".

Comment (1907)

37.22. In 1907, Sir Lawrence Jenkins, Chief Justice of the Bombay High Court also expressed himself thus:[1]

"Article 25 and 24 should be only one article providing for defamation."

Law Commission's Report.

37.23. The Law Commission, in its Report on the Act of 1908, did not examine the above question, because it preferred one article for all tortious acts and observed thus[2]:—

"Article 24 relates to an action for libel and the period of limitation is one year from the time when the libel is published. Article 25 relates to slander and the period provided for is one year from the date when the words were spoken or, if the words are not *per se* actionable. when the special damage complained of results. It is settled law that the cause of action for libel accrues from the date of the publication of the defamatory statement. When slander is actionable *per se*, the cause of action is its publication and time runs from that date. If the action is maintainable only on proof of the special damage, the happening of the damage is the cause of action. (See *Burry* v. *Perry*[3] and also *Darley Main Colliary Co.* v. *Thomas Wilfria*[4]). In respect, therefore, both of libel and slander, the time from which limitation runs coincides with the accrual of the cause of action. The suits under all these articles are suits founded on tort and a uniform period of three years may be fixed for the institution of these suits, time running from the date of the accrual of the cause of action."

History of article relating to slander.

37.24. As regards the article relating to slander in the Act of 1877, in the third column of the schedule, the words "or, if the words are not actionable in themselves, when the special damage complained of results" were added, alongwith the pre-existing words "when the words are spoken". Since then, there has been no change. The addition of these words was presumably intended to cover the cases which can arise under the rule of English Law that slanderious words are not actionable *per se* and a suit is maintainable only after when special damage is caused.

Position in India as to the tort of defamation, and need for amendment of the Limitation Act.

37.25. We have given anxious thought to the question whether articles 75 and 76 (libel and slander) should be retained as they are. This necessitates an examination of the substantive law of defamation as a tort. The common law position is that libel is actionable *per se*, while slander is actionable without proof of special damage (unless the case falls within certain exceptional categories). This distinction, however, hardly possesses any realistic importance in India, since most High Courts do not recognise the distinction between libel and slander. It can be asserted that net result of Indian judicial decisions is that both libel and slander are actionable as torts, without the need to prove special damage. We are aware that there is one solitary ruling[5] which holds that the distinction is still valid in the town of Calcutta, but the majority of the High Courts have, as stated above, taken the view that the technical distinction made by English common law

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[1]Chief Justice L. Jenkins, Bombay High Court Letter No. 2469 dated 18-12-1907, National Archives File 1908, paper 6, page 13.

[2]Law Commission of India, 3rd Report (Limitation Act), page 44, para 116

[3](1725) Raym. 1588.

[4](1886) II A.C. 127.

[5]*Bhooni Money* v. *Naobar*, (1901) I.L.R. 28 Cal. 432, 452, 462, 463 (Case relating to Town of Calcutta).

has no validity in India, and is not in harmony with justice, equity and good conscience and is out of tune with the notions of Indian society.[1-2-3]

It should also be pointed out that even in the West, the distinction between libel and slander has not been regarded as satisfactory, and has been very strongly criticised both by academic writers and by law reform agencies who have had occasion to deal with the subject. Though the distinction still exists in the United Kingdom, the English Committee of Defamation, popularly known as the Faulks Committee in its Report recommended its abolition and removal from the law of England and Wales, so that for the purposes of civil proceedings in England and Wales, slander should be assimilated to libel.

In fact, in at least one Commonwealth country, namely, New Zealand, tho distinction has been abolished by statute.[4]

It should also be recorded here that the reform effected in New Zealand has not given rise to any serious problems. Sir Denis Blundell (who later became the Governor-General of New Zealand), in his evidence given to the Faulks Committee, stated that in New Zealand the abolition of the distinction between libel and slander had not resulted in any spate of petty actions for slander.

The retention of the two articles in the present form in the Limitation Act thus tends to perpetuate a distinction which is unfair in principle, anachronistic in nature and, in any case, in the Indian context, almost out of tune with reality. It is also not in conformity with the position in substantive law, as generally understood in India. The Law of limitation should, as far as possible, maintain harmony with the substantive law and should not give a fillip to a distinction that is already discarded.

37.26. In the light of the above considerations, we are of the opinon, and we recommend, that in place of articles 75 and 76, one single article should be substituted, to deal with compensation for defamation, the period being one year and the starting point being the date of the publication or, where the defamatory statement is not published in a permanent form, the date when the defamatory matter comes to the knowledge of the plaintiff. When the words are not published in a permanent form, it is fair that the starting point should be the plaintiff's knowledge, so that the short period of limitation available does not commence to run until he has knowledge. **Recommendation.**

We, therefore, recommend that articles 75-76 should be replaced by one single article to read as under :—

"75. For compensation for defamation. [To be substituted for present articles 75-76.]	One year.	*When the defamatory statement is published, or where the defamatory statement is not published in a permanent form, when it comes to the knowledge of the plaintiff.*"

37.27. This disposes of articles 75-76. Article 77 prescribes a time limit of one year for a suit "for compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter". The time limit is to be counted from the date when the loss occurs. The article is identical with article 26 of the Acts of 1908 and 1877 and article 27 of the Act of 1871. **Article 77 and case-law thereon.**

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[1] *A. D. Narvana Saha* v. *Kannamma* (1931) I.L.R. 55 Mad 727: A.I.R. 1931 Mad 445, 450, 451, 452.
[2] *Hirabai* v. *Dinshaw* (1926) I.L.R. 51 Bom. 167.
[3] *Sukhan* v. *Bipad* (1907) I.L.R. 34 Cal 48.
[4] Section 4 of the (New Zealand) Defamation Act, 1954.

The first case on this article is from Allahabad, in which a Hindu father claimed damages for the seduction of his married daughter and consequential loss of services as a result of abduction by the defendant. He also claimed the costs incurred by him in prosecuting the defendant for the offence of abduction. The trial court gave him a decree for Rs. 200 for the loss of his daughter's services and Rs. 300 for costs incurred by him in prosecuting the defendant. In appeal, the High Court disallowed the sum of Rs. 200 decreed as damages for the loss of service, while maintaining the decree for the costs incurred in prosecution. Stuart, C.J. discussed the English theory on which the remedy for seduction is based and expressed himself as against encouraging its introduction into the Indian legal system. He pointed out that in Scotland and other European countries, the seduced woman needed no help from her father or other relation "but may sue directly for the wrong done to her." His colleague on the bench, Oldfield, J. was of the view that the English cause of action for seduction was founded not upon the wrongful act of the defendant but upon the loss of service of the daughter in which service the parent is, by fiction, supposed to have a legal right or interest. He observed as under:—

> "It would be very undesirable to introduce a fiction of this kind into the law of this country. The plaintiff cannot be allowed to maintain a suit on a contract for service which is not seriously asserted, nor indeed found to exist in fact, and which is not consonant with Hindu custom. Hindu women are no doubt dependent to a great extent on their male relatives, and they have certain household duties which they are expected to perform, but their position is not one of servitude, from which any contract of service can be implied.[1]"

37.28. In a Nagpur case, Mr. Justice Niyogi, while awarding damages for seduction, held that it was more appropriate to look at such a wrong as constituting an invasion of the right of the family to the security of domestic relations, rather as an interruption of the service rendered by the daughter to her father. However, this reasoning was not approved by the Division Bench that heard the matter on appeal. It held that the law of torts was administered in the Central Provinces and Berar (as then constituted) under section 6 of the Central Provinces Laws Act as a rule of justice, equity and good conscience. The only law of seduction was that found in the English law of torts applicable to India and it was not open to Indian courts "to invent new heads of law not covered by the English law, though the legislature can.[2]"

Comments 1908.

37.29. It may be of interest to note that when the draft Bill which led to the Act of 1908 was circulated for comments, the District Judge, Guntur suggested that the words "or daughter" should be omitted from the article.[3] On the other hand, Mr. Justice Knight of the Bombay High Court suggested a widening of the article by adding the words "or ward[4]";

Present English Law as to seduction.

37.30. It may also be mentioned that in England, by statute, actions for seduction have been abolished.[5]

Need for change in the law.

37.31. Taking note of the case law as well as current thinking on the subject, we have come to the conclusion that there are two special aspects that necessitate a change in article 77. In the first place, the element of "loss of service" is emphasised in the article, but, in India, as a matter of substantive law there is some

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[1]*Ram Lal* v. *Tula Ram* (1882) I.L.R. 4 All 97.
[2]*Babu* v. *Subanshi Dhobi*, A.I.R. 1942 Nag. 97.
[3]Dewan Bahadur S. Gopalachariar, Avargal Distt. Judge, Guntur. National Archives File 1908, letter No. 3073, dated 9th December, Paper No. 8, page 10.
[4]Letter No. 2469, dated 18-12-1907. National Archives File 1908, Paper No. 6.
[5]Section 5, Law Reform (Miscellaneous provisions) Act, 1970 (Eng.).

uncertainty in this regard. This is apparent from the Allahabad decision mentioned above.[1] How far the English common law rule which stresses the element of loss of service applies in India thus itself becomes doubtful. Secondly, in article 77, the laying of stress on loss of service amounts to lending prominence to an aspect that is totally out of tune with the views of society. No right thinking member of society seeking compensation for seduction would attribute any relevance to the economic factor represented by "loss of service" of the female.

Need for change.

37.32. In this situation, the present wording of article 77 needs change, as it accentuates an unjust rule of the common law which, even if it is applicable at all, should not be given prominence in the law of limitation. We would, therefore, re-word the article as one applicable to a suit for compensation for seduction, thereby removing the objectionable part. By way of anticipating a possible objection to such an amendment, we may state that if, as a matter of substantive law, any High Court still takes the view that an action for seduction on the common law pattern is still permissible in India, there will not be any *casus omissus* in the Limitation Act. If article 77 as sought to be amended is regarded as inapplicable to such an action, the residuary article would still apply.

Recommendation.

37.33. In the light of the above discussion, we recommend that article 77 should be revised as under:—

"77. For compensation for seduction.	One year.	When the *seduction* occurs."

Article 78.

37.34. This takes us to aritcle 78. Article 78 prescribes a period of limitation of one year "for compensation for inducing a person to break a contract with the plaintiff". The period is computed from the date of the breach. The article is identical with article 27 of the Acts of 1908 and 1877, and with article 28 of the Act of 1871.

In this article also, having regard to the position in substantive law, there appears to be need for a small change. This need arises from the fact that the concept of inducement of breach of contract as an actionable wrong is, as a matter of substantive law, subject to certain limitations. We deal with this aspect in the succeeding paragraphs.

The tort and its limitations.

37.35. Inducement of breach of contract is actionable as a tort if certain conditions are satisfied. But this is subject to two important limitations. In the first place, by legislation, certain inroads have been made into the common law doctrine, legalising conduct that would otherwise be tortous under this head. Secondly, in some cases, even at common law, special circumstances supply a justification for conduct that would be otherwise actionable under this head. These circumstances constitute an exception to the general rule that the direct inducement of breach of contract is a tort, and that where "the intervener, assuming he knows of the contract and acts with the aim and object of procuring its breach (he) will be liable if he directly intervenes by persuading A to break it.[2]

To this general rule, however, there arise exceptions in specific circumstances.[3] It is enough to cite the classic test of what constitute the essential ingredients of this tort as formulated by Romer, L.J.[4] namely, ".....regard might be had to the nature of the contract broken: the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach;

[1]Para 37.27 (supra).
[2]*Thomson* v. *Deakin* (1952) Ch. 646, 670 (Lord Evershed).
[3]*Smithies* v. *National Association of Operative Plasterers*, (1901) 1 K.B. 310, 337.
[4]*South Wales Miners Federation* v. *Glamorgan Coal Ltd.* (1903) 2 K.B. 545.

the relation of the person procuring the breach to the person who breaks the contract; and.....to the object of the person in procuring the breach."

Cases where inducing breach of contract is not wrongful.

37.36. It is not every inducement of breach of contract that is actionable. Sometimes, the justification constituting a legal defence is said to be analogous to privilege in defamation.[1-2] At other times, it is described as "acting in exercise of equal or superior right.[3] It is the latter test that has been more current as the accepted one in recent years.[4-7] The more serious difficulties have arisen in regard to *bonafide* advice given to a person to withdraw from a contract, particularly in the performance of a duty to give the advice that is given to a person to withdraw from a contract. This situation arises particularly in the case of advice to terminate a contract of marriage which the person giving the advice regards as harmful to the interests of the parties concerned.[6] Similarly, in modern times, many cases concern the use of unlawful means such as violence, restrictions on liberty, intimidation, defamation and so on.[7] The substantive law on the subject has thus developed extensively, and it is desirable that article 78 should be revised in the light thereof.

Recommendation.

37.37. Having regard to the above considerations, it appears to us that the language of the article is capable of improvement, so as to make it conform to the substantive law without, at the same time, making it too cumbersome. We, therefore, recommend that article 78, first column, should be revised to read as under:—

"For compensation for *wrongfully* inducing a person to break a contract with the plaintiff."	(Rest of the columns as at present).

Articles 79 and 80.

37.38. (a) Article 79 reads as under :—

"For compensation for an illegal, irregular excessive distress.	One year.	The date of the distress."

It is identical with article 28 of the Acts of 1908 and 1877.

Article 29 of the Act of 1871 was as under:

"For an illegal, irregular or excessive distress.	One year.	The date of the distress."

(b) Article 80 reads as under:—

"For compensation for wrongful seizure of movable property under legal process.	One year.	The date of the seizure."

It is identical with article 29 of the Acts of 1908 and 1877.

Article 30 of the Act of 1871 was as under:

"For wrongful seizure of movable property under legal process.	One year.	The date of the seizure."

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[1]Cf. section 768, Restatement of Tort (Second) (1970).
[2]See note in (1902-1903) 16 Harvard law Rev. 299.
[3]*Read* v. *Friendly society etc.* (1902) 2 K.B. 96.
[4]Sayre, "Inducing breach of contract" (1923) 36 Harvard Law Rev. 663, 687, 696.
[5]Carpenter, "Interference with contract relations" (1928) 41 Harvard Law Rev. 728.
[7]J. D. Heydon, "Justification in international economic torts laws" (1970) 20 University Toronto Law Journal 139, 161, 163, 168 and 182.
[7]J. D. Heydon, "Justification in intentional economic torts law" (1970) 20 University of Toronto Law Journal 139, 161, 163, 168 and 182.

(Chapter 37—Articles 72 to 91—Suits relating to tort.)

Articles 79 and 80 are taken together, since they represent one group of articles dealing with the subject to distraint of property under legal process or seizure by extra-legal methods. The Law Commission[1] in its Report on the Act of 1908 had suggested their inclusion in one general article, dealing with torts, with a period of three years.

> ".....there is no reason why they should not be brought under the general category of torts and the period of three years applied to them. The dates in column three coincide with the dates of accrual of the causes of action".

Expression "legal process" in article 80.

37.39. The expression 'legal process' occurring in article 80 had given rise to certain conflict. The Allahabad High Court[2] ruled that it included all processes issued under any law. In regard to the seizure of crops under tenancy law by the landlord, the High Court observed:—

> "In my opinion, a distraint effected under the local tenancy Act (No. II of 1901) is a seizure of movable property under legal process, because it is done under the special provisions of the local act and subject to the due observance of the procedure therein laid down."

A contrary view was taken by the Bombay High Court,[3] to the effect that the "legal process" envisaged by this article necessarily implied some process through the Court and accordingly a direction from the Collector, acting under the Bombay Land Revenue Code, was outside the scope of this article. Beamount C.J. observed thus:—

> "The learned Government Pleader has argued that the words 'under legal process' in article 29 means 'according to law is legal process'. In my opinion, that is not the meaning of the words. I think 'legal process' denotes procedure by some sort of Court, and the Collector acting under section 154, Bombay Land Revenue Code, is not acting as a creditor. He, as the officer entitled to recover arrears of land revenue, is given power to seize the defaulter's goods. He is in a position analogous to that of a creditor who is given power under the contract to seize his debtor's goods, if his moneys are not paid. If legal process merely means process according to law, it seems to me that seizure under a valid contract would be just as much seizure according to law as seizure under a statute. In my opinion, Article 29 applies to seizure under a process issued by a Court. Possibly a revenue Court may issue legal process, but in my view the Collector was not acting in any sense as a Court when he seized these goods."

However, in a later judgment of the Bombay High Court,[4] the meaning of the expression "legal proceedings" was considered and the following observations made:—

> "It must be remembered in this context that the expression 'legal proceedings' is not synonymous with 'judicial proceedings'. Proceedings may be legal even if they are not judicial proceedings, if they are not authorised by law; and Mr. Palkhiwala, by his argument undoubtedly requires us to equate the expression 'legal proceedings' in S. 48 sub-section (2)(ii) with judicial proceedings, for which, in our opinion, there is no warrant in law."

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[1] Law Commission of India, 3rd Report, (Limitation Act, 1908), pages 44-45, para 118.
[2] *Man Singh* v. *Ram Nath*, A.I.R. 1924 All. 828.
[3] *Shivrao Shsgiri* v. *Secretary of State*, A.I.R. 1942 Bombay 300. Also see *Pahari* v. *Surai*, (1948) I.L.R. 27 Pat. 680.
[4] *Abdul Aziz* v. *State of Bombay* A.I.R. 1958 Bombay 279, 282.

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No change as to legal process.

37.40. It is likely that the expression "legal process' would also be held to encompass all processes issued under any law, as has been held by the Allahabad High Court.[1] As the matter has not been specifically raised after 1958 in reported cases, we would not recommend any amendment of the article on that score.

Starting point-comments (1908).

37.41. The starting point under this article requires some comments. When the draft Limitation Bill 1908 was circulated, Dr. H.S. Gaur made the following comments also on the starting point of limitation:—

> "At present, the starting point for Limitation is the date of attachment and not the release (*Ramnarain* v. *Umrao Singh*, I.L.R. 29 All. 615). I submit that the starting point should be the release, not the date of attachment. In the view of the law, it may be that enquiry into the propriety of attachment may take a year or more and the party aggrieved may, in the meantime, lose its remedy."[2-3]

The opinion of Mr. Justice Banerji also dealt with the same difficulty in these words:—

> "*Articles* 29-30: In case of wrongful distress or seizure, limitation should be computed from the date of distress or seizure and where the distress or seizure continues, from the date of the termination of the distress or seizure. If property remains under wrongful distress or attachment it is difficult for the plaintiff to assess his compensation until the property is released. The attachment may continue for a period exceeding one year. In such a case the owner of the property cannot, under the present law, get the compensation to which he might be justly entitled. It is doubtful whether the attachment can be held to be a continuing wrong."[4]

The Chief Justice of Bombay wanted to extend the scope of this article further, suggesting, as under:—

> "This might be extended to a prohibitory order."[5]

Suggestions considered.

37.42. It is not clear from the file of the Act of 1908 as to why these suggestions were not accepted. We have however given some thought to the matter and find considerable force in these suggestions. It is true that generally the person aggrieved would know about the wrongful attachment within a few days thereof, and can move the court or other authority issuing the process of attachment for relief. If the attaching authority takes only a few months to pass the final order upholding the contentions of the petitioner, the latter would still have enough time left to file a civil suit for damages, as the prescribed period of limitation is one year.

Need for change in the law.

37.43. However, considering the long duration of pendency of cases in courts and the time taken in their disposal, it is likely that the attaching authority may take a long time before objections regarding the attachment are decided. In such a case, a period of limitation starting from the attachment may cause serious hardship. Till the result of the objection filed before the attaching authority is known, the civil court cannot decide the matter. It would rather be harsh to drive an aggrieved person to a civil court even before a cause of action has accrued in his favour, or at least before his claim can be effectively decided.

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[1] *Man Singh* v. *Ram Nath*, A.I.R. 1924 All. 828.

[2] Dr. H. S. Gaur, Bar-at-Law, Raipur, Letter No. 2063/V. 4-5 dt. 19-12-1907 National Archives File 1908, Paper No. 2, page 9.

[3] Cf. *Eng. Gim Moh* v. *Chinese Merited Com. Banking* A.I.R. 1940 276 (F.B.).

[4] Mr. Justice Banerji, High Court of Judicature N.W. Provinces letter No. 4021 dated 18th December, 1907 National Archives File 1908, Paper No. 4, page No. 8.

[5] Sir Lawrence Jenkins, Chief Justice, Bombay High Court, letter No. 2469 dated 18-12-1907, National Archives File 1908, Paper No. 6, page 13.

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37.43. To obviate such hardships as well as to avoid a multiplicity of litigation, we recommend that the third column of article 79 should be revised as follows:[1] **Recommendation as to articles 79-80.**

"The date of release of the distress."

Similarly, the third column of article 80 should be revised as under:—

"The date of *release* from the seizure."

37.44. Article 81 reads as under:— **Article 81**

"81. By executors, administrators or representatives under the Legal Representatives' Suits Act, 1885.	One year.	The date of the death of the person wronged."

It is identical with article 20 of the Act of 1908.

Article 20 of the Act of 1877 was as under:

"20. By executors, administrators or representatives under Act No. XII of 1855 (to enable executors, administrators or representatives to sue and be sued for certain wrongs).	One year.	The date of the death of the person wronged."

It was identical with article 12 of the Act of 1871.

(b) Article 82 reads as under:—

"82. By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855.	Two years	The date of the death of the person killed."

It is identical with article 21 of the Act of 1908 except that the period in that Act was one year.

In the Act of 1877, article 21 was as under:—

"21. By executors, administrators or representatives under Act No. XIII of 1855 (to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong)	One year.	The date of the death of the person killed."

Article 13 of the Act of 1871 was in identical terms.

(c) Article 83 reads as under :—

"83. Under the legal Representatives' Suits Act, 1855 against an executor, an administrator or any other representative.	Two years.	When the wrong complained of is done."

Articles 33, 34 and 35 of the Act of 1908 were as under:—

"33. Under the Legal Representatives' Suits Act, 1855, against an executor.	Two years.	When the wrong complained of is done."
"34. Under the same Act against an administrator.	Two years.	When the wrong complained of is done.

[1]Compare articles 73, 74 and 90 and see *Manga* v. *Changa Mal* A.I.R. 1925 All. 1311.

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35. Under the same Act against any other representative.	Two years.	When the wrong complained of is done."

Article 33 of the Act of 1877 was as under:—

"33. Under Act No. XII of 1855 (to enable executors, administrators, or representatives to sue and to be sued for certain wrongs) against an executor, administrator, or other representative.	Two years.	When the wrong complained of is done."

Article 39 of the Act of 1871 was in identical terms.

Law commission Report—point concerning survival of cause of action on death.

37.45. The Law Commission[1] in its Report on the Act of 1908, while considering the scheme of the relevant Act, observed as under:—

"The maxim of English Law "*actio personalis moritur cum persona*" has been modified in India by various Acts. The Fatal Accidents Act provides that in the case of death of a person injured by a wrongful act, neglect or default, a right to suit accrues to recover damages for the benefit of the wife, husband, parent and child, if any, of the person who dies. "But the suit has to be instituted in the name of the executor, administrator or representative of the deceased person. Under the Legal Representatives' Suits Act, XII of 1855, the executor, administrator or representative of any deceased person has been given a right to bring a suit for a wrong committed in the life-time of such person which occasioned pecuniary loss to his estate, provided the suit was in respect of a wrong committed within one year before the death. Death will not abate any cause of action relating to loss of damage to property. The damages recovered form part of the estate of the deceased." A suit may be maintained against the executor, administrator or representative of the deceased for any wrong committed by him in his life-time for which he would have been subject to an action if the wrong was committed within one year before his death. Section 2 of that Act further provides that the death of either party to a suit shall not abate the suit. Section 306 of the Indian Succession Act provides that the right to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his death survives to and against his executor, administrator or representative. But an exception is made in respect of a cause of action based on defamation, assault as "defined in the Indian Penal Code, or other personal injury not causing the death of the party. In England, until recently, the maxim above referred to applied generally till it was abrogated by the Law Reform (Miscellaneous Provisions) Act, 1934. But even under this Act, a cause of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other and for damages on the ground of adultery were excepted. The law, therefore, both in England and in India at the present moment is more or less the same. The difference lies only in the exceptions existing under the Indian Law and the English law."

History.

37.46. Article 83 of the Act of 1963 replaces articles 33, 34, and 35 of the Act of 1908. The period under this article is two years, whereas under article 81 it is one year. In article 82, the period of one year has been increased to two years (suits under the Fatal Accidents Act, 1855).

Law Commission Report-point concerning limitation.

37.47. The Law Commission[2] in its Report on the Act of 1908, observed as under:—

[1]Law Commission of India, 3rd Report (Limitation Act 1908), page 41, para 112.
[2]Law Commission of India, 3rd Report (Limitation Act 1908), pages 42-45, para 113, 114-115.

(Chapter 37—Articles 72 to 91—Suits relating to tort.)

"113. Article 20 relates to a suit filed by a legal representative for torts causing pecuniary loss to the estate, while article 21 relates to a suit filed by a legal representative for damages for death, which has to be a representative action. The other group of Articles 33, 34 and 35 relate to suits against the legal representatives. Under articles 20 and 21, the date of death of the person is taken as the starting point of limitation. Under the Fatal Accidents Act, the suit is for damages for causing death by any wrongful act, neglect or default and the suit is for the benefit of the dependants. The suit under the Legal Representatives' Suits Act is restricted to wrongs which occasion pecuniary loss to the estate of the deceased and cause of action in respect of which, according to the law then prevailing, did not survive. Under the Succession Act, all rights of action survive to the executors or administrators except actions for defamation, assault or personal injuries not causing the death of a party. The substantive law preventing the abatement of the cause of action is laid down by the said Acts. The cause of action under the Fatal Accidents Act is the death and time under Article 20 begins to run from the date of the accrual of the cause of action. However, under the Legal Representatives' Suits Act, as the suit is in respect of a wrong committed in the life time of a person but time is made to run from the date of the death, the running of time does not synchronise with the date of accrual of the cause of action. On the other hand under Articles 33 and 35, a period of 2 years is provided which runs from the date when the wrong complained of is done. This synchronises with the date of the accrual of the cause of action. The suits contemplated under the two Acts, i.e. Legal Representatives' Suits Act and the Fatal Accidents Act relate to torts. No special period of limitation is provided for actions contemplated by section 306 of the Succession Act, as it was assumed that the provisions laid down in the Limitation Act will govern such actions."

"114. A provision for the survival of the right of action having been made, the action may be treated as one founded on tort whether it is by or against an executor, administrator or representative and the time for limitation may be made to commence with the accrual of the cause of action. If a period of three years from the accrual of the cause of action is provided, no hardship will be caused to either party. In view of the proposed period of 3 years from the date of accrual of the cause of action the period of one year before death provided in the Legal Representatives' Suits Act will have to be abrogated. It may be observed here that instead of leaving the question of survival of the cause of action to be dealt with by three separate Acts, a consolidating amendment in an appropriate manner may be made in section 306 of the Indian Succession Act.

"115. There is also a conflict of decisions under section 306 of the Indian Succession Act as to whether a right to an action for malicious prosecution is one relating to personal injury not causing the death of the party and whether it survives. This conflict may be set at rest by specifically bringing within the exception to section 306 of that Act, actions for malicious prosecution if it is intended that the cause of action in respect of such wrongs should not survive the death of the person aggrieved."

37.48. There is a period of limitation of one year under all these articles, except in the case of fatal accidents under article 82, where it has been increased to two years in the Act of 1963 on the recommendation of the Joint Committee. The Joint Committee Report stated[1] thus: Joint Committee Report.

[1]Joint Committee Report, (1963 Act).

(Chapter 37—Articles 72 to 91—Suits relating to tort.)

"The Committee feels that the limitation of one year provided for suits under the Indian Fatal Accidents Act, 1855, is short and should be increased to two years."

Comment.

37.49. The period of one year in earlier articles (corresponding to present articles 81 and 83) was commented upon by W.J. Money, Officiating Judge Maimansingh, in his old opinion of 1871, as to be too short for the purpose in hand:

"That, under Act XII of 1855, there was a limitation of two years in the case of actions of a certain kind against executors, & c. points out that delay in instituting actions of this class may often be unavoidable, owing to the difficulty of obtaining full information, and urges that it is not apparent. therefore, why the period of limitation should be reduced to one year. He submits whether in such cases it would not be more for the public interest that the limitation should be fixed at two years in the cases of actions both by and against executors, such limitation being in respect of wrong committed within one year of the death of the person, and to be calculated from the date of decease, and not from the commission of the wrong."[1]

Causes of action surviving on death.

37.50. So much as regards matters of primarily historical interest. A question that may need to be looked into is this. Under section 306 of the Indian Succession Act, the right to prosecute or defend an action or proceeding in favour of or against a person at the time of his death survives to, and against, his executors, administrators or representatives. It seems desirable to refer to the impact of this provision on the law of limitation. In contrast with the general position, the starting point mentioned in article 81 is the date of death of the person wronged, and not the date of commission of the wrong. In other words, though the suit is in respect of a wrong committed in the life-time of a person, time is made to run from the date of the death, and the running of time does not synchronise with time with the accrual of the cause of action.

Reason for special provision.

37.51. The reason why this special provision was made might be that the wronged person, when alive, might not have found time to take legal steps, and if the starting point is counted immediately from the date of commission of the wrong, then the prescribed period may, in many cases, terminate very soon while the executors, administrators or representatives are still taking time to settle down and to take stock of the situation.

In this context we have considered the question whether the enactment of the Indian Succession Act (which is not referred to in articles 81 and 83) had any impact on the articles under consideration. It appears that this question can, if necessary, be more conveniently considered when the Succession Act is itself taken up for review by the Law Commission.[2]

Article 84.

37.52. This takes us to article 84, which reads as under:—

"84. Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years.	When the perversion first becomes known to the person injured thereby."

It is identical with article 32 of the Acts of 1908 and 1877.

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[1]Officiating Junior Secretary, Government of Bengal letter No. 416 dated 2nd February, 1871, National Archives File 1871, Paper No. 5, page 14.

[2]Articles 81 and 83 to be considered when the Indian Succession Act, 1925, is taken up for review.

(Chapter 37—Articles 72 to 91—Suits relating to tort.)

Article 38 of the Act of 1871 was as under:—

"38. Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years.	The time of the perversion."

Articles 85 and 86.

37.53(a) Article 85 is as under :—

"85. For compensation for obstructing a way or a watercourse.	Three years.	The date of the obstruction."

It is identical with article 37 of the Acts of 1908 and 1877.

In the Act 1871, Article 37 was as under :—

"37. For obstructing a way or watercourse.	Two years.	The date of the obstruction."

(b) Article 86 reads as under :—

"86. For compensation for diverting watercourse.	Three years.	The date of the diversion."

It is identical with article 38 of the Acts of 1908 and 1877.

Article 32 of the Act of 1871 was as under:—

"32. For diverting a watercourse.	Two years.	The date of the diversion."

The starting point of limitation.

37.54. The starting point of limitation under these two articles is the date of the obstruction or the date of the diversion, as the case may be. One learned writer has commented adversely on this point:—

> "The starting point of limitation is the date of the obstruction. If obstruction to way or water-course is, as has been recognised, a *continuing wrong*, it is rather difficult to reconcile it with the third column which provides that the starting points of limitation is the date of the obstruction and not the date of the cessation or removal of the obstruction. It is noteworthy that articles 53, 73, 74 and 90 do provide for commencement of limitation from the date of the cessation of the branch of contract or the wrong, as the case may be. The point is, therefore, not free from difficulty, due perhaps to illogical drafting."[1]

The above quoted passage referred to a single bench decision from Madhya Pradesh, wherein a suit had been filed to recover mesne[2] profits from a trespasser, wrongfully occupying a house, Shri Dayal, J. observed in that case:—

> "The time begins to run from the "date of tresspass" mentioned in the article which means every date *on which the tresspass continues* and is not restricted to the date on which tresspass commenced. A suit will be within time for the entire period of tresspass which falls within three years immediately preceding the suit, but not beyond three years."

No change needed.

37.55. We have given thought to the matter. However, if one treats the obstruction as a continuing wrong, it would have the effect of making the cessation of the wrong the starting point. The practical result would not be different from what it is now. No change is, therefore, recommended.

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[1]U. N. Mitra's Law of Limitation and Prescription (9th Edition), page 1801.
[2]Antoolal v. Chitarmal, (1964) M.P.L.J. (Notes) 106.

(Chapter 37—Articles 72 to 91—Suits relating to tort.)

Article 87.

37.56. Article 87 reads as under :—

"87. For compensation for tresspass upon immovable property.	Three years.	The date of the tresspass."

It is identical with article 39 of the Acts of 1908 and 1877.

In the Act of 1871, article 43 was as under:—

"43. For tresspass upon immovable property.	Three years.	When the tresspass takes place."

By the Act of 1877, the words "for compensation" were added in the first column (before the words "For tresspass upon immovable property"). This addition clarified the position that the article is applicable only to suits for damages, and not to suits for recovery of possession.

No change needed.

37.57. As there is no controversy under this article, we do not recommend any change.

Article 88.

37.58. Article 88 reads as under :—

"88. For compensation for infringing copyright or any other exclusive privilege.	Three years.	The date of the infringement."

It is identical with article 40 of the Acts of 1908 and 1877.

In the Act of 1871, article 11 was as under:—

"11. For damages for infringing copyright or any other exclusive privilege.	One year.	The date of the infringement."

Case law on Act of 1871 as to "damages".

37.59. The Calcutta High Court,[1] dilating upon the word "damages" in the Act of 1871, observed as under:—

> "In my opinion article 11 of schedule (ii) embraces any suit or action brought under section 22 of the Act XV of 1859, and there was no intention of drawing any distinction between a suit framed as an action for damages, and one framed as a suit for an account. The taking of an account of profits is only a mode of compensating an inventor for the infringement of his privilege other than by an assessment of damages, and it seems unreasonable that if the period of limitation is one year in the one case, it should be six years in the others".

View of Dr. Stokes.

37.59. This view was also favoured by Dr. Stockes, in the following words:—

> "The article should be extended expressly to suits for an account of the profits obtained by infringement.[2]"

Accordingly, in the Act of 1877, the word 'damages' was replaced by the word 'compensation'.

Period of limitation.

37.60. The present period of limitation under article 88 is three years. Chief Justice Sir Richard Garth and the then Secretary, Legislative Department had made certain comments on article 11 of the Act of 1871 (which had fixed a period of one year).

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[1] *Kinmond* v. *Jackson*, (1877) I.L.R. 3 Cal. 17, 19.
[2] Stokes, The Anglo-Indian Codes, Vol. 2 page 981.

(Chapter 37—Articles 72 to 91—Suits relating to tort.)

"By clause 11, one year only is fixed as the period of limitation in case of infringement of copyright. This, certainly, seems an unreasonably short time. It must be remembered that infringements of copyright are from their very nature frequently, indeed generally, not discovered until long after the infringement has occurred. It is often the work of months, if not years, to make a book or a piece of music (unless it is of the very striking character) well known to the public; and in the greatest majority of cases, if such book or piece of music is an infringement of some author's copyright the author might probably not hear of the infringement until some time after it had taken place. This is, therefore, one of those instances, as it seems to me, in which it would be right to allow a plaintiff a much longer period of limitation."

And again observed:—

"Clause 11—The limitation, I think should be three years instead of one.[2]"

Mr. J. H. Nelson stated:—

"Article 39—Literary piracy is theft. I would make the starting point the discovery of infringement.[3]"

37.61. These views were endorsed by the Secretary, Legislative Department, in the following note:—

"No. 11—Infringement of copyright—The Chief Justice objects that the period of one year is too short. So it is, but it was the period prescribed by Act XIV of 1859, section 1, clause 2, and in framing Act IX of 1871, the old periods were, for obvious reasons, kept when possible." "I think we should lengthen the period if we alter the law at all.[4]"

37.62. Thus, the period of one year in the Act of 1871 and Draft Limitation Bill, 1877 was changed in 1877 to three years. The Report[5] of the Law Commission on the Act of 1908 did not suggest any change in this regard. Earlier Report of the Law Commission.

37.63. There is a defect in the third column of the article under consideration. We think that it would not be reasonable to allow time to run against a person, when he does not know that any of his rights have been infringed. It is also necessary to widen this article so as to add, in the first column, at the end, the words "or for restraining such infringement". The object is to cover a suit for injunction. Amendment as regards starting point, and also for adding intellectual property and injunction.

As to the meaning of the words "exclusive privilege" occurring in article 88, some comment seems to be in order, because these words are not very precise. We are of the opinion that in order to introduce a modicum of precision in this article, *right to "Intellectual Property"* should also be mentioned, alongwith "copyright".

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[1]Sir Richard Garth, Demi-Official Letter dated 8th March, 1876 to Arthur Hobhouse, National Archives File 1877, Paper No. 1, page 2.

[2]Sir Richard Garth, Demi-Official letter dated 24th July 1876 National Archives File 1877, Paper No. 1, page 3.

[3]J. H. Nelson, District Judge, Cuddapah, letter No. 34 dated 2nd April 1877 National Archives File 1877, Paper No. 25, page 8.

[4]Note by Arthur Hobhouse, Secretary, Legislative Department on Sir Richard Garth's remarks. National Archives 1877, paper No. 1, page 5.

[5]Law Commission of India, 3rd Report (Limitation Act, 1908), page 45, para 1.

(Chapter 37—Articles 72 to 91—Suits relating to tort.)

Recommendation.

37.64. To make the discussion concrete, we recommend the following redraft of article 88, so as to cover the points made above[1]:

"88. For compensation for infringing copyright *or* right to *other intellectual* property, or any other exclusive privilege, *or for restraining such infringement.*	Three years.	*When the* infringement *first becomes known* to the plaintiff."

Article 89.

37.65. We now proceed to article 89, which reads as under:—

"89. To restrain waste. . . .	Three years.	When the waste begins."

It is identical with article 41 of the Acts of 1908 and 1877.

There was no comparable provision in the Act of 1877.

No change needed.

37.66. In the absence of practical difficulties, we see no reason to disturb the present article.

Article 90.

37.67. Article 90 reads as under :—

"90. For compensation for injury caused by an injunction wrongfully obtained.	Three years.	When the injunction ceases."

It is identical with article 42 of the Acts of 1908 and 1877.

In the Act of 1871, article 86 reads as under :—

"86. For compensation for damage caused by an injunction wrongfully obtained.	Three years.	When the injunction ceases."

When the draft of the Act of 1908 was circulated for comments, a District Judge suggested that attachment should be brought within the scope of those provisions. His suggestion was as follows:—

"Article 41—After the word 'an', I would insert[2] 'attachment' "

However, this suggestion does not seem to have been accepted.

Need for amendment to cover wrongful attachment.

37.68. We have given some thought to the matter. In our view, there is a case for adding in article 90 a suit for compensation for wrongful attachment. No doubt, as a summary remedy, section 95 of the Code of Civil Procedure, 1908 provides for the grant of compensation for arrest before judgment or attachment before judgment or issue of a temporary injunction, but this does not, bar a regular suit for compensation for such wrongful act[3] arrest, attachment or injunction. At present, it would appear that wrongful attachment is not a continuing wrong[4]. The article relating to compensation for statutory acts may not apply to attachment. As to attachment before judgment, old article 29 of the Act of 1908 (relating to wrongful seizure) seems to have been applied[5], under the Act of 1908. However, it is desirable to make article 90 comprehensive, and, for this purpose, to cover an attachment wrongfully obtained.

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[1]Paragraph 37.63 *supra.*

[2]Dewan Bahadur S. Gopalacharia Avargal, District Judge, Guntur, Letter No. 2155 dated 30th December, 1907. National Archives File 1908. Paper No. 11.

[3]*Harkumar* v. *Jagatbandhu*, A.I.R. 1927 Cal. 247.

[4]*Pannaji* v. *Firm Senaji*, (1930) I.L.R. 53 Mad. 621.

[5]*Yellammal* v. *Ayyappa Naick* (1914) I.L.R. 38 Mad. 972. (Scope of article 29 of the Act of 1908 fully discussed).

(Chapter 37 - Articles 72 to 91: Suits relating to tort.)

37.69. Accordingly, we recommend that article 90 should be revised as under:— Recommendation.

"90. For compensation for injury caused by an injunction *or attachment* wrongfully obtained.	Three years.	When the injunction *or attachment* ceases."

[One could even add arrest but for the fact that certain specific articles exist on the subjects.]

37.70. Article 91 reads as under:— Article 91.

"91. (a) For compensation for wrongfully taking or detaining any specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years.	When the person having the right to the possession of the property first learns in whose possession it is.
(b) For compensation for wrongfully taking or injuring or wrongfully detaining any other specific movable property.	Three years.	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful."

It corresponds to article 48 and 49 of the Acts of 1908 and 1877.

In the Act of 1871, six articles covered the subject matter, viz. articles 48, 47, 35, 34, 33, and 26, with varying periods. It is unnecessary to quote them for the present purpose, since they do not throw particular light on many important ingredients of the present article. In 1877 and 1908, all these articles were brought under two articles, and a uniform period of limitation of 3 years was provided. The Law Commission in its Report[1] on the Act of 1908 recommended a different arrangement of the articles, but that recommendation has not been accepted.

37.71. The expression specific movable property" occurring in the article renders relevant a discussion of two cases of application of the article to money *in specie* (as against simple money claims). The first case is an Allahabad one, in which a company had instructed its bankers to make payment of excise duty amounting to Rs. 50,000 in the sub-treasury and got the challan duly stamped and signed by the accountant and the treasurer. The amount paid was, however, defalcated by the treasury officials, and was not credited to the account of the Collector of Central Excise. As a result, the company had to make payment of the excise duty for the second time. The company then filed a suit for recovery of the money from the State Government. The Allahabad High Court, *inter alia*, held[2] that the suit was neither for certain "specific movable property" nor for the return of particular coins or currency notes (which the plaintiff had deposited) and, therefore, articles 48 and 49 of the Act of 1908 did not apply to the case. Holding that the suit was based on the liability of the Government for the misconduct of its servants, the High Court applied the residuary article 120 of the Act of 1908, which gave a longer period of six years to the plaintiff. Case law as to money in specie.

37.72. In the second case,[3] which is from Rajasthan, a person had deposited money with the municipal council for the construction of a septic tank and soakpit for the disposal of waste water. On the failure of the Municipality to carry

[1]Law Commission of India, 3rd Report (Limitation Act 1908) page 45, para 121 and page 83, articles 1.2.6.
[2]*State of U.P.* v. *Hindustan Lever Ltd.*, A.I.R. 1972 All. 480.
[3]*Chandrabhan Bansilal* v. *Bikaner Municipality*, A.I.R. 1975 Raj. 35.

out the work, the plaintiff demanded the money from the Municipal Council, which refused the payment. The High Court observed that under article 91(b), a suit for compensation for wrongfully detaining the movable property has to be instituted within three years from the date on which the detainee's possession became unlawful. The suit, filed within three years from the date when the Municipality refused to adjust the amount towards house tax, was in time.

The judgment has not pin-pointed the exact article applicable. Articles 91(b) and 55 (in addition to the residuary article 113) of the Act of 1963 have been taken as the articles possibly of relevance.

No change needed.

37.73. In this state of the case-law—which does not rule out the residuary article—we do not consider it necessary to amend the wording of article 91.

CHAPTER 38

ARTICLES 92 TO 96 : SUITS RELATING TO TRUSTS AND TRUST PROPERTY

Article 92.

38.1. Article 92 reads as under :

"92. To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff."

The article corresponds to a part of article 134 of the earlier Acts. In the earlier Acts, the relevant articles were as under:

Article 134 *of the Act of* 1908.

134. To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff. [Before 1929, the third column read, "the date of the transfer]"

Article 134 *of the enactment of* 1877.

134. To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration.	Twelve years.	The date of the purchase.

Article 134 *of the Act of* 1871.

134. To recover possession of immovable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee in good faith and for value.	Twelve years.	The date of the purchase.

The amendments effected by the 1963 Act are in consonance with the recommendations of the Law Commission[1].

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), paragraphs 122-130.

(Chapter 38—Articles 92 to 96: Suits Relating to Trusts and Trust Property.)

Successor trustee.

38.2. In a Calcutta case[1] decided with reference to article 134 of the Act of 1908 as it stood before 1929, a trustee executed on 8th February, 1910 a lease of the trust property in derogation of the trust, and subsequently appointed a successor trustee who filed a suit to set aside the lease on 21st January, 1932. The successor to the original trustee was appointed only on 30th September, 1931. However, relying on section 2(8) of the Limitation Act, 1908, the court held the successor trustee to be within the definition of the word "plaintiff" and held that the suit was barred by time. With respect, this overlooks the context. The time should now begin to run only from the date of the knowledge of the succeeding trustee who brings the suit[2].

No change needed.

38.3. No other points requiring discussion from the point of view of possible need for amendment in the article have come to our notice. In this position, no amendment of the article is called for.

Article 93.

38.4. Article 93 reads as under:—

"93. To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Three years.	When the transfer becomes known to the plaintiff."

The parallel provisions may be found in article 48A of the Act 1908 and in article 133 of the Act of 1877 and 1871. They were as under:—

Act of 1908

"48A. To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterward bought from the trustee, depository or pawnee for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff."

Act of 1877

"133. To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depository or pawnee for a valuable consideration.	Twelve years.	The date of the purchase."

Act of 1871

133. To recover movable property conveyed in trust, deposited or pawned and afterwards bought from the trustee, depository or pawnee, in good faith and for value.	Twelve years.	The date of the purchase.

Article 48A in the Act of 1908 was inserted by Act I of 1929. It corresponded to the old article 133 which was repealed, with the third column changed. The starting point of limitation was changed from "the date of purchase" to "when the sale becomes known to the plaintiff". Certain verbal changes were made in 1963, when the Act was re-enacted[3].

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[1] *Srikissan Khanas* v. *Tarachand Ghanashyamdas*, A.I.R. 1940 Cal. 228, 232.
[2] *Gokuldoss Jamnadoss & Co.* v. *M. Lakshminarasimhalu Chetti*, A.I.R. 1940 Mad. 920-923. [Decision on that part of article 134 which now forms part of article 61(b)].
[3] Law Commission of India, 3rd Report (Limitation Act, 1908), para 122.

(Chapter 38 Articles 92 to 96: Suits Relating to Trusts and Trust Property.)

No change needed.

38.5. No difficulties have arisen under this article as enacted 1964, and no change appears necessary in the article.

Article 94 and 95.

38.6. Article 94 reads as under:—

"94. To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff."

In the Act of 1908, the corresponding provision was article 134A, which was introduced by Act 1 of 1929. It was identical with present article 94.

(b) Article 95 reads as under:—

"95. To set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years.	When the transfer becomes known to the plaintiff."

The corresponding article in the Act of 1908 was article 48B, which was introduced for the first time by Act 1 of 1929. That article was as follows:—

"48B. To set aside sale of movable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff."

State laws as to public trusts.

38.7. Several States have enacted their own laws to regulate and make better provision for the administration of public trusts. These enactments contain, *inter alia,* provisions relating to suits concerning public trusts. Thus, under section 50 of the Bombay Public Trusts Act, 1950 permission of the Charity Commissioner is necessary for the institution of a suit. Then, by section 75-C of the Madras Hindu Religious and Charitable Endowments Act, 1959 the right of suit has been specifically granted to any trustee or any person having an interest in the trust property.

Recommendation as to articles 94 to 96.

38.8. Reverting to the articles in the Limitation Act, article 94-95 of the Limitation Act have not given rise to textual controversies. But we see no reason why articles 94 to 96 should not apply to religious or charitable endowments created by persons professing the Sikh or Jain faith. The legal doctrines and rules applicable to these endowments are not substantially different from those applicable to Hindus[1].

We therefore recommend that articles 94 to 96 should be extended to Sikh and Jain endowments also.

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[1]Compare & recommendation as to section 10, *supra.*

(Chapter 38 Articles 92 to 96: Suits Relating to Trusts and Trust Property.)

38.9. Article 96 reads as under:— Article 96.

"96. By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment, whichever is latter."

The corresponding provisions in the Act of 1908 were articles 134B and 134C. These articles read as under:—

"134B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor.
"134C. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of movable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the seller."

38.10. In the Act of 1908, these articles were inserted in 1929, resolving the conflict between two Privy Council rulings.[1-2] They have been consolidated in article 96 in the Act of 1963, with the added advantage given to the plaintiff as respects the computation of time. The Law Commission, in its Report on the Act of 1908, took notice of the fact that an interregnum might arise between the removal of one manager and the appointment of a successor, and the successor should not be hamstrung from filing a suit only because of such interregnum.[3] Under the present Act, the successor can compute the running of time from the date of his appointment. At the same time, the right of a person interested who may not be the manager to challenge the alienation of a previous manager who is no longer in office has been retained, as otherwise such a person would be required to wait for the appointment of the successor manager which may unnecessarily be delayed[4]. History.

38.11. The only change required in article 96 is its extension to Sikh and Jain endowments, as already recommended by us[5] while considering articles 94-95. Recommendation.

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[1]*Vidya Varuthi* v. *Balusami*, A.I.R. 1922 P.C. 123.

[2]*Abdul Rahim* v. *Narayan Das*, I.L.R. (1922) 50 Cal. 329 (P.C.).

[3]Law Commission of India, 3rd Report (Limitation Act, 1908), page 46 para 12.3.

[4]Articles 94-95.

[5]Para 38.8 *supra*.

CHAPTER 39

ARTICLES 97 TO 112 : SUITS RELATING TO MISCELLANEOUS MATTERS

Article 97.

39.1. Article 97 reads as under :—

"97. To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.	One year.	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered."

The corresponding article in the Limitation Acts of 1908, 1877 and 1871 was article 10, which in the respective Acts read as under :—

Act of 1908

"10. To enforce a right of pre-emption whether the right is founded on law, or general usage, or on special contract.	One year.	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered."

Act of 1877

Same as in the Act of 1908.

Act of 1871

"10. To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	One year.	When the purchaser takes actual possession under the sale sought to be impeached."

Pre-emption laws.

39.2. Though the article recognises the right of pre-emption in law as well as under general usage, most of the cases of pre-emption arose out of Acts passed by the State legislature in respect of agricultural land. However, many of the State laws granting a right of pre-emption have now been amended, abolishing that right.

No change needed.

39.3. Though there has been some controversy regarding the date when possession could be deemed to have been taken under the sale, the matter is integrally connected with the substantive law. We do not therefore recommend any change in the article.

Article 98.

39.4. Article 98 reads as under :—

"98. By a person against whom an order referred to in rule 63 or in rule 103 of Order XXI of the Code of Civil Procedure, 1908 or an order under section 28 of the Presidency Small Cause Courts	One year.	The date of the final order."

Act, 1882, has been made, to establish the right which he claims to the property comprised in the Order.		

The corresponding articles in the Act of 1908 were 11 and 11A, which read as under:—

"11. By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order : (1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree; (2) Order under section 28 of the Presidency Small Cause Courts Act, 1882.	One year.	The date of the order."
"11A. By a person against whom an order has been made under the Code of Civil procedure, 1908, upon an application by the holder of a decree for the possession of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order.	One year.	The date of the order."

Corresponding provision in the Act of 1877 was article 11, which we are not quoting.

Corresponding article in the 1871 Act was article 15, which, again, we are not quoting. The reason is that the connected provisions have changed.

39.5. The adjective 'final', qualifying the word 'order' in the third column, did not occur in article 11 of the 1908 Act. A controversy raged as to whether the starting point of limitation should be taken as the date of the order of the executing court passed in proceedings under Order 21, rule 58, Code of Civil Procedure, 1908 or the date of the final order of the revisional court (where the objector chose to challenge the order in revision). The Kerala High Court,[1] in a Full Bench judgment, by majority, decided that 'limitation for a suit under Order 21, Rule 62, or 103, Code of Civil Procedure, runs from the date of the order of the executing court on the claim petition (under Order 21, rule 101, Code of Civil Procedure in the instant case) and not from the date of the order on an infructuous application for revision thereof.' Starting point.

[1]*Thycattusari Church* v. *Sicilyamma*, A.I.R. 1963 Ker. 137 (F.B.).

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39.6. The Kerala Judgment, being a case arising out of the old Limitation Act, would not throw light upon the interpretation of the expression 'final order' now occurring in the third column of article 98 of the 1963 Act. The use of the word 'final' would now seem to shift the starting point of limitation from the date of the order of the executing court to the date of the order passed in revision, and an argument on this scope, as well as on the applicability of section 14 to such cases and the period available should not now arise. Moreover, as is elaborated below,[1] the scheme of the procedural provisions with which article 98 is linked has been radically revised in 1976.

O.21, R. 58, C.P.C. as amended in 1976.

39.7. The very important amendment made in 1976 in the Code of Civil Procedure, 1908, concerning Order 21, Rule 58, deserves to be noticed at this place. This amendment sustantially implements the recommendation of the Law Commission[2] in its Report on the Code.

Scheme of the amended Code.

39.8. Under the amended Code of Civil Procedure, there has been a drastic change in the procedure, the mode of approach and the method by which the court should arrive at a decision, when an application under Order 21, Rule 58 of the Code is filed. Under the law before 1976, such an investigation into a claim or objection was summary in its nature, and was, in a *very large number of cases*, liable to be set aside by a regular suit. The present law, after 1976, on the other hand, making a significant departure in the method of disposals and adjudication of such claims and objections, contemplates a full enquiry into all questions, including questions of right, title and interest in the property. Its mandate is that the court inquiring into such a claim or objection shall determine all such questions. Except in the very limited number of cases mentioned in Order 21, Rule 58(5) there is a total embargo on a separate suit. Order 21, Rule 58(4) now provides that the order made in such adjudication shall have the same force and be subject to the same conditions as to appeal or otherwise, as a decree. Thus, the order passed in these proceedings is a substitute for a decision in an ordinary litigation resulting in a decree. The adjudication contemplated by amended Order 21, Rule 58 as amended is not summary, the intention being that it should be like a decision rendered in a regular suit, and should result in an appealable decree, so that, in these very proceedings, the court could ultimately decide and adjudicate all questions, including questions relating to right, title or interest in the property attached, which might arise directly or indirectly between the parties.[3]

Scope of article 98 now limited.

39.9. In other words, the scope of article 98 is now confined to those very limited number of cases where in respect of claims or objections to an attachment, a suit can still be instituted or permitted under the Code of Civil Procedure (as amended in 1976). Once the *claim filed in execution proceedings is entertained*, and adjudicated, the adjudication by the court has now been given the status of a "decree". Hence, the scope for filing a suit to assert a claim in respect of the attached property is very limited after the amendment of 1976.

Change needed in article 98.

39.10. It is desirable to amend the article in the light of the changed position as resulting from the amendment made in the Code of Civil Procedure, 1908. It is necessary that, in this article, the reference to the rules of Order 21 C.P.C. should be made more precise, by framing it as a reference to Rule 58(5) of Order 21 of the Code, that being the only provision under which a suit can be filed to challenge any attachment.

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[1]See para 39.7 *infra*.

[2]Law Commission of India 54th Report (Code of Civil Procedure, 1908), Chapter 21.

[3]*Southern Steelmet & Alloys Ltd.* v. *V.M. Steels, Madras*, A.I.R. 1978 Mad. 270; I.L.R (1978) 3 Mad. 140; (1978) 1 M.L.J. 468.

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39.11. In the light of the above discussion, we recommend that article 98 should be revised so as to read as under:— Recomendation.

"98. By a person against whom an order *referred to in sub-rule* (5) of rule 58 of Order XXI in the First Schedule to the Code of Civil Procedure, 1908 or an order under section 28 of the Presidency Small Cause Courts Act, 1882, has been made, to establish the right which he claims to the property comprised in the order, *where such a suit is permissible in law.*	One Year.	The date of the final order."

39.12. This takes us to article 99, which reads as under :— Article 99.

"99. To set aside a sale by a civil or revenue court or a sale for arrears of Government revenue or for any demand recoverable as such arrears.	One Year.	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought."

Article 12 in the Act of 1908 read as under:—

"12. To set aside any of the following sales : (a) sale in execution of a decree of a Civil Court; (b) sale in pursuance of a decree or order of a Collector or other officer of revenue; (c) sale for arrears of Government revenue, or for any demand recoverable as such arrears; (d) sale of a patni taluq sold for current arrears of rent.	One Year.	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought."

Explanation.—In this article, 'patni' includes any intermediate tenure saleable for current arrears of rent."

Article 12 of the Act of 1877 was in the same terms. Article 14 in the 1871 Act was also in the same terms.

39.13. On the applicability of article 99 to a suit filed by a Hindu son to have a court sale in execution of a decree against his father set aside, there exists a conflict of views. The first view is represented by a judgment of the Kerala High Court.[1] It was a suit brought by Hindu son, alleging that his share in the joint family properties was not liable to be sold in execution of a decree obtained against his father and that the sale in execution was not binding on his share. It was held that the son was by the decree against the father precluded from questioning the existence of the debt on which that decree was obtained, and that it was open to him to challenge the decree and the execution proceedings on the ground that the original debt itself was non-existent or fictitious. The court relied on a Madras judgment[2] for holding that if the son's interest is found not to have been sold or if the execution sale *is void as against him*, it is unnecessary to Suits by Hindu son.

[1] *Lakshmandas* v. *Karunakaran*, A.I.R. 1957 Ker. 126.
[2] *Lakshmadu* v. *Ramudu*, A.I.R. 1939 Mad. 867.

make a prayer for setting aside the sale in a suit for recovering possession of his share and article 12 of the Limitation Act, 1903 (present article 99), can have no application to such a case.

The Punjab High Court,[1] dissenting from the above view, has held that in such cases the sale is a voidable one and not a void sale, with the result that such a suit by a Hindu son to have set aside a court sale in execution of a decree against his father is governed by article 12(a) of the Limitation Act, 1908 (present article 99). A Travancore-Cochin case takes the same view.[2] A Supreme Court decision, while touching the point, does not settle this particular conflict.[3]

Conflict—the earlier comments.

39.14. The conflict dates back to the days when the draft Bill of the 1877 Act was circulated for comments. The problem was mentioned in the comments on the 1908 Bill.

Comments—District Judge, Cuddapah (1877).

39.15. The District Judge, Cuddapah, commented[4] in 1877 as under, when offering his suggestions on the Bill then circulated :—

"I have known repeated instances in which a suit brought really for the establishment of one's right to own and possess an immovable that has been the subject of a court sale has been wrongly dismissed as barred by the lapse of time as being a suit to set aside a sale and brought more than one year after the date of the sale. If there are suits that can properly be brought to set aside a sale ordered and effected by a court of Justice, I think it desirable to introduce (the section) into words descriptive of the nature of such suits. In any case, something should be done to remove the impression that exists, perhaps very generally, that if C is ousted from his possession of an immovable in consequence of a sale to A of B's supposed right over that immovable, C cannot recover possession unless he sues within one year from the date of the sale being confirmed."

"The starting time (in this article 13) appears to me to be ill-chosen, inasmuch as ordinarily in this Presidency, at least the courts seem not to trouble themselves to confirm a sale unless and until a dispute about the regularity thereof actually arises and not always then."

Comments—Divisional Judge, Nagpur. (1907).

39.16. Thirty years thence, when the Limitation Bill, which led to the Act of 1908 was circulated, the Divisional Judge, Nagpur,[5] made the following comment:—

"Defendants frequently argue with subtle plausibility that a decree or order must be 'set aside' before a possessory relief can be obtained and try to put this and like short period of limitation in the way of the plaintiff. The counter-argument often is that it is not necessary to 'set aside' the order or decree as it is mere nullity by which the plaintiff is not bound. One expected that the Legislature would give an expression of its opinion in embarrassing cases of the kind unless it has taken some recent Privy Council cases (I.L.R. 25 Bom. 337; I.L.R. 32 Cal. 296) as settling the controversy."

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[1] *Ajit Singh* v. *Hem Raj*, A.I.R. 1956 Punjab 139.

[2] *Nellakanta Iyer Vanchiswara Iyer* v. *Narayana Iyer Venkitasubba Iyer*, A.I.R. 1956 Trav. Co. 262.

[3] *Faqirchand* v. *Harnam Kaur*, A.I.R. 1967 S.C. 727, 730 [See para 39.17, *infra*.]

[4] J. H. Nelson, Esq. District Judge, Cuddapah to the Officiating Chief, Secretary to Government, 2nd April, 1877, No. 34.

[5] Note by Rai Bahadur Sharat Chandra Sanyal, Divisional Judge, Nagpur, Accompaniment to F.S.A. Slocock Esq., I.C.S., Chief Secretary to Chief Commissioner, Central Provinces dt. 19-12-1907, No. 2063, V. 4-5. National Archives File on Limitation Bill, 1908.

Unfortunately, the National Archives file does not show what action was taken on these comments, but the problem even now survives, because, under section 6 of the Hindu Succession Act, 1956, the rights of a member of coparcenary in the Mitakshara coparcenary property have been saved.

39.17. The current conflict of views has been already adverted to[1]. Even though the Supreme Court has not, in so many words, ruled on this subject, there are observations in one case[2] to indicate that the Court would treat such a sale as a voidable one:— Supreme Court case.

> "It is the existence of the father's debt that enables the creditor to sell the property in execution of a money decree against the father. Likewise, if a mortgage decree against the father directs the sale of the property for the payment of his debt, the creditor may sell the property in execution of the decree. It is true that the procedure for the execution of a money decree is different from that for the enforcement of a mortgage decree. A money decree is executed by attachment and sale of the debtor's property. For the execution of the mortgage decree, an attachment of the property is not necessary and the property is sold by force of the decree."
>
> "But this distinction in procedure does not affect the pious obligation of a Hindu son to pay his father's debt. As in the case of a money decree, under a mortgage decree also the property is sold for payment of the father's debt. The father could voluntarily sell the property for payment of his debt. If there is no voluntary sale by the father, the creditor can ask the Court to do compulsorily what the father could have done vountarily. The theory is that as the father may, in order to pay a just debt, legally sell the whole estate without suit; so his creditor may bring about such a sale by the intervention of a suit. See *Ramasamayyan* v. *Virasami Ayyar*.[3] Even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree for the realisation of a debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. *After the sale has taken place, the son is bound by the sale, unless he shows that the debt was non-existent or was tainted with immorality or illegality.*"

39.18. Without pronouncing upon the correctness or otherwise of the divergent views on the subject, it seems to us that the position should be clarified in this regard. Further, it is not proper that sword of a possible suit by the son of a Mitakshara coparcenary family should hang over his head for a long period. Consequently, we recommend that article 99 should be revised to read as under: Recommended.

"99. To set aside—

(a) a sale by a civil or a revenue court, *including a sale of the coparcenary property of a Hindu undivided family governed by the Mitakshara law in execution of a decree obtained against the father or*	One year.	(As at present).

[1]Para 39.13, *supra*.
[2]*Fakir Chand* v. *Harnam* [illegible] 1967 SC [illegible]
[3]*Ramasamayyan* v. *Virasami* [illegible]

(b) a sale for arrears of Government revenue or any demand recoverable as such arrears.		

Article 100. **39.19** Article 100 reads as under :

"100. To alter or set aside any decision or order of a civil court in any proceeding other than a suit or any act or order of an officer of Government in his official capacity.	One year.	The date of the final decision or order by the court or the date of the act or order of the officer, as the case may be."

Articles 13 and 14 of the Limitation Act, 1908 read as under:

"13. To alter or set aside a decision or order of a civil court in any proceeding other than a suit.	One year.	The date of the final decision or order in the case by a court competent to determine it finally."
"14. To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	One year.	The date of the act or order."

Parallel provisions in the 1877 Act (articles 13 and 14) were identical:

"13. To alter or set aside a decision or order of a civil court in any proceeding other than a suit.	One year.	The date of the final decision or order in the case by a Court competent to determine it finally."
"14. To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	One year.	The date of the act or order."

In the 1871 Act, articles 15 and 16 read as under:

"15. To alter or set aside a decision or order of a civil court in any proceeding other than a suit.	One year.	The date of the final decision or order in the case by a court competent to determine it finally."
"16. To set aside any act of an officer of Government in his official capacity, not herein otherwise expressly provided for.	One year.	The date of the suit."

The two articles were put into one article (in place of articles 13 and 14 of the Act of 1908) as article 100. This change had been recommended by the Law Commission.[1]

Meaning of the term 'Officer of Government'.

39.20. The expression "Officer of Government" (which occurs in the article) is nowhere defined. The Madras High Court[2] as long back as 1895 was required to decide the status of a "karnam" with reference to article 3 of Schedule II to the Small Cause Courts' Act (9 of 1897). The Court observed as under:

> "Officers of Government are, no doubt, public servants, but every public servant is not an officer of Government. This is clear from the article itself in which the Court of Wards is expressly mentioned, indicating that otherwise it would not come within the article."

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[1]Law Commission of India, 3rd Report, page 57, para 149.
[2]*Orr and another* v. *Neelamegam Pillai*, (1895) I.L.R. 18 Mad. 395.

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The Supreme Court, while deciding that the office of a Governor of a State is not an "employment" under the Government of India, referred to its earlier rulings[2] in support of the proposition that a High Court Judge is not a Government servant and observed that a Judge of the Supreme Court also falls in that category.

39.21. The difficulty as to who is, and who is not an officer of Government is not of recent origin. Even when the draft Bill of the Act of 1877 was circulated for comments, the District Judge of Cuddapah[3] observed: Comments—District Judge, Cuddappah (1877).

> "Article 15 contains the troublesome expression that I objected to, in remarking on the new Code of Civil Procedure, namely, 'Officer of Government'. What it means I have not the slightest idea. Is a District Judge one? Is a Batta Peon? Is a Magistrate? Is a 'public servant' as defined in the Indian Penal Code?
>
> "And, besides this, there is the same difficulty as in article 13 as to what kinds of suits can be brought to set aside an act of an officer of Government, and being so brought, must be brought within one year from the date of the Act?"

39.22 Notwithstanding such queries and also the difficulties that do arise from time to time, we have come to the conclusion that the insertion of a definition of the expression "Officer of Government" may create problems. We would not therefore recommend any amendment in this regard. No need to define the term "Officer of Government".

39.23. The third column of the article puts the date of the order as the starting point for the purposes of computation of limitation. It is based on the assumption that the order in question will be communicated to the affected party in good time. However, if, by negligence or over-sight, the order is not communicated, the person aggrieved would have no remedy if the communication is delayed by one year. To provide for such a contingency, we recommend that the third column of article 100 should be revised to read as under:— Recommendation as to starting point under article 100.

> "The date of *communication* of the final decision or order by the court, or the date of communication of the act or order of the officer, or, *where there has been no such communication, the date on which the plaintiff first had knowledge of the act or order of the officer, as the case may be.*"

39.24. Article 101 reads as under:— Article 101.

"101. Upon a judgment, including a foreign judgment, or a recognisance.	Three years.	The date of the judgment or recognisance.

In the Act of 1908, articles 117 and 122 read as under:—

"117. Upon a foreign judgment as defined in the Code of Civil Procedure, 1908.	Six years.	The date of the judgment."
"122. Upon a judgment obtained in the Provinces, or a recognisance.	Twelve years.	The date of the judgment or recognisance."

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[1] *Hargovind* v. *Raghukul Tilak*, A.I.R. 1979 S.C. 1109.

[2] (a) Union of India v. S.H. Sheth, A.I.R. 1977 S.C.
(b) *Baldev Raj Gulani* v. *Punjab and Haryana High Court*, A.I.R. 1976 S.C. 2490.

[3] Mr. J. S. Nelson, District Judge, Cuddapah—Letter No. 34, dated 2nd April, 1877 to the officiating Chief Secretary to Government. National Archives file relating to 1877 Limitation Bill.

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The corresponding provisions in the Act of 1877 were articles 117 and 122, which read as under:—

"117. Upon a foreign judgment as defined in the Code of Civil Procedure.	Six Years.	The date of the judgment."
"122. Upon a judgment obtained in British India, or a recognisance.	Twelve years.	The date of the judgment or recognisance."

Law Commission's Report.

39.25. The Law Commission[1], in its Report on the Act of 1908, observed that articles 117 and 122 of the Act of 1908, relating to suits upon a foreign judgment and upon a judgment or recognisance, the periods prescribed being six years and twelve years from the date of judgment or recognisance, that in England, such suits were treated as suits on contracts. Adopting this principle, the Law Commission recommended a period of limitation of three years to bring the article on par with those dealing with contracts. The Law Commission also recommended the substitution of one composite article in place of two articles.

Accordingly, the present provision was enacted in 1963.

No change needed.

39.26. No further controversy has arisen in respect of the article and no amendment is therefore needed.

Article 102.

39.27. Article 102 reads as under :—

"102. For property which the plaintiff has conveyed while insane.	Three years.	When the plaintiff is restored to sanity and has knowledge of the conveyance."

In the Act of 1908, article 94 read as under :—

"94. For property which the plaintiff has conveyed while insane.	Three years.	When the plaintiff is restored to sanity and has knowledge of the conveyance."

The corresponding provision in the Acts of 1877 and 1871 Acts was in identical terms.

Failure to make enquiries —Does this postpone running of time?

39.28. The first point that arises for consideration in connection with this article is: if the plaintiff, upon attainment of sanity, wilfully neglects to make enquiries about the state of affairs of his property while he was insane, should such wilful default on his part postpone the running of time?

Dr. Whitley Stokes[2] in his Anglo-Indian Codes, commented as under:—

> "For the purposes of Schedule II, articles 32, 48, 90, 91, 92, 94, 95, 113, 114, 118 and 127, it should be declared that wilful ignorance is equivalent to, or carries with it the consequences of, knowledge."

He quoted 4 Suth. S.C.C. Ref. 19:9 Suth Civ. R. 329; 11 *ibid* 163 in support of his suggestion.

This suggestion about constructive knowledge being made the starting point of limitation has not, however, been countenanced, probably because it would lack exactitude in the matter of proof. We recommend no change as to the starting point.

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 61, para 158.
[2]Stokes, Anglo-Indian Codes (1889), Vol. 2, page 949.

39.29. The second point that arises is as to the period, which is three years in actual practice, it may not be easy upon the person who has regained sanity to prove the date of knowledge of the conveyance; he would then be faced with the argument that the suit should have been brought within three years from the cesser of disability. In such cases the period available would cause hardship. The period.

39.30. We are of the view that the period in article 102 should be increased from 3 years to 6 years, having regard to the considerations mentioned above. We recommend accordingly. Recommendation to increase the period to six years in article 102.

Article 103.

39.31. Article 103 reads as under:—

"103. To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years.	The date of the trustee's death or if the loss has not then resulted, the date of the loss."

It is identical with article 98 of the Acts of 1908 and 1877.

The corresponding article in the Act of 1871 was article 99, which read as under:—

"99. To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years.	The date of the trustee's death, or if the loss has not then been occasioned, the date of the loss."

The present article needs no change.

Article 104.

39.32. Article 104 reads as under :—

"104. To establish a periodically recurring right.	Three years.	When the plaintiff is first refused the enjoyment of the right."

In the Act of 1908, article 131 read as under:—

"131. To establish a periodically recurring right.	Twelve years.	When the plaintiff is first refused the enjoyment of the right."

The period of 12 years under the old article 131 and the period of 6 years under the residuary article 120 have both been reduced to three years, upon the recommendation of the Law Commission[1] in its Report on the Act of 1908. One consequence of this is that the conflict of decisions as to whether old article 131 (12 years) applied to the facts of a particular case or the residuary article 120 (prescribing a shorter period) applied, has now lost its practical importance.

No change is needed in the article.

Article 105.

39.33. Article 105 reads as under :—

"105. By a Hindu for arrears of maintenance.	Three years.	When the arrears are payable."

In the Act of 1908, article 128 read as under:—

"128. By a Hindu for arrears of maintenance.	Twelve years.	When the arrears are payable."

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), Appendix 1, pages 83 and 87 (articles 1 and 38).

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Reduction of the period of limitation from twelve years (Act of 1908) to three years was a result of the recommendation of the Law Commission[1], made in its Report on the Act of 1908.

No change is recommended in the present article.

Article 106.

39.34. This takes us to article 106, which reads as under :—

"106. For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate against an executor or an administrator or some other person legally charged with the duty of distributing the estate.	Twelve years.	When the legacy or share becomes payable or deliverable."

In the Acts of 1908 and 1877, article 123 read as under:—

"123. For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years.	When the legacy or share becomes payable or deliverable."

In the Act of 1871, article 122 read as under:—

"122. For a legacy or for a distributive share of the moveable property of a testator or intestate.	Twelve years.	When the legacy or share becomes payable or deliverable."

In view of a Privy Council case,[2] the article in the Act of 1908 was held to apply only where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate. The Law Commission[3] in its Report on the Act of 1908, recommended an amendment of article 123 of the Act of 1908 to bring it in accord with the above ruling. This recommendation has been implemented in the present article. The article has not given rise to any further controversies, and may be retained as it is.

Article 107.

39.35. Article 107 reads as under :—

107. For possession of a hereditary office	Twelve years.	When the defendant takes possession of the office adversely to the plaintiff.

Explanation.—A hereditary office is possessed when the properties thereof are usually received, or (if there are no properties) when the duties there of are usually performed."

In the Acts of 1908 and 1877, article 124 reads as under:—

"124. For possession of an hereditary office.	Twelve years.	Where the defendant takes possession of the office adversely to the plaintiff.

Explanation.—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed."

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 60, para 165 and page 87, article 35.

[2]*Ghulam Muhammad* v. *Sheikh Ghulam Hussain*, I.L.R. 54 All. 193, A.I.R. 1932 P.C. 81.

[3]Law Commission of India, 3rd Report (Limitation Act, 1908), page 61, para 160 and page 86, para 30.

(Chapter 39– Articles 97 to 112: Suits Relating to Miscellaneous Matters.)

In the Act of 1871, article 123 differed very slightly (and only in the last column), by expressly mentioning "some person through whom he (defendant) claims."

The present article needs no change.

39.36. Article 108 reads as under :— Article 108.

"108. Suits during the life of a Hindu or Muslim female by a Hindu or Muslim who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years.	The date of alienation."

In the Acts of 1908 and 1877, article 125 was in identical terms.

Parallel provision in the Act of 1871 was article 124, which read as under:—

"124. Suit during the life of a Hindu widow by a Hindu entitled to the possession of land on her death to have an alienation made by the widow declared to be void except for her life.	Twelve years.	The date of the alienation."

39.37. Article 124 of the Act of 1871 restricted the scope of the article to estates held by Hindu widows. Later on, however, the ambit of the article was extended in order to include life estates held by Muslims females of the Punjab who were governed by customary Hindu law. Such instances have dwindled after the passing of the Muslim Personel Law (Sheriat) Application Act of 1937, which has overridden any such customs under certain circumstances. Muslims.

39.38. After the passing of the Hindu Succession Act, 1956, utility of the article has declined even as regards a Hindu female. Section 14 of that Act confers absolute title in the property upon her[1]. The exceptions to this general rule have been enumerated in sub-section (2) of that section. Thus, the practical utility of the article is decreasing. However, the time has not yet come for outright deletion of the article. Section 14, Hindu Succession Act.

39.39. In the result, the article needs no change. No change needed.

39.40 We now Proceed to article 109, which reads as under :— Article 109.

"109. By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.	Twelve years.	When the alienee takes possession of the property."

39.41. In the Act of 1908 and 1877, article 126 reads as under :— History.

"126. By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Twelve years.	When the alienee takes possession of the property."

[1] *V. Tulasamma* v. *Sesha Reddy*, (1977) 3 S.C.C. 99.

(Chapter 39—Articles 97 to 112—Suits Relating to Miscellaneous Matters.)

In the Act of 1871, article 125 read as under: —

"125. By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Twelve years.	The date of the alienation."

Property covered by the article.

39.42. The article unedr consideration applies to alienations of ancestral property moveable as well as immovable[1]. As regards the onus on the Hindu son to challenge the alienation made by his father, the Supreme Court[2] has made it clear that after the sale has taken place, the son is bound by the sale, unless he shows that the *debt was non-existent or was tainted with immorality or illegality.*

Period.

39.43. The period of 12 years allowed under the article is in symmetry with the general approach of the Act in regard to suits concerning affairs of a Hindu family. Moreover, most of the suits governed by this article are, in practice, suits mainly involving immovable property. The period of 12 years is understandable on that account also.

No change needed.

39.44. No change is needed in the article.

Article 110.

39.45. This takes us to article 110, which reads as under :—

"110. By a person excluded from a joint family property to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to the plaintiff."

Article 127 in the Acts of 1908 and 1877 was in identical terms.

In the Act of 1871, article 127 read as under:

"127. By a Hindu excluded from joint-family property to enforce a right to share therein.	Twelve years.	When the plaintiff claims and is refused his share."

Recommendation

39.46. The "exclusion" contemplated by article 110 of the present Act (and its predecessors) has been held to be a *total and absolute* exclusion and when a coparcener is in receipt of cash maintenance or in possession of some lands in lieu of the same, he was not entitled to main a suit under this articl.[3-4] However, certain rulings have expressed a contrary view, namely, that the exclusion need not be total[5]. To put the matter beyond doubt, we recommend that article 110 should be revised as under:

"110. By a person *totally and absolutely* excluded from a joint family property to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to the plaintiff."

Article 111.

39.47. Article 111 reads as under :—

"111. By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years.	The date of the dispossession or discontinuance."

Article 146A of the Act of 1908 was in identical terms.

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[1]*Hurajalli Hunia Goundan* v. *Ramasami Chetti*, A.I.R. 1918 Mad. 19.
[2]*Faqir Chand* v. *Hanam kaur*, A.I.R. 1967 S.C. 727.
[3]*Nihan Singh* v. *Lal Rudra Partab*, A.I.R. 1926 P.C. 100.
[4]See *V. G. Panicker* v. *Velumvikun*, A.I.R. 1958 Ker. 178 (FB).
[5]*Lingangouda* v. *Sangangouda*, A.I.R. 1933 Bom. 386, 392.

(Chapter 39—Articles 97 to 112—Suits Relating to Miscellaneous Matters.)

Case law as to land in possession of defendant at the time of vesting.

39.48. In an Allahabad case[1] it was held that the word "dispossess" in this Article should be given a wide meaning, and even if the defendant was in possession of the road much before the road come to be vested in the District Board, the District Board should be deemed to have been "dispossessed" of the road immediately on the *date of vesting* thereof, and limitation for a suit under article 146A of the Act (1908 Act) should be deemed to have started from the date of such vesting.

A contrary view was taken in a Calcutta case.[2]

In our view, it would be straining the language of the article too far to say that a person was "dispossessed" of a property when, on or before the date of alleged dispossession, he was not in possession of the same.

Change not needed.

39.49. It is, we think, probable that the view taken in the Calcutta decision will be followed by other High Courts also. For that reason, we do not suggest any clarificatory amendment of the article on this particular point. The point, in any case, may not recur frequently.

Summary eviction after expiry of limitation.

39.50. We should mention another question that is somewhat related to article 111. Various State Acts establishing Municipal Corporations, Zilla Parishads and other local authorities contain provisions empowering the local authority to require a person to remove any projection, obstruction or encroachment upon a public road[3]. Usually, a Municipal Corporation takes recourse to the expeditious process of eviction prescribed by such special Acts, rather than go in for the time consuming process of a civil suit. However, the question sometimes arises whether the Corporation is legally entitled to take recourse to such summary proceeding if, for the period of thirty years (prescribed by article 111), the Corporation has acquiesced in the encroachment. There has been a conflict of opinion on this subject. According to the High Courts of Bombay[4] and Punjab[5], the right of the Corporation to remove the encroachment by the summary procedure is not lost, even after such acquiescene. But a contrary view has been expressed by the Madras[6] and Lahore[7] High Courts. The question primarily concerns interpretation of the state laws, which is the reason why it cannot be dealt with by amending the Limitation Act.

Article 112.

39.51. This takes us to article 112, which reads as under :—

"112. Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government or any State Government, including the Government of the State of Jammu and Kashmir.	Thirty years.	When the period of limitation would begin to run under this Act against a like suit by a private person.

Article 149 of the Act of 1908 read as under:—

"149. Any suit by or on behalf of the Central Government or any Provincial Government (except a suit before the Federal Court in the exercise of its original jurisdiction).	Sixty years.	When the period of limitation would begin to run under this Act against a like suit by a private person."

[1] *Zila Parishad* v. *Ram Khelawan*—A.I.R. 1976 Allahabad 209.
[2] *Dhajadhari Ghosh* v. *Union Board of Kendrogoria*—A.I.R. 1942 Calcutta 151.
[3] See. for example, section 172 of the Punjab Municipal Act, Act 3 of 1911; section 179, Maharashtra Municipalities Act, Act 40 of 1965; section 182. Madras District Municipalities Act, 1920.
[4] *Tayabali Abdullabhai Vohra* v. *Dohab Municipality*, A.I.R. 1922 Bom. 9.
[5] *Pyarelal* v. *Municipal Committee, Ludhiana*, A.I.R. 1955 Punjab 185.
[6] *Baseveswaraswami* v. *Eellary Municipal Council*—A.I.R. 1916 Mad. 613.
[7] *Municipal Committee, Amritsar* v. *Mt. Gujri*, A.I.R. 1936 Bah. 182.

(Chapter 39—Articles 97 to 112—Suits Relating to Miscellaneous Matters.)
(Chapter 40—Article 113—Suits for Which there is no Prescribed Period.)

In the Act of 1877, article 149 reads as under:

"149. Any suit by or on behalf of the Secretary of State for India in Council.	Sixty years.	When the period of limitation would begin to run under this Act against a like suit by a private person."

In the Act of 1871, article 150 read as under:

"150. Any suit in the name of the secretary of State for Indian in Council.	Sixty years.	When the right to sue accrues."

As the period of 60 years available to Government under the earlier Acts for filing any suit was rather on the high side, it was reduced to 30 years by the present Act, on the recommendation of the Law Commission[1].

Banks—suggestion considered but not accepted.

39.52. In an article published in 1980, a plea has been made[2] to extend the benefit of article 112 of the Limitation Act, to banks and other financial institutions, on the ground that in view of the extensive lending by the banks, several debts are getting barred, and this has happened even though the banks try to keep all the security documents relating to the advances alive and enforceable. It has been stated that the shorter loans granted by the banks, like over-drafts and cash credits, have to be renewed or re-loaned at the expense of vast manpower, just to save the loans from getting barred under the Limitation Act and this process involves considerable delay and expense.

We are afraid that the case of banking institutions can hardly be treated like Government. Unlike the Government is often faced with multiple problems that require decision making at various points (somehow right upto the Cabinet level), and the process is time-consuming. This is not the position in the case of banks which are run on commercial line. Secondly, if a period of 30 years is made applicable to banks, similar demands for a special treatment would also be put forth by other large business houses, who have a network of offices throughout the country. For example, a large tea industry may claim that it has offices throughout India in every village, and should be given an enlarged period of limitation when it comes to the question of filing suits arising out of supply of tea to its retailers. It would obviosuly be impossible to extend the concession to all other cases.

We do not, therefore, favour acceptance of the suggestion.

CHAPTER 40

ARTICLE 113: SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD

Article 113.

40.1. Article 113 is the residuary article regarding suits and reads as under:—

"113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years.	When the right to sue accrues."

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 61, para 162.
[2]K. Chalapati Rao (Law Officer, State Bank of India Hyderabad), "Limitation Act, 1963—Article 112: Necessity to extend its benefit to banks", A.I.R. 1980 Journal 16.

(Chapter 40—Articles 113—Suits for Which there is no Prescribed Period.)

This article corresponds to article 120 of the 1908 Act, which read as under:—

"120. Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues."

Corresponding provisions in the Act of 1877 (article 120) and the Act of 1871 (article 118) were identical.

It may be noted that article 120 of the Act of 1908 provided a period of limitation of 6 years, whereas the present Act has reduced the period of limitation to 3 years, as recommended by the Law Commission[1] in its Report on that Act. No change is recommended in the present law.

CHAPTER 41

ARTICLES 114 TO 117: APPEALS

Article 114.

41.1. Article 114 reads as under:—

"114. Appeal from an order of acquittal,		
(a) under sub-section (i) or sub-section (2) of section 417 of the Code of Criminal Procedure, 1898.[2]	Ninety days.	The date of the order appealed from.
(b) under sub-section (3) of section 417 of that Code.[3]	Thirty days.	The date of the grant of special leave."

In the Act of 1908, article 157 read as under:—

"157. Under the Code of Criminal Procedure, 1898, from an order of acquittal.	Six months	The date of the order appealed from."

In the Act of 1877, the parallel provision was found in article 157, which read as under:—

"157. Under the Code of Criminal Procedure from a judgment of acquittal.	Six months	The date of the judgment appealed against."

The Law Commission[4], in its Report on the Act of 1908, noted that the periods provided for appeals in England were shorter, in contrast with the period of three months allowed, by article 157 of the Act of 1908 (as amended in 1955). The Commission did not recommend a general reduction of the period for appeals. But it recommended a limitation period of one month in the case of an appeal against acquittal by a private party with special leave.

Recommendation to make verbal change.

41.2 While we do not propose any changes of substance in this article, a verbal change is necessary in view of the passing of the Code of Criminal Procedure, 1973, which repeals and re-enacts the Code of 1898, referred to in the article. For the reference in the article to sub-sections (1) and (2) of section 417, a reference to sub-sections (1) and (2) of section 378 should be substituted, and for the reference to sub-section (3) of section 417, a reference to sub-section (4)

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[1]Law Commission of India, 3rd Report (Limitation Act 1908), page 61, para 159.
[2]Cf. now section 378 (1) and (2), Cr. P.C. 1973.
[3]Cf. now section 378 (4) Cr. P.C., 1973.
[4]Law Commission of India, 3rd Report (Limitation Act 1908), page 63, paras 166-167 and page 87, article 39.

of section 378 of the Code of Criminal Procedure, 1973 should be substituted[1], these being the provisions of the new Code corresponding to those of the Code of 1898.

Article 115.

41.3. The next article is also concerned with appeals under the Code or Criminal Procedure and reads as under:—

"115. Under the Code of Criminal Procedure, 1898—		
(a) from a sentence of death passed by a court of session or by a High Court in the exercise of its original criminal jurisdiction;	Thirty days.	The date of the sentence.
(b) from any other sentence or any order not being an order of acquittal—		
(i) to the High Court.	Sixty days.	The date of the sentence or order.
(ii) to any other court.	Thirty days.	The date of the sentence or order."

This article corresponds to articles 150, 150A, 154 and 155 of the Act of 1908. They read as under:

"150. Under the Code of Criminal Procedure, 1898, from a sentence of death passed by a court of Session or by a High Court in the exercise of its original cirminal jurisdiction.	Seven days.	The date of the sentence.
150A. Under the Code of Criminal Procedure, 1898, from a finding rejecting a claim under section 443 of that Code.	Seven days.	The date of the finding
154. Under the Code of Criminal Procedure, 1898, to any court other than a High Court.	Thirty days.	The date of the sentence or order appealed from.
155. Under the same Code to a High Court, except in the cases provided for by article 150 and article 157.	Sixty days.	The date of the sentence or order appealed from."

The Law Commission[2], in its Report on the Act of 1908, recommended that the period of seven days available under articles 150 and 150A of the Act of 1908 (Death sentence) should be increased to thirty days. This recommendation has been accepted. The Commission also recommended a uniform period of 30 days irrespective of the forum—a recommendation which has not been carried out.

Recommendation as to article 115.

41.4. The reference in this article to the Code of Criminal Procedure, 1898, should now be revised and a reference to the present Code of 1973 should be substituted in the opening part of the article. We recommend that article 115 should be so amended.

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[1]For the earlier history of section 417, Cr. P.C., see *Kaushalya Rani* v. *Gopal Singh*, A.I.R. 1964 S.C. 260, 262.

[2]Law Commission of India, 3rd Report (Limitation Act, 1908), page 61, para 163, and page 88, article 40 (first part).

(Chapter 41- Articles 114 to 117 –Appeals.)

41.5. This takes us to article 116, which provides for limitation for civil appeals as under:— Article 116.

"116. Under the Code of Civil Procedure, 1908—

(a) to a High Court from any decree or order.	Ninety days.	The date of the decree or order.
(b) to any other Court from any decree or order.	Thirty days.	The date of the decree or order."

The corresponding articles in the Act of 1908 were 156 and 152, which read as under:—

"156. Under the Code of Civil Procedure, 1908, to a High Court, except in cases provided for by article 151 and article 153.	Ninety days.	The date of the decree or order appealed from.
152. Under the Code of Civil Procedure, 1908, to the Court of a District Judge.	Thirty days.	The date of the decree or order appealed from."

Appeals under the Code of Civil Procedure, provided for in articles 156 and 152 of the Act of 1908, had different periods of limitation; a larger period of ninety days for appeals to High Courts and a shorter period of thirty days for appeals to the court of a District Judge. The Law Commission[1], in its Report on that Act, took the view that in the light of improvement in the means of quick transport enabling the litigant to undertake travel to the seat of the High Court, the period of ninety days was unrealistic and should be reduced to thirty days. The Limitation Bill, 1962, as introduced, sought to implement this recommendation. However, when the matter came up before the Joint Committee, the Committee accepted an amendment moved by an Honourable Member (Shri S. K. Basu) which sought to retain the period of ninety days. That is how article 116 (combining the earlier articles 156 and 152) came to be enacted in the present form.

41.6. We should reiterate the earlier recommendation of the Law Commission for reduction of the period for appeal to the High Court to thirty days. Reduction of the period is justified for the reasons given in the Report on the earlier Act. It may, to some extent, also help to reduce the number of appeals to the High Court, since a shorter period might dissuade a wavering appellant from taking a chance. Recommendation as to article 116.

41.7. This takes us to article 117, which reads as under:— Article 117.

"117. From a decree or order of any High Court to the same Court.	Thirty days.	The date of the decree or order."

Article 151 of the Acts of 1908 and 1877 read as under:—

"151. From a decree or order of any of the High Courts of Judicature at Fort William [Madras] [and Bombay, or of the High Court of East Punjab] in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order."

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 62-63, para 165 and page 88, article 40, latter part.

(Chapter 41—Articles 114 to 117—Appeals.)—(Chapter 42—Articles 118 to 136—Applications in Specified Cases.)

Increase of the period from 20 days to 30 days was recommended by the Law Commission in its Report on the Act of 1908—which also recommended a uniform period for all High Courts.[1] The recommendation has been carried out. The Commission observed that the then existing period (20 days) was too short "and attempts are often made to get an extended period by first applying for leave to appeal as a pauper (for which a period of 30 days) is provided and then on failure to obtain such leave, to ask for time for payment of court fee, the delay in such payment being excused by the Court".

No further change is needed in the article.

CHAPTER 42

ARTICLES 118 TO 136: APPLICATIONS IN SPECIFIED CASES

Article 118.

42.1. Article 118 reads as under :—

"For leave to appear and defend a suit under summary procedure.	Ten days.	When the summons is served."

This corresponds, in substance, to article 159 of the Acts of 1908 and 1877. They read as under:—

"For leave to appear and defend a suit under summary procedure referred to in section 128(2) (f) or under Order XXXVII of the same Code (Code of Civil Procedure, 1908).	Ten days.	When the summons is served."

Order 37, C.P.C.

42.2. The article has to be read with Order 37, Code of Civil Procedure, 1908, which lays down the procedural law applicable to suits triable under the summary procedure. The Courts and suits governed by the Order are enumerated in Order 37, rule 1. It is enough to note that their range and ambit have been considerably widened by the amendments made in 1976 in the Code. The procedure to be followed step-by-step is provided for in Order 37, rules 2 and 3. The remaining rules of the Order deal with matters of detail.

The scheme laid down in Order 37, rules 2-3, for the trial of a suit under the summary procedure (so far as is material for the present purpose) can be said to comprise several stages, of which two are important—

(i) appearance by the defendant, and

(ii) seeking leave to defend.

There are two distinct categories of summons envisaged by Order 37, rule 3, corresponding to the two stages mentioned above.

Outline of the procedure.

42.3. In outline, the procedure under Order 37, is as under:—

After the summons for appearance is issued to the defendant, he may, under Order 37, rule 3(1), enter an appearance within 10 days.

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 62, para 164 and page 88, article 40, latter part.

If he enters an appearance, he has to file in court an address for service. On the date of entering the appearance, he has to serve or send a "notice of appearance" to the plaintiff.

After the appearance is so entered, the plaintiff has to serve on the defendant a summons for judgment (in the prescribed form), returnable not less than 10 days from the date of service. The summons must be accompanied by an application verifying certain facts.

(2) The next—and the second most important—stage is the seeking by the defendant of leave to defend. Under Order 37, rule 3(5), within ten days from the service of the summons for judgment, the defendant may, by affidavit or otherwise disclosing sufficient facts, apply for leave to defend the suit. If leave is not sought or (though sought) is not granted, a decree follows. If leave is granted, the trial proceeds.

(We are not, in the present Report, concerned with the considerations to be taken into account by the Court while considering the grant of leave).

Proposal of Government of Maharashtra.

42.4. We have referred above to the provisions in the Code of Civil Procedure in view of the fact that we find that the Government of Maharashtra has, for sometime, been actively considering a proposal for amending article 118 of the Limitation Act and also the relevant provisions of Order 37 of the Code of Civil Procedure, with a view to mitigating certain difficulties that have been experienced under the present provisions.

The Government of Maharashtra has stated[1] that the period of limitation of ten days under article 118 is found to be too short, by persons residing outside the jurisdiction of the court and by the big concerns (including Government departments and local authorities) who require more time to obtain orders of their appropriate authorities. Similarly, the present procedure (in order 37, C.P.C.) of first entering appearance and then obtaining leave to defend, results in avoidable delay and cost to both the parties. To save the litigant from such hardship, the State Government has proposed that in a summary suit when the summons is served, the defendant should apply for leave to defend and, for this purpose, the period of limitation should be extended to thirty days from the date on which the summons is served on him. The proposal is to amend article 118 in its application to the State of Maharashtra for this purpose, after which amendment, it is expected that the High Court will take necessary action to amend Order 37 C.P.C. suitably. The High Court, it is stated, has been consulted and is in favour of the amendment. The proposal was forwarded by the State Government to the Government of India for administrative approval according to the instructions of the Government of India regarding legislative proposals concerned with matters in the Concurrent List. Copies of the relevant papers were forwarded to this Commission by the Legislative Department of the Government of India, with a request for information as to whether any proposal for amendment of article 118 has been considered by the Commission for amendment of article 118 and, if so, with what result. Though there is, before us, no formal suggestion for amendment of the article, we have found the proposal of the Government of Maharashtra as deserving of favourable consideration.

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[1]Papers in Government of India Legislative Department File F.14(138)/81-Leg. II; Maharashtra State L.A. Bill No. 94 of 1981 entitled "The Limitation (Maharashtra Amendment) Bill, 1981" introduced in the State Assembly 30 Nov. 1981.

(Chapter 42—Articles 118 to 139—Applications in Specified Cases.)

Proposal to be viewed favourably.

42.5. Since the proposal of the Government of Maharashtra is a composite one, involving an amendment both of the Code of Civil Procedure, 1908 and of article 118 of the Limitation Act, we are not, in this Report, recommending any amendment of article 118 of the Limitation Act on an all-India basis. At the same time, it appears to us that acceptance of the proposal of State Government of Maharashtra for amendment of the Limitation Act in its application to that State is ultimately likely to improve the expeditious disposal of Summary Suits, and our recommendation for the present is that any such proposal by a State Government for replacing the various stages of Order 37 rule 3, by a simpler mode of trial should, in principle, be viewed favourably. If the experience of working of the proposed procedure in the State or States where such an amendment is effected shows good results, it will be worthwhile to consider the incorporation of similar amendments on an all-India basis in the Code of Civil Procedure, 1908, Order 37 and in article 118 of the Limitation Act, 1963.

Verbal point regarding leave to appear.

42.6. A verbal point concerning article 118 may be mentioned at this stage. The first column of the article describes the application as one "for leave to appear and defend a suit under summary procedure". However, it should be mentioned that Order 37 rule 3, as it now stands, does not require leave for appearance of the defendant, though leave is still required for defending the suit. In order to ensure that this position is reflected in the Limitation Act, we would have considered recommending a verbal change in the first column. However, it should, at the same time, be pointed out that a number of time limits, for taking various steps contemplated by the rules of procedure are specified in the rules also—Order 37, rule 3(1) to 3(5).

Somewhat elaborate amendments may be required in Order 37, Rule 3.

Recommendation.

42.7. In view of what we have stated above in our comments on the proposal of the Government of Maharashtra—a proposal involving substantial amendments in the procedural provisions—we think that it would be more beneficial if, instead of a mere verbal amendment of article 118, the procedural scheme itself receives consideration from the point of view of the numerous stages envisaged at present by Order 37, Rule 3 C.P.C. After the State amendments (when they materialise) are given a trial, this can be taken up. Along with an amendment of Order 37 C.P.C., Article 118 of the Limitation Act can also then be amended so as to increase the period to 30 days.[1]

Article 119.

42.8. This takes us to article 119, which reads as under :—

"119. Under the Arbitration Act, 1940—

(a) for the filing in court of an award;	Thirty days.	The date of service of the notice of the making of the award;
(b) for setting aside an award remitted for reconsideration.	Thirty days.	The date of service of the filing of the award."

Articles 158 and 178 of the Act of 1908, as substituted by the Arbitration Act, 1940, read as under:

"158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration.	Thirty days.	The date of service of the notice of filing of the award.

[1]For future action at the appropriate time.

(Chapter 42—Articles 118 to 136: Applications in Specified Cases.

178. Under the Arbitration Act, 1940, for the filing in court of an award.	Ninety days.	The date of service of the notice of the making of the award."

Corresponding provisions in the Act of 1877 were articles 158 and 176, which read as under:

"158. Under the Code of Civil Procedure to set aside an award.	Ten days.	When the award is submitted to the Court.
176. Under the Code, of Civil Procedure, section 516 or 525, that an award be filed in Court.	Six months.	The date of the award."

Corresponding provisions in the 1871 Act were articles 155 and 165, which read as under:

"155. Under the Code of Civil Procedure to set aside an award.	Ten days.	When the award is submitted to the Court and notice of the submission has been given to the persons and in manner prescribed by the High Court.
165. Under the Code of Civil Procedure, section three hundred and twenty seven, that an award be filed in Court.	Six months	The date of the award."

It may be mentioned that in the present Act, the period has been made uniform.

Arbitrator filing award in court.

42.10. The question of the arbitrator filling an award is of interest. In a Nagpur case[1], after summarising the case law, the court observed:

"It has been held in a series of cases that article 178 of the Limitation Act (of 1908) does not apply to (the) arbitrator," i.e. to the arbitrator who himself files the award.

Law-Commission's Report on the Act of 1908.

42.11. This matter was considered by the Law Commission[2] in its Report on the Act of 1908. It recommended that there should be a time limit for the arbitrator to file the award, and that the period should be thirty days from the last date of service of notice of the making of the award on any one of the parties. This recommendation of the Law Commission was not, however, accepted at the drafting stage. One of the comments[3] received was that the arbitrator should have no right at all under the Arbitration Act to file an award in court by himself without the parties moving within 90 days or the court ordering him to file the award in court.

Another District Judge[4] opposed the recommendation for curtailing the period of 90 days under article 178. Ultimately, the article emerged as quoted above. We have no further suggestion to make on this point. It would seem that the filing of an award by an arbitrator need not be accompained by an application[5].

Recommendation as to Arbitration Act, 1940.

42.12. As to the scope of the words "otherwise invalid", which occur in section 30(b) of the Arbitration Act, 1940, the Law Commission[6] in its Report on

[1]*Goonda Lal* v. *Mathura Dass*, A.I.R. 1957 Nagpur 32.
[2]Law Commission of India, 3rd Report (Limitation Act, 1908), page 66, para 172.
[3]District Judge Shri J. Sambasivrao, Andhra Pradesh Legislative Department file (1963 Bill).
[4]District Judge, Shri B.M. Nigam, Uttar Pradesh Legislative Department file (1963 Bill).
[5]*Cf. State* v. *Thomas*, A.I.R. 1973 Ker. 262, 264, 265.
[6]Law Commission of India, 76th Report (Arbitration Act, 1940), page 53.

that Act has recommended that an Explanation should be added to section 30 as follows:—

"*Explanation.*—The expression 'or is otherwise invalid' includes the ground that there was no valid arbitration agreement or no valid reference to arbitration".

We reiterate this recommendation, which makes the statement of the law in the section comprehensive.

Article 120.

42.13. Article 120 reads as under :—

"Under the Code of Civil Procedure, 1908, to have the legal representative of a decease plaintiff or appellant or of a deceased defendant or respondent, made a party.	Ninety days.	The date of death of the plaintiff, appellant, defendant or respondent as the case may be.

This article corresponds to articles 176 and 177 of the 1908 Act, which read as under:—

"176. Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ninety days.	The date of the death of the deceased plaintiff or appellant.
177. Under the same Code to have the legal representative of a deceased defendant or a of a deceased respondent made a party.	Ninety days.	The date of the death of the deceased defendant or respondent."

Corresponding provisions in the Act of 1877 were contained in articles 175A, 175B and 175C, which we need not quote.

Applicability to proceedings under special law.

42.14. The Delhi High Court[1] has held that under section 53 of the Land Acquisition Act, 1895, the provisions of Order 9 as well as Order 22 of the Code of Civil Procedure, 1908 apply to proceedings before the District Court under that Act and the District Court must bring the legal representatives on record on the death of a party to such proceedings; at the same time, the court held that the provisions of the Limitation Act would not be attracted, and the application for substitution should be made within reasonable time.

42.15. On principle, a person whose land has been acquired and who claims more compensation than that given by the Collector should be vigilant, and, if the original owner dies during the pendency of the proceedings, it should be obligatory for the legal representative of the deceased to apply for being brought on record in the same manner—as he would do if the deceased was a plaintiff in a regular civil suit.

To permit the legal representative to apply within a "reasonable time" might encourage undue pendency of the proceedings. However, we are not recommending an amendment of the Limitation Act, as this question has to be dealt with in the special laws, rather than in the Limitation Act.

We may incidentally mention here that in discussing certain other sections, we have dealt with the position of Tribunals.[2]

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[1] *Union of India* v. *Sanwalia*, I.L.R. (1975) Delhi 837.
[2] See discussion as to section 29 and article 137.

(Chapter 42—Articles 118 to 136: Applications in Specified Cases.)

Starting point.

42.16. The third column of the article under discussion speaks about the date of death of the plaintiff (or the appellant, defendant or the respondent), as the starting point of limitation. The Supreme Court (in another context), while interpreting article 171 of the Act of 1908 (corresponding to present article 121), held[1] that the date of the appellant's knowledge of the death of deceased respondent was irrelevant for the purposes of computation of time under that article.

However, the Judicial Commissioner, Goa has held[2] that the period of limitation under article 120 starts on the day on which the parties opposing the deceased party acquire knowledge of the death of the deceased. When it was argued that the text of column 3 leaves no margin to accommodate such an interpretation, the Court observed:—

> "However, it seems to me that if such an interpretation had been accepted, it would lead to starting results in cases in which *deliberately or otherwise the death of a party was kept in secret by the party interested in not having the heirs* brought on record in time so that they might raise the defence of limitation. The party who did not have the knowledge of the death would in such circumstances be put in serious jeopardy. This leads me to believe that the interpretation placed by Shri Usgaonkar on the passage quoted above is not correct. The words "the date of death of the plaintiff, appellant, defendant or respondent, as the case may be' apply to the heirs or legal representatives of the plaintiff, appellant, defendant or respondent as the case may be when such heirs or legal representatives have the duty of being brought on record or the duty of informing the other side about the fact of the death. The period of limitation under Item 120 therefore starts on the day on which the parties opposing the deceased party acquire knowledge of the death of the deceased."

42.17. No other case has come to our notice to support the interpretation of the Judicial Commissioner, Goa, and in a sense, such an interpretation, with respect, runs counter to the one placed by the Supreme Court on article 171 of the Act of 1908.

No change needed.

42.18. Nor does the present position really cause serious hardship. An abatement that follows on non-substitution can be set aside under article 121, and, in regard to an application under that article, section 5 of the Act is also applicable.

Bonafide ignorance of the death of a party is sufficient cause in this context.[3]

Article 121.

42.19. Article 121 reads as under:—

"Under the same Code for an order to set asipe an abatement.	Sixty days.	The date of abatement."

Article 171 of the Act of 1908 reads as under:—

"Under the Code of Civil Procedure, 1908, for an order to set aside an abatement.	Sixty days.	The date of abatement."

This article has not given rise to any controversy, and needs no change. It should be noted that though the period is sixty days, it can be extended under section 5. Further, ignorance of death is a factor to be taken into account in applying section 5.[4]

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[1] *Union of India* v. *Ram Charan*, A.I.R. 1964 S.C. 215, 220 (case under article 121).
[2] *Polpoto* v. *Nilkhant*, A.I.R. 1972 Goa 31.
[3] O.22. R. 4(5), Code of Civil Procedure, 1908, as inserted in 1976.
[4] Order 22, Rule 4(5), Code of Civil Procedure, 1908 as inserted in 1976.

Article 122.

42.20. Article 122 reads as under :—

"To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs."	Thirty days.	Date of dismissal."

Articles 160, 163, 168 and 172 of the Act of 1908 read as under:—

"160. For an order under the same Code, to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing.	Fifteen days.	When the application for review rejected.
163. By a plaintiff for an order to set aside a dismissal for default of appearance or for failure to pay costs of service or process or to furnish security for costs.	Thirty days.	The date of the dismissal.
168. For the re-admission of an appeal dismissed for want of prosecution.	Thirty days.	The date of dismissal.
172. Under the same Code by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the dismissal of a suit or an appeal.	Sixty days.	The date of the order of dismissal.

The corresponding provisions in the 1877 Act were contained in articles 160, 162, 168 and 171, which need not be quoted.

On the recommandation of the Law commission,[1] articles 160, 163, 168 and 172 of the Act of 1908 were consolidated into one article, and a uniform period of 30 days from the date of dismissal has been provided in the present Act.

Failure to deposit cost of paper book.

42.21. Article 122 has been differently interpreted as respects its application to the restoration of appeals dismissed for failure to deposit the cost of paper book. The Rajasthan High Court has observed[2]:

> "An application for restoration of an appeal which is dismissed because of the failure of the appellant to pay the cost of preparing the paper book as required by Rules of High Court is governed by Art. 168 of the Limitation Act (of 1908). Such a dismissal can only be called dismissal for want of presecution and Art. 168 applies to all cases where there is an application for re-admission of an appeal which has been dismissed for want of prosecution, even though the application may not be under O.XLI, R.19, C.P.C."

In an old case, the Calcutta High Court held[3] that such an application was made under the rules of the High Court and not under section 558 of Code of Civil Procedure, 1882 and is, therefore outside this article.

This view was also followed by the Patna High Court[4].

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[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 67, para 174.
[2]*Ram Niwas* v. *Sulaman*, I.L.R. (1951) I Raj. 827, 829.
[3]*Ram Hari Sahu* v. *Madan Mohan Mitter*, (1896) I.L.R. 25 Cal. 339, 347.
[4]*Minnie Lal* v. *Mahadeo Lall Marwari*, A.I.R. 1949 Pat. 112, para 2; I.L.R. 27 Pat. 745.

(Chapter 42—Articles 118 to 136: Applications in Specified Cases.)

42.22. The Mysore High Court[1] has held that when the High Court has dismissed an appeal for non-payment of costs for preparation of paper book, such dismissal is in the exercise of the inherent powers under section 151 of the Code of Civil Procedure 1908, and the Limitation Act does not apply to an application for restoration of the appeal. The Court took the view that an application for restoration should be made within reasonable period, and what the reasonable period is depends upon the facts and circumstances of each case.

However, a contrary view has been taken by a ruling of the Full Bench of the Orissa High Court[2] in which the expression "for want of prosecution" occurring in article 122 has been given a wide connotation so as to cover any class of appeal dismissed for non-compliance with the High Court rules.

The point may not, in practice, arise very frequently. It is for that reason that we refrain from recommending a clarificatory amendment.

42.23. The next article—article 123 reads as under:— Article 123.

"123. To set aside a decree passed ex parte or to rehear an appeal decreed or heard exparte.	Thirty days.	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree."

Explanation.—For the purpose of this article, substituted service under rule 20 of Order V of the Code of Civil Procedure, 1980, shall not be deemed to be due service."

In the Act of 1908, articles 164 and 169 read as under:—

"164. By a defendant, for an order to set aside a decree passed ex parte.	Thirty days.	The date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree."
"169. For the re-hearing of an appeal heard ex parte.	Thirty days.	The date of the decree in appeal or, where notice of the appeal was not duly served when the applicant has knowledge of the decree."

42.24. The Law Commission had, in its Report on the Act of 1908, taken notice of the different interpretations of the expression "duly served" in column 3 of the relevant article and observed that it would be unjust to impute knowledge of the decree to a party when the party was not served with summons (in the ordinary manner). The recommendation[3] of the Commission was to amend the article suitably on this point. The recommendation has been accepted, and an Explanation added in the article (by the Act of 1963) so as to ensure that substituted service is not 'due service' within the meaning of the article.[4] No further change is needed in article 123. Law Commission Report on the Act of 1908.

42.25. Article 124 reads as under :— Article 124

"124. For a review of judgment by a court other than the Supreme Court.	Thirty days.	The date of the decree or order."

[1] *Baswantarava* v. *Gurappa*, A.I.R. 1968 Mysore 329, 330, 331.
[2] *Bimla Devi* v. *Patitapaban*, A.I.R. 1973 Orissa 169, 171 (F.B.).
[3] Law Commission of India, 3rd Report (Limitation Act, 1908), page 67, paragraph 175 and page 88, article 46.
[4] *Cf. Kanshi Ram* v. *Bhagwan Kaur*, A.I.R. 1970 Punjab 300.

(Chapter 42– Articles 118 to 136: Applications in specified cases)

Article 161, 162 and 173 of the Act of 1908 read as under :—

"161. For a review of judgment by a Court of Small Causes (other than a Presidency Small Cause Court) or by a Court invested with the jurisdiction of a Court of Small Causes when exercising that jurisdiction.	Fifteen days.	The date of the decree or order.
162. For a review of judgment by any of the following Courts, namely, the High Courts of Judicature at Fort William, Madras, Bombay and Nagpur and the High Court of East Punjab in the exercise of its original jurisdiction.	Twenty days.	The date of the decree or order.
173. For a review of judgment except in the cases provided for by article 161 and 162.	Ninety days.	The date of the decree or order."

Corresponding articles in the Act of 1877 were 160A, 162 and 173, which we need not quote.

Court Fees Act and other aspects— No change needed.

42.26. Articles 4 and 5 of Schedule 1 to the Court Fees Act, 1870 make a distinction between applications for review of judgment if presented on or after the ninetieth day from the date of decree (on the one hand) and applications presented before the ninetieth day from the decree. An applicant pays one-half court fee in the latter case. However, this is a matter separate from limitation.

Several other aspects of the article under consideration have practical importance, but the case law discloses no need for amendment or clarification of its wording.

Article 125.

42.27. Article 125 reads as under:—

"125. To record an adjustment or satisfaction of a decree.	Thirty days.	When the payment or adjustment is made."

It corresponds to article 174 of the Act of 1908 and to article 173A of the Act of 1877. They read as under:—

Act of 1808

"174. For the issue of a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified.	Ninety days.	When the payment or adjustment is made."

Act of 1877

"173. For the issue of a notice under section 258 of the same Code, to show cause why the payment or adjustment therein mentioned should not be recorded as certified.	Ninety days.	The date of the decree or order."

Formal application.

42.28. Some controversy exists as to the need for formal application for recording an adoption. But the matter primarily relates to the law of procedure and an amendment in the form or substance of the Limitation Act would hardly be appropriate.

Article 126.

42.29. Article 126 reads as under:—

"For the payment of the amount of a decree by instalments.	Thirty days.	The date of the decree."

Article 175 of the Act of 1908 read as under:—

"For payment of the amount of a decree by instalments.	Six months.	The date of the decree."

The period of limitation in this article has been cut down to 30 days as envisaged by the Law Commission in its Report on the Act of 1908[1]. The article needs no change.

Article 127.

42.30. Article 127 reads as under:—

"To set aside a sale in execution of a decree, including any such application by a judgment-debtor.	Sixty days. (Substituted in 1976 for "Thirty days").[2]	The date of the sale."

Article 166 of the Act of 1908 was as under :—

"Under the same Code to set aside a sale in execution of a decree, including any such application by a judgment-debtor.	Thirty days."	The date of the sale."

(The last seven words were added in 1927.)

In the Act of 1877, article 172 read as under:—

"By a purchaser at an execution-sale to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein.	Sixty days."	The date of the sale.

In the Act of 1871, article 159 read as under :—

"To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale.	Thirty days.	The date of the sale."

Insolvency proceedings-applicability.

42.31. A question arose in the past as to the applicability of this article to an application to set aside a sale in insolvency proceedings. The Judicial Commissioner, Nagpur,[3] held that the provisions of Order 21, Code of Civil Procedure, 1908 (Execution), were applicable to insolvency proceedings and the period of limitation applicable to a petition for setting aside a sale in insolvency proceedings must be thirty days under article 166 of the Limitation Act of 1908 (present article 127). But the Chief Court of Punjab took a contrary view,[4] and held that article 166 (Act of 1908) was not applicable to such an application, as it was not an application to set aside a sale in "execution of a decree" and that an application to set aside a sale that had been conducted by the court in realising the assets

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 88, article 49.
[2]Section 98, Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976).
[3]*Balaji* v. *Gopal Mali*, A.I.R. 1927 Ng. 262.
[4]*Afzal Ali* v. *Aman Ali*, A.I.R. 1914 Lah. 209.

of the insolvent was governed by article 181 of the Limitation Act, 1908. These two are comparatively old cases, and since then, the controversy does not appear to have come on the surface during the last fifty years. Hence no explanatory amendment on this count appears to be needed.

Parties to the application-joinder of.

42.32. Another controversy is concerned with the joinder of parties in an application under O.21, Rule 92, C.P.C. The Patna High Court has held[1] that the auction-purchaser is a necessary party to an application under Order 21, Rule 92, to set aside an execution sale and where he is not made a party within the time allowed, the application cannot be entertained. A contrary view has been taken by Rajasthan High Court, holding[2] that it is not necessary to mention the name of the party in the heading of the application and if any party is left out, it is the duty of the Court to give notice under the proviso to O.21, R.92(2) C.P.C. and the application would not be barred by limitation. Since the passing of the Limitation Act in 1963, this article has not given rise to any controversy and the above solitary conflict need not detain us.

Fraud—antecedent or subsequent.

42.33. Then, there is the question of fraud, be antecedent and subsequent. In one case,[3] the Kerala High Court has observed that on principle, if the fraud antecedent to the sale was of such a nature as to suffice for the requirements of section 18 (Limitation Act, 1908), such fraud could not be dismissed from consideration as having had its origin earlier. However, the Patna High Court[4] has held that the petitioner must satisfy the court that he had been kept from the knowledge of his right to file an application and that his right to set aside the sale occurred after the sale. The Court further observed that fraud prepetrated by the opposite party must be a fraud committed after the sale, and not a fraud committed in bringing about the sale. In this context, section 17 of the Limitation Act, 1963 does not differentiate between antecedent fraud and subsequent fraud. The limitation runs from the time the applicant has discovered the fraud or could, with reasonable diligence, have discovered it. In the absence of further case law on the point, we would leave the matter at that.

Effect of fraud of alone on decree holder auction-purchaser alone.

42.34. A question has arisen whether the fraud of the decree-holder alone or of the auction-purchaser alone would be sufficient to extend the period of limitation. The Mysore High Court holds[5] that section 18 (of the Act of 1908), could be attracted where the fraud in question was practised either by the decree-holder or by the auction-purchaser. In a Calcutta case,[6] it was held that a judgment debtor was not entitled to the benefit of section 18 for the purpose of making an application under O.21, R.90, C.P.C. to set aside an execution sale, if the decree-holder was not a party to the fraud alleged. In an Allahabad Full Bench case[7], the view taken is that fraud of the decree-holder suffices and that it is immaterial whether the decree-holder alone is guilty of the fraud, or whether the auction-purchaser was also a party to the fraud.

K.S. Hegde J. (in the Mysore case[8] referred to above) has taken stock of the judicial opinion on the subject and concluded as under:—

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[1] *Sumitra Kaur* v. *Damri Lall*, A.I.R. 1921 Pat. 498.
[2] *Alladin* v. *Karimbux*, A.I.R. 1955 Raj. 51.
[3] *Malhan Simon* v. *Ouseph looka*, A.I.R. 1964 Ker 88, 89, 90 Para 3.
[4] *Jagdhar Missir* v. *Dharai Khatwa*, A.I.R. 1920 Pat. 725.
[5] *D. Veerappa* v. *Bangarappa*, A.I.R. 1960 Mys. 297.
[6] *Azizunnessa* v. *Dwarika Prasad*, A.I.R. 1925 Cal. 1227, 1228.
[7] *Mt. Balkesha Kunwar* v. *Harakh Chand*, A.I.R. 1934 All 255, 258; I.L.R. 56 All 613 (F.B.)
[8] *Veerappa* v. *Bangarappa*, A.I.R. 1960 Mys 297, 299, I.L.R. (1960) Mys. 324.

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"Both on principle and on preponderance of judicial authority, it appears to me that the correct view is that section 28 of the Limitation Act (of 1908) is applicable where the fraud in question is practised either by the decree-holder or by the auction-purchaser."

The controversy really appertains to section 17 of the present Act. Much may depend on the manner in which the parties are arrayed and other relevant facts. In view of this, we do not recommend any amendment on this point.

Recommendation as to O.21, R. 92(2), C.P.C.

42.35. However, we should refer to a connected provision in the Code of Civil Procedure, 1908, which seems to need amendment. Article 127 of the Limitation Act is concerned with applications, in regard to which O.21, R.92(2) of the Code is relevant. The period of limitation for an application under article 127 is sixty days, after its amendment[1] in 1976. The application is to be accompanied by a deposit. The period for making the required deposit under O.21, R.92, C.P.C. is, however, still thirty days. This disharmony between the two statutory provisions should be removed. We may point out that the disharmony has been adverted to in a recent judgment of the Kerala High Court[2] also. To remove this discrepancy, we recommend that O.21, R.92(2) of the Code of Civil Procedure, 1908, should be suitably amended by increasing the period from 30 days to 60 days[3].

Article 128.

42.36. We now turn to article 128, which reads as under :—

"For possession by one dispossessed of immovable property and disputing the right of the decree holder or purchaser at a sale in execution of a decree.	Thirty days.	The date of the dispossession."

Article 165 of the Act of 1908 read as under:—

"Under the Code of Civil Procedure, 1908 by a person dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	Thirty days.	The date of the dispossession."

In the Act of 1877, article 165 was in identical terms. In the Act of 1871 also, article 158 was in identical terms.

No change recommended.

42.37. Certain controversies on this article have ceased to be relevant after the 1976 amendment of the Code of Civil Procedure, 1908, O.21, R.100. In view of this position, we do not see any reason to recommend any change in the article.

Article 129.

42.38. Article 129 reads as under :—

"For possession after removing resistance or obstruction to delivery or possession of immovable property decreed or sold in execution of a decree.	Thirty days.	The date of resistance or obstruction."

In the Act of 1908, article 167 read as under:—

"Complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree.	Thirty days.	The date of the resistance or obstruction."

[1]Section 98, Code of Civil Procedure (Amendment) Act, 1976.
[2]*Dakshayini* v. *Madhavan*, A.I.R. 1982 Ker. 126 (June).
[3]To be carried out under O.21, R. 92(2), Code of Civil Procedure, 1908.

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In the Act of 1878, article 167 read as under :—

"Complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree, or of possession in the delivery of possession to the decree holder or the purchaser of such property.	Thirty days.	The date of the resistance, obstruction or dispossession."

In the Act of 1871, article 160 read as under :

"Complaining of resistance or obstruction to delivery of possession of immovable property sold in execution of a decree, or of dispossession in the delivery of possession to the purchaser of such property.	Thirty days.	The date of the resistance, obstruction or dispossession."

Starting point of limitation.

42.39. There is some debate in the case law about the starting point in regard to fresh obstructions. The Madras High Court has held that an application[1] for the removal of a second obstruction, made more than thirty days after acquiescence in a previous obstruction, was not barred by article 167 (of the Act of 1908) and such acquiescence did not deprive the person entitled to possession of any further right to obtain execution. The calcutta High Court held[2] that the auction-purchaser was not limited to one application under O.12, Rule 95, C.P.C. and the period of 30 days prescribed by article 167 (Act of 1908) was to be counted from the date of the resistance or obstruction in respect of which the complaint was made. However, the Bombay High Court has held[3] that the time limit for a subsequent application in respect of an obstruction by the same person would count from the earlier obstruction.

42.40. The Bombay view has been expressly dissented from in a Gujarat case,[4] on the ground that though the Bombay ruling was a Full Bench decision the observations in that ruling were *obiter*. The Gujarat High Court held that since the law allows the decree-holder to make a second application for execution and to complain about the obstruction within 30 days from the date of resistance or obstruction, it was immaterial whether the decree-holder came, or failed to come, to court within 30 days of the date of the first obstruction. In view of the fact that the observations in the Bombay case were *obiter*, we make no recommendation regarding any change therein.

Article 130-Recommendation.

42.41. This takes us to article 130 which reads as under :—

"130. For leave to appeal as a pauper—

(a) to the High Court	Sixty days.	The date of decree appealed from.
(b) to any other court.	Thirty days.	The date of decree appealed from."

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[1] *Mayappan Chetty* v. *Mayappan Servai*, A.I.R. 1921 Mad. 559, 561.

[2] *Burma Sundari Devi* v. *Kiranshashi Chodhaurani*, A.I.R. 1938 Cal. 352 *cf.* A.I.R. 1959 Cal. 613, 615 and *Kedar* v. *Baijnath*, A.I.R. 1939 Cal. 494.

[3] *Mukand Babu* v. *Tanu Sabbu*, A.I.R. 1933 Bom. 457 (F.B.)

[4] *Maneklal* v. *Ochhavlal*, A.I.R. 1970 Guj. 49, 50, 10 Guj. L.R. 654.

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Article 170 of the 1908 Act, article 170 of the 1877 Act and article 162 of the 1871 Act read as under:—

"170. For leave to appeal as a pauper	Thirty days.	The date of the decree appealed from.
170. For leave to appeal as a pauper.	Thirty days.	The date of the decree appealed against.
162. For leave to appeal as a pauper.	Ninety days.	The date of the decree appealed against."

Pre-1963 position.

42.42. Prior to 1963, a uniform period of limitation of 30 days was prescribed for an application for leave to appeal as a pauper. The present article provides for two different periods, namely, 60 days and 30 days. The change was made at the committee stage.

Recommendation as to Article 130.

42.43. We are of the view that the period prescribed for such leave should be the same as that prescribed for the appeal, and that this principle should be applied to all courts. Such a procedure should, we believe, work smoothly. If ultimately the leave to appeal as an indigent person is granted, the application can be converted into an appeal. If such leave is not granted, the court would generally grant time for the payment of court fees and (where the limitation period for appeal has already expired), allow condonation of delay under section 5. In either case, a period identical with the period prescribed for the appeal itself would cause no inconvenience.

Accordingly, we recommend that article 130 should be revised as under:—

"130. For leave to appeal as an *indigent person* to any court.	*The same period as is prescribed for the appeal in respect of which the leave is sought.*	The date of decree appealed from."

Article 131.

42.44. This takes us to article 131. It reads as under :—

"To any court for the exercise of its powers of revision under the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1898.	Ninety days.	The date of the decree or order or sentence sought to be revised."

There was no corresponding provision in the earlier enactments, though the practice of the High Courts generally laid down a time limit of 90 days. The Law Commission, in its Report[1] on the Act of 1908, recommended the incorporation of a new provision for making an application to any court for the exercise of its powers of revision under the C.P.C. or Cr.P.C. and recommended a period of limitation of 30 days. The Joint Committee, in its Report, however, observed that the period of thirty days was too short and recommended that it should be ninety days. That is how the article came to be enacted.

Case law as to starting point.

42.45. A question concerning the starting point under article 131 needs attention. In framing this article, it was presumed that the aggrieved person would be so connected with the proceedings affecting him that the date of the decree or order or sentence passed in the proceeding will be known to him immediately, because he would (in all probability) be present in court at the relevant time, or will be notified by his counsel about the order affecting him. But this is not

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 89, suggested article 57.

always the case in reality. A Gujarat case illustrates the matter.[1] An auto rickshaw was seized as a conveyance used for theft. The rickshaw was the subject matter of hire purchase. Neither the real owner of the auto rickshaw, nor the one to whom it was given on hire purchase, was directly connected with the case relating to theft. A revision was preferred by one Balamal against the order of seizure of the auto rickshaw. It was discovered that if article 131 was to be taken literally, the revision would be barred by time, as being beyond ninety days of the date on which the order of seizure was passed.

Shelat J. (as he then was), realising the hardship that would arise if column 3 of the article were given a literal meaning, relied upon the observations of the Supreme Court in an earlier case[2] where the expression "the date of the award" in section 18(2) of the Land Acquisition Act, 1894, was construed as requiring either actual or constructive knowledge of the order. Such knowledge was an essential requirement for fair play and natural justice. The Supreme Court had, in that case, refused to put a literal or mechanical construction on the expression "from the date of the Collector's award", used in the proviso to section 18. On the basis of this reasoning, Shelat, J. held that it would be reasonable and fair that the period of ninety days (in article 131) should also run from the date of the knowledge of the order, and not from the date of the order.

Recommendation.

42.46. With a view to preventing recurrence of the injustice which may result from a mechanical construction being placed on the language occurring in column 3 of article 131, we recommend that column 3 of the article should be revised as follows:—

"When the *applicant had knowledge* of the decree or order or sentence sought to be revised."

In the first column of the article, the reference to the Code of Criminal Procedure, 1898, should be replaced by a reference to the present Code of 1973.

Article 132.

42.47. Article 132 reads as under :—

"132. To the High Court for a certificate of fitness to appeal to the Supreme Court under clause (I) of article 132, article 133 or subclause (e) of clause (I) of article 134 of the Constitution or under any other law for the time being in force.	Sixty days.	The date of the decree, order or sentence."

Articles 153 and 179 of the 1908 Act read as under:—

"153. Under the same Code to a High Court from an order of a Subordinate Court refusing leave to appeal to His Majesty in Council.	Thirty days.	The date of the order."
"179. By a person desiring to appeal under the Code of Civil Procedure, 1908 to His Majesty in Council for leave to appeal.	Ninety days.	The date of the decree appealed from."

In the Act of 1877, articles 153 and 177 read as under: —

"153. Under the same Code, section 601, to a High Court.	Thirty days.	The date of the order refusing the certificate.

[1] *Balamal* v. *State of Gujarat*, A.I.R. 1970 Guj. 26 29. 30 (1970) Cr. L.J. 46.
[2] *Harish Chandra* v. *Deputy Land Acquisition Officer*, A.I.R. 1961 S.C. 1500.

(Chapter 42– Articles 118 to 136: Applications in specified cases.)

177. For the admission of an appeal to Her Majesty in Council.	Six months	The date of the decree appealed against."

Law Commission Report.

42.48. The Law Commission, in its Report on the Act of 1908 observed,[1] that new provisions prescribing periods of limitation were necessary for making applications to the High Court for a certificate of fitness to appeal to the Supreme Court. Article 179 of the Limitation Act, 1908, as it then stood, provided a period of 90 days for an application under the Code of Civil Procedure and did not prescribe a period of limitation for other applications. The Law Commission recommended that a comprehensive provisions should be made as to the limitation for applications to the High Court for a certificate of fitness for appeal to the Supreme Court, and that, for all such applications a period of 30 days might be prescribed. But the Joint Committee felt that the period of 30 days was too short and that the period should be 60 days.

Recommendation.

42.49. This newly added provision has not given rise to any controversy. However, in view of the amendments that have been made in the Constitution[2] it would be proper to revise the wording of article 132 of the Limitation Act so as to make it conform to the changed constitutional phraseology.

Accordingly, we recommend a redraft of the first column of article 132 as under:—

Article 132, *First Column (Revised)*

"To the High Court for a certificate of *the nature referred to* in clause (1) of article 132, clause (1) of article 133 or sub-clause (c) of clause (1) of article 134 of the Constitution, *read with article* 134*A thereof*, or under any other law for the time being in force."

Article 133.

42.50. This takes us to article 133, which reads as under :—

"To the Supreme Court for special leave to appeal—

(a) in a case involving death sentence.	Sixty days.	The date of the judgment, final order or sentence.
(b) in a case where leave to appeal was refused by the High Court;	Sixty days.	The date of the order of refusal.
(c) in any other case.	Ninety days.	The date of the judgment or order."

There was no corresponding provision in the earlier Acts.

Report of the Law Commission.

42.51. The Law Commission had, in its Report[3] on the Act of 1908, recommended a period of limitation of 30 days in respect of applications to the Supreme Court for special leave in a case involving death sentence. The Joint Committee, however, felt that the period was too short, and that it should be sixty days.

Suggestion of the Supreme Court.

42.52. With reference to this article, a suggestion of the Supreme Court has been forwarded to the Law Commission by the Legislative Department, being a

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 64, para 169.
[2]Articles 132, 133, 134 and 134A of the Constitution.
[3]Law Commission on India, 3rd Report (Limitation Act, 1908), pages 90, 168-169, article 59(a).

suggestion made by the Registrar of the Supreme Court[1] for amendment of the article in regard to cases where a party against whom a judgment or order has been pronounced by the High Court applies orally for a certificate of fitness to appeal. The difficulty felt in regard to this article may be thus stated in brief. In some cases, in the High Court a request for a certificate of fitness for appeal to the Supreme Court is made by counsel orally. When this oral request is refused, the question as to whether a petition for special leave to appeal to the Supreme Court can be filed in the Supreme Court within 60 days—clause (b) of article 133 or within 90 days-clause (c) of article 133 of the Limitation Act—has arisen. Under article 133(b), which deals with the cases of refusal of leave to appeal by the High Court, the period of limitation is 60 days. Under article 133(c), which applies "in any other case", the period of limitation is 90 days. The period of 60 days mentioned in article 133, clause (b) is to be counted from the date of the order of refusal (by the High Court), while the period of 90 days mentioned in article 133, clause (c), is to be counted from the date of the judgment or order of the High Court. Once the High Court refuses leave (the correct expression is "certificate"), clause (b) would presumably apply and the proceeding can be filed in the Supreme Court only within 60 days from the date of refusal of the certificate. But, by adopting this course, the litigant is deprived of the benefit of the longer period of 90 days, which would, under article 133(c), have been available to him, if he had come directly to the Supreme Court for special leave. No doubt, the Supreme Court can condone the delay under section 5 of the Limitation Act in such cases, but in order to avoid unnecessary applications under section 5, it has been suggested that it is better to provide that in such contingencies the petitioner shall have the benefit of limitation whichever is more beneficial to him. That means that where the date of order refusing a certificate and the date of the judgment appealed from are the same, the petition for special leave to appeal to the Supreme Court may be filed within 90 days. The Registrar of the Supreme Court has requested the Government to take appropriate steps for suitably amending the Limitation Act for bringing out above position.

Constitutional position as to appeal to Supreme Court.

42.53. We have carefully considered this suggestion, and are in broad agreement with it. Before we make our concrete recommendations in this behalf, it may be convenient to set out briefly the constitutional position. Under article 136 of the Constitution, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter, passed or made *by any court or tribunal* in the territory of India—with the exception of a court or tribunal constituted by or under any law relating to the armed forces. In regard to judgments of High Courts, an appeal to the Supreme Court lies under article 132(1), 133(1) and 134(1) of the Constitution in the specified cases on a specified ground, where the High Court gives the requisite certificate under article 134A of the Constitution. In certain criminal cases involving a sentence of death, an appeal lies to the Supreme Court under article 134(1) (a) and (b), even without a certificate. Further, article 134(2) and article 135 deal with appellate jurisdiction conferred on the Supreme Court by Parliament by legislation and appellate jurisdiction in any matter exercisable by the Supreme Court inherited from the Federal Court, respectively. But we are concerned only with appeals where a certificate can be applied for.

Position as to Limitation.

42.54. Now, while appeals from courts other than the High Court to the Supreme Court under article 136 would, as regards the position for special leave filed in the Supreme Court, be governed by article 133(c) of the Limitation Act,—

[1]Letter from the Registrar (Judicial), Supreme Court of India to the Secretary to Government, Ministry of Law, Justice & Company Affairs dated 28th January, 19[illegible], copy forwarded to the Law Commission by the Legislative Department under its O.M. No. 11 (14)/82/Leg. II dated 24th August, 1982.

or in the rare case of death sentence imposed by some special court under statute by article 133(a) of Limitation Act—applications for leave to appeal from judgments and orders of the High Court by special leave can fall either under article 133(b) of the Limitation Act or under article 133(c) of that Act. If the certificate is applied for in the High Court and refused, clause (b) becomes applicable and only 60 days, it seems, would be available from the date of the order of refusal, while, if a direct application had been made to the Supreme Court, clause (c) would apply, giving a period of 90 days. This 90 days period is counted from the date of the judgment or order. Where the date of the order of refusal is much later than the date of the judgment or order of the High Court, the litigant may stand to gain by relying on clause (b), but where the two are simultaneous, he would stand to lose if clause (b) is applied. This is the anomaly which is sought to be removed by the suggestion made by the Registrar of the Supreme Court, referred to above. As far as we could understand, it is not the intention that clause (c) of article 133 should be disturbed, the only change desired is to ensure that the litigant whose application in the High Court for certificate is refused should get 90 days from the date of the judgment, if the judgment of the High Court and the order of refusal are simultaneous. We do not see any objection to the acceptance of this suggestion and are recommending a re-draft of article 133 to achieve the object.

42.55. It should be mentioned at this stage that under article 134A of the Constitution, every High Court passing or making a judgment etc. (appealable on certificate)— Article 134A of the Constitution.

"(a) may, if it deems fit so to do, on its own motion; and

(b) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after passing or making of such judgment, decree, final order or sentence,"

determine, "as soon as may be after such passing or making", the question whether the certificate in question should be given in respect of that case. Thus, the Constitution contemplates that the grant or refusal of certificate shall be "as soon as may be" after the passing of the judgment etc. It can be presumed that in most cases the grant or refusal would be simultaneous or at least within a very short time. Hence, the amendment which we are contemplating would be of some practical utility.

42.56. Accordingly, we recommend that article 133 of the Limitation Act should be revised as under: Recommendation.

"133. To the Supreme Court for special leave to appeal.

(a)	in a case involving death sentence;	Sixty days.	The date of the judgment, final order or sentence.
(b)	*in a case where a certificate of the nature referred to in article 134A of the Constitution was refused by the High Court and the Order of refusal was passed on a date later than the judgment or order in respect of which such leave was applied for.*	*Sixty days.*	*The date of the order of refusal.*

(Chapter 42—Articles 118 to 136: Applications in specified cases.)

(bb)	*in a case where a certificate of fitness of the nature referred to in article 134A of the Constitution was refused by the High Court, and the order of refusal was passed on the same date as the judgment or order in respect of which such leave was applied for.*	*Ninety days.*	*The date of the judgment or order.*
(c)	in any other case.	Ninety days.	The date of the judgment.

Article 134.

42.57. This takes us to article 134, which reads as under :

"For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year.	When the sale becomes absolute."

Article 180 of the Act of 1908 read as under:

"By a purchaser of immovable property at a sale in execution of a decree for delivery of possession.	Three years.	When the sale becomes absolute."

There was no corresponding provision in the Acts of 1871 and 1877.

Reduction of period in 1963.

42.44. The period of Limitation (provided in article 180 of the Act of 1908) has been reduced in 1963 to one year, upon the recommendation of the Law Commission.[1] The Statement of Objects and Reasons annexed to the Bill states[2] the reasons as under:

> "As existing article 182 is being omitted, article 180 (which the proposed article 133 (now article 134) seeks to replace, will apply to all purchasers in execution whether decree-holder or not. The period, however, is being reduced to one year from three years."

No change needed.

42.58. Certain controversies pertaining to this article have lost their importance after the amendment of O.21, R. 97-101 of the Code of Civil Procedure in 1976. No change is, therefore, needed in the article.

Article 135.

42.59. Article 135 reads as under :

"For the enforcement of a decree granting a mandatory injunction.	Three years.	The date of the decree or where a date is fixed for performance, such date."

There was no corresponding provision in the earlier enactments. The Law[3] Commission in its Report on the earlier Act, recommended a period of three years in the case of mandatory injunctions.

Accordingly, this provision came to be enacted in 1963.

42.60. The provision has not given rise to any controversy, and hence no change is necessary. It may be mentioned that applications for such relief are excluded from general article as to execution—article 13[4].

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[1]Law Commission of India, 3rd Report (Limitation Act of 1908) page 67, para 180.
[2]Statement of Objects and Reasons, Limitation Bill, 1962.
[3]Law Commission of India, 3rd Report (Limitation Act, 1908), page 65, para 170.
[4]Paragraph 42.61 *infra.*

(Chapter 42—Articles 118 to 136: Applications in specified cases.)

Article 136.

42.61. Article 136 reads as under :

"136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years.	Where the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place, provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation."

Corresponding provisions in the Act of 1908 were contained in articles 182 and 183, which were much more elaborate. As the entire scheme has been changed, no useful purpose would be served by quoting the earlier provisions.

Parallel provisions in the Act of 1877 were contained in articles 179 and 180, which also need not be quoted. Parallel provisions in the Act of 1871 were contained in articles 167, 168 and 169.

Law Commission's Report.

42.62. The Law Commission, in its Report[1] on the Act of 1908, observed as under, with reference to article 182 (applications for executions):

> "170. Article 182 has been a very fruitful source of litigation and is a weapon in the hands of both the dishonest decree-holder and the dishonest judgment debtor. It has given rise to innumerable decisions. The commentary in Rustomji's Limitation Act (5th Edn.) on this article itself covers nearly 200 pages. In our opinion the maximum period of limitation for the execution of a decree or order of any civil court should be 12 years from the date when the decree or order became enforceable (which is usually the date of the decree) or where the decree or subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. There is, therefore, no need for a provision compelling the decree-holder to keep the decree alive by making an application every three years. There exists a provision already in section 48 of the Civil Procedure Code that a decree ceases to be enforceable after a period of 12 years. In England also, the time fixed for enforcing a judgment is 12 years. Either the decree-holder succeeds in realising his decree within this period or he fails and there should be no provision enabling the execution of a decree after that period. To this provision an exception will have to be made to the effect that the court may order the execution of a decree upon an application presented after the expiration of the period of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within the twelve years immediately preceding the date of the application. Section 48 of the Civil Procedure Code may be deleted and its provisions may be incorporated in this Act. Article 183 should be deleted..."

In pursuance of the aforesaid recommendation, the present article has enacted in place of articles 182 and 183 of the 1908 Act. Section 48, Code of Civil Procedure 1908 has been repealed.

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[1]Law Commission of India, 3rd Report, (Limitation Act, 1908), pages 64-65, para 170.

(*Chapter 42—Articles 118 to 136: Applications in specified cases.*) *Chapter 43: Other Applications*)

(*Chapter* 43—*Article* 137 : *Other Applications*)

No change needed.

42.63. There is extensive case law on the corresponding articles of the earlier Act; and we have examined a large number of those cases. We find that most of the controversies that once arose now do not survive, the matter having been either settled by subsequent Supreme Court decisions or clarified or rendered obsolete by the changes made by the Act of 1963. Hence, no change is needed in the article under consideration.

CHAPTER 43

ARTICLE 137 : OTHER APPLICATIONS

Article 137.

43.1. Article 137 reads as under:—

"137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years.	When the right to apply accrues."

This article corresponds to article 178 of Act 15 of 1877 and article 181 of the Act of 1908. The latter article was as follows:—

"181. Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908 (5 of 1908).	Three years.	When the right to apply accrues."

Scope of the article.

43.2. The recommendation of the Law Commission of India, in its Report on the Act of 1908,[1] was to have a residuary article for applications (including prohibitions) as in the case of suits. The period was to be the same as in the Act of 1908, namely three years from the date when the right to apply accrues. But the description of the applications appearing in the first column, as recommended by the Law Commission was in a wider language than the Act of 1908. The matter will be clear from the following extract from the Annexure to the Report of the Law Commission, which showed in a concrete form its recommendation on the subject:—

"60. Other applications for which no period of limitation is provided by any law for the time being in force.	Three years.	When the right to apply accrues."

Earlier, by that Report, while dealing with the ambit of the word "application" (which was not defined in the Act of 1908), the Law Commission had made[2] the following recommendations:

> "We recommend that a new definition of the word 'application' as to include any petition *original or otherwise*, should be added. The object is to provide a period of *limitation for original petitions and applications* under special laws, as there is no such provision now. Consequential alterations in the definition of the word 'applicant' should also be made."

Scope of article 137-special laws.

43.3. The Act of 1963, as enacted, however, does not carry out fully the the recommendation made by the Law Commission in the above mentioned Report, as regards the residuary articles. A controversy therefore arose whether

[1]Law Commission of India, 3rd Report (Limitation Act, 1908), page 67, para 181 and page 90, article 60.

[2]Law Commission of India, 3rd Report (Limitation Act 1908) page 5, para 9 and page 90, article 60.

the new article was intended for applications under special laws[1]. It was in 1977 that the controversy was resolved[2], by a decision of the Supreme Court. This decision of 1977 has practically overruled as much of an earlier decision of the Supreme Court as had held that the article did not apply to applications under special laws.[3-4] However, that part of the earlier decision of the Supreme Court which had held that article 137 does not apply to *bodies other than courts* seems still to hold the field.[5]

Courts and other bodies.

Article 227, Constitution.

43.4. It is now necessary to refer to another aspect of the article under discussion. It is connected with the distinction between courts and tribunals. By way of analogy, it is of interest to refer to the text of article 227 of the Constitution, Article 227, as amended by the Forty-second Amendment, reads:—

> "Every High Court shall have superintendence over *all courts* subject to its appellate jurisdiction."

Earlier, article 227 was in these terms:—

> "Every High Court shall have superintendence over all *courts and tribunals* throughout the territories in relation to which it exercises jurisdiction."

Tribunal.

43.5. The effect of the deletion of the word "tribunals" came up in article 229 for consideration before a Full Bench of Bombay High Court[6]. The Court observed:—

> "In the first place, neither the expression 'court' nor the expression 'tribunal' has been defined in the Constitution and therefore, the dictionary meaning or the normal connotation of these expressions will have to be considered. Secondly, the proposition is well-settled that all courts are tribunals, but all tribunals are not courts. If necessary, reference may be made to Justice Hidayatullah's judgment in *Harinagar Sugar Mills* v. *Shyam Sunder*[7] where the above proposition has been clearly stated; the proposition in other words means that some tribunals would be basically courts, i.e. courts in their normal connotation, while some others would not be courts and therefore it cannot be said that Parliament wanted to exclude all tribunals from the purview of the High Court's superintendence under the amended Article 227, but it can be said that Parliament intended to exclude only such tribunals as are not basically courts from the High Court's superintendence."

43.6. In *M. Joshi* v. *Life Insurance Corporation of India*[8] the Suprme Court held that article 137 of the Limitation Act, 1963, contemplates only applications to courts and the scheme of the Act is, that it deals only with applications to courts, and the Labour court is not a 'court' within the Limitation Act, 1963.

Article 137, Limitation Act, 1963.

43.7. All the same, the observations of the Supreme Court in Athanis case[9] to the effect that article 137 does not apply to proceedings before bodies other than courts (such as quasi-judicial tribunals and executive bodies), could not be

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[1]As to "application", see *Beeravu* v. *Kathiyamma*, A.I.R. 1973 Ker. 226.
[2]*Kerala State Electricity Board* v. *T. P. Kunhiliumma*, A.I.R. 1977 SC. 282.
[3]*Athani Municipality* v. *Presiding Officer, Labour Court, Hubli*, A.I.R. 1969 S.C. 1335.
[4]For a review of the earlier cases, see Mirza Ghouse Baig, "Article 135, etc." (1977) 2 M.L.J. 18, 21.
[5]See also *M. Joshi* v. *L.I.C.*, (1969) 2 S.C.J. 749.
[6]*S. D. Ghatge* v. *State of Maharashtra*, A.I.R. 1977 Bombay 384 (F.B.).
[7]*Harinagar Sugar Mills* v. *Shyam Sunder*, A.I.R. 1961 S.C. 1669.
[8]*M. Joshi* v. *Life Insurance Corporation of India* (1969) 2 S.C.J. 749.
[9]A.I.R. 1969 S.C. 1035

effected, for reasons which the Court itself gives in the *Kerala State Electricity Board's* case[1].

> "But it has to be an application to a Court for the reason that sections 4 and 8 of the 1963 Limitation Act speak of expiry of prescribed period when *Court is closed* and extension of prescribed period if applicant or the appellant satisfies the *Court* that he had sufficient cause for not preferring the appeal or making the application during such period."

43.8. Before the pronouncement of the Supreme Court in the Kerala State Electricity Board case[2], the High Courts, by an ingenious application of the principles of interpretation of statutes, tried to mitigate the hardships suffered by litigants seeking redress before quasi-judicial bodies and tribunals which could not fall within the meaning of the expression 'court'. But there again, it is the same story of reversed judgments. For example, in one of the cases[3], the Allahabad High Court observed that though section 14 of the Limitation Act does not, in terms, apply to proceedings under the Sales Tax Act, *its principle* may apply to them and an assessee may be able, in a subsequent proceeding, to exclude the time spent in an earlier proceedings. This view was based on an earlier Full Bench decision of the same High Court.[4] But in that case also the dissenting Judge had struck a strong discordant note:

> "In the absence of any statutory provision for enlarging the time, the time cannot be enlarged on the basis of some principle of equity, justice or good conscience. The principle of s. 14 by analogy can be applied by courts on the basis of justice, equity and good conscience only if there is no maximum limit fixed by the statute for extending the period of limitation. If the tribunal applies the principles of s. 14 of the Limitation Act for computing the period of limitation for the revision, it will, in the guise of computing the period of limitation, extend and enlarge the time for filing the revision beyond the limit permitted by s. 10 (3-B) of the U.P. Sales Tax Act. When limitation is prescribed by a special law and the provisions of the nature of s. 14 have not been incorporated there, it would be outside the scope of the tribunal created by the statute to import the provisions of s. 14 of the Limitation Act by analogy and thereby virtually amend the provisions limiting the power to enlarge the period of limitation."

The *Parson Tools* case[5] went up in appeal by special leave to the Supreme Court, which reversed the majority judgment and held that the appellate authority and the Judge (Revisions) (Sales Tax), exercising jurisdiction under the U.P. Sales Tax Act, *were not Courts,* but *were merely administrative tribunals.* In view thereof, it was held that section 14 of the Limitation Act did not, in terms apply to proceedings before such tribunals. The Supreme Court also negatived the theory (propounded by the Allahabad High Court) that even though section 14, in terms, did not apply to proceedings before sales tax authorities, *its principle* should apply. After scanning the scheme and language of the U.P. State Sales Tax Act, the Supreme Court observed as under:—

> "These provisions of the Limitation Act which the legislature did not, after due application of mind, incorporate in the Sales Tax Act, cannot be imported into it by analogy. An enactment being the will of the Legislature, the

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[1]A.I.R. 1977 S.C. 282.
[2]*Kerala State Electricity Board,* A.I.R. 1977 S.C. 282.
[3]*S. C. N. Kumar* v. *Sales Tax Commisisoner,* U.P. (1973) Tax Law Reports 2307 (Allahabad)
[4]*Commissioner of Sales Tax* v. *Parson Tools and Plants* A.I.R. 1970 Allahabad 428, "courts".
439 (for later stages of the case. see *infra.*).
[5]*Parson Tools* v. *C.S.T.* (1976) S.C.J. 242, 247.

paramount rule of interpretation which overrides all others is that a statute is to be expounded according to the intent of them that made it."

43.9. In another case,[1] the Supreme Court has made a departure from its earlier stand about the applicability of the Limitation Act to Tribunals and held that section 12(2) of the Limitation Act, 1963, was applicable to proceedings before the Judge (Revisions), Sales Tax.

43.10. It is possible that the Supreme Court may revise its thinking and take a liberal view as regards the applicability of other provisions of the Limitation Act to Tribunals.

High Court cases as to "courts."

43.11. The Allahabad High Court had held that the provisions of section 12 of the Limitation Act did not apply to the proceedings before a Registrar, because a Registrar acting under the Registration Act is not a "Court", as no judicial functions are exercised by him. The controversy arose because the sub-Registrar refused to register a sale deed, against which refusal the aggrieved party moved the District Registrar under section 73(1) of the Registration Act, 1908. The District Registrar gave the benefit of section 12, limitation Act, to the vendee. The High Court reversed[2] the judgement.

43.12. The Kerala High Court in U. Chacko v. P. Marakkar[3] held that the appellate authority under the Kerala Buildings (Lease and Rent Control) Act is not a "court", and where an appeal under the Rent Control Act is barred by the Limitation, that authority has no power to condone delay under section 5 of the Limitation Act. The High Court also held that the principle of section 14 of the Act cannot be extended by analogy where, owing to uncertainty in the identity of the forum where the appeal had to be preferred, the appellant flitted between one court and to another.

43.13. Similar view was expressed by the Madras High Court,[4] holding that the Rent Controller and Appellate Authority under the Tamil Nadu Buildings (Lease and Rent Control) Act of 1960 are not courts and therefore sections 5 and 29(2), Limitation Act are not applicable to proceedings before them.

43.14. The Mysore High Court[5] has held that a Munsiff before whom an election petition is filed, challenging the elections of the Chairman and Vice-Chairman of Village Panchayats, is not a "court".

43.15. On the other hand, in some cases it has been held[6] that the question whether the provisions of the Limitation Act are confined in their operation to proceedings before courts is no longer *res intergra,* in view of the judgment of the Supreme Court in *Athani's case*[7].

43.16. In a Delhi case, the argument that the Lt. Governor of Delhi before whom an application was filed under section 91 of the Punjab Land Revenue Act (17 of 1877) as applied to Delhi is not a court, but functions as a *persona designata* was pressed before a Division Bench[8]. In that case certain property

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[1] *C.S.T.U.P.* v. *Madan Lal,* A.I.R. 1977 SC. 523.
For comment, see S.N. Jain in (1977) 19 J.I.L.I. 484.
[2] *Shiv Charan Das* v. *Rukmani Devi* A.I.R. 1975 All. 374.
[3] *U. Chacko* v. *P. Marakkar* A.I.R. 1978 Kerala 161.
[4] *S. Ganapathi* v. *N. Kumaraswami* A.I.R. 1975 Madras 383.
[5] *Nagreddy* v. *Khandappa,* A.I.R. 1970 Mysore 166.
[6] *Bando Banaji* v. *Bhaskar Balaji,* A.I.R. 1972 Mysore 311.
[7] *Athani's case, supra.*
[8] *Raj Chopra* v. *Smt. Shanno Devi,* A.I.R. 1891 Delhi 18.

in Nizamuddin West, New Delhi, had been put to auction by the Collector, Delhi in 1971, in order to realise a certain sum of money due to the Department of Rehabilitation of the Delhi Administration and had been purchased by the appellant in the said auction. The sale was confirmed by the Lt. Governor of Delhi on 23-12-1971 and the possession of the property was given to the appellant/auction purchaser.

Section 91 of the Punjab Land Revenue Act (17 of 1877) as applied to Delhi, provides for making an application to set aside a sale within 30 days from the date of the sale. However, respondent no. 1 filed an application under that section on 19-2-1972 and pleaded condonation of delay under section 5 of the Limitation Act, 1963, on the ground that he (respondent no. 1) came to know of the sale only on 9-2-1972.

It was argued before the Delhi High Court that section 5 of the Limitation Act was not applicable because the Lt. Governor before whom the application was filed was not a court but a *persona designata*. In support of this contention, reliance was placed on a Full Bench judgement of the Kerala High Court.[1]

Dissenting from the Kerala view, the Delhi High Court held that the Kerala view had been over-ruled by the Supreme Court.[2]

43.17 Summarising the law on the subject after the *Kerala State Electricity Board's* case, the High Court said :—

> "We feel that the argument based on the contention that the application under a special law must necessarily be to a court, before the provisions of Limitation Act are attracted is not borne out by any precedent or principles of law. This argument does not appreciate the difference between case where there is no period prescribed by a special law and where it is so provided. In the former instance, a party will have to invoke Article 137 of the Schedule to Limitation Act, 1963, and this can be resorted to for filing an application under any Act, vide A.I.R. 1970 S.C. 209, A.I.R. 1977 S.C. 282. Such an application alone is required to be filed before a civil court. But in case of latter kind—as in the present case—where the period is prescribed under a special law like the Act, Article 137 of the Schedule to the Limitation Act is not being resorted to at all and the requirement of application being to a court does not necessarily arise."

43.18. Even prior to the *Kerala State Electricity Board's case*, the Supreme Court had applied the provisions of the Limitation Act in computing the period of limitation under a special law like the U.P. Sales Tax Act.[3]

43.19. Considerable difficulties have been experienced in deciding whether a functionary acting under a statute is a 'court' or not, for the purposes of enactments using that expression. The Supreme Court has held[4] that the Registrar of Cooperative Societies under the Bihar and Orissa Cooperative Societies Act, 1935 was, to all intents and purposes, a court discharging the same functions and duties in the same manner as a court of law is expected to do. In a Punjab case[5], it was held that a Commissioner under the Workmen's Compensation Act

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[1] *Jokkim Fernandes* v. *Amina Kuphi Umma*, A.I.R. 1974 Ker. 162.
[2] *Kerala State Electricity Board* v. *T. P. Kunhalinumma* A.I.R. 1977 S.C. 282 para 21.
[3] Commissioner of Sales Tax, U.P. v. Madan Lal, A.I.R. 1977 S.C. 523.
[4] *Jugal Kishore* v. *Sitamarhi Central Cooperative Bank Ltd.*—A.I.R. 1967 S.C. 1494.
[5] *Ram Sarup* v. *Gurdeb Singh* (1969) Labour and Industries Cases 371 (Punjab).

is not a 'civil court', within the meaning of section 110F of the Motor Vehicles Act, 1939.

Article 136 of the Constitution—Case Law.

43.20. There are numerous decisions under article 136 of the Constitution on the construction of the expression "tribunal". The earliest case was *Bharat Bank Ltd.* v. *Its Employees.*[1] in which it was observed that tribunals adorned with the same trappings as courts which derive their power from the State and are exercising the judicial power of the State come within the scope of Article 136. This principle has been followed in later cases, [2-3] but the tests were with reference to statutes other than the Limitation Act.

43.21. The result is, that while the Bombay High Court[4], concluded that the Commissioner of Workmen's Compensation is a "court", the Madhya Pradesh High Court[5] took a contrary view.

43.22. A single Judge of the Calcutta High Court[6] has listed no less than 11 conditions or criteria on whose touchstone an enactment creating a statutory authority will have to be scrutinised, in order to decide whether that authority is a "Court". According to him, on the basis of the judicial decisions, it would appear that a tribunal or authority shall be a court if the following conditions, in effect, are present: (i) the source of power of the tribunal or authority is the State as the fountain of justice and it is charged with and exercises the inherent judicial powers of the State; (ii) the jurisdiction to adjudicate the *lis* between contending parties involving their rights is conferred on it by law and does not depend on any voluntary act or submission of parties; (iii) the right to move the tribunal or authority is conferred on the aggrieved party by law; (iv) the proceeding on the *lis* commences by presentation of the case by the aggrieved party with a corresponding right on the other party to meet the case; (v) in adjudicating the dispute the tribunal or authority follows an established or prescribed procedure; (vi) if the dispute is on a question of fact, an opportunity to the parties is given to adduce evidence and the facts are to be ascertained through evidence, supplemented by argument; (vii) if the dispute is on questions of law, there will be a submission of arguments on such questions of law by the parties before such tribunal or authority; (viii) the tribunal or authority, in arriving at its decision, acts judicially and according to law, following the principles of natural justice and fair play and not on any other consideration of policy; (ix) there is a decision wholly disposing of the matter by a finding upon the facts and disputed questions of law (if required); (x) finality (subject to appeal, if provided) and authoritativeness of the decisions, as being binding on parties; (xi) enforceability of the decisions by the tribunal or authority through the process of law.

No change needed.

43.23. The above exposition has been quoted as of some interest for understanding the expression "Court". We do not, of course, propose to introduce any definition of 'court' in the Act of Limitation.[7]

No change needed in article 137.

43.24. Nor do we recommend any change in article 137 on the above point.

[1] *Bharat Bank Ltd.* v. *Its Employees*, A.I.R. 1950 S.C. 188.
[2] *Engineering Mazdoor Sabha* v. *Hind Cycles Ltd.* A.I.R. 1963 S.C. 874.
[3] *A.C. Companies Ltd.* v. *P. N. Sharma*, A.I.R. 1963 SC. 1595.
[4] *Rajvabi* v. *Mackinnon Mackenzie & Co. P. Ltd.* A.I.R. 1976 Bombay 278.
[5] *Yashwant Rao* v. *Sampat*, A.I.R. 1979 M.P. 21 (F.B.)
[6] *Indian Iron and Steel Co.* v. *Shish Ram*, 83 Calcutta Weekly Notes 786.
[7] Certain points relevant to the concept of court have been dealt with under sec. 12.

CHAPTER 44

SUMMARY OF RECOMMENDATIONS

We summarise in this Chapter the recommendations for amendment of the law contained in the preceding Chapters.

Sections

1. In section 3(2)(a)(ii), the expression "paper" should be replaced by the expression "indigent person" (paragraph 3.2).

2. In section 4 (Court closed on the last day of the period of limitation), a clarification should be made regarding the combined applicability of sections 4 and 14. (Section 14 deals with infructuous legal proceedings) (paragraph 4. 3, read with paragraph 14.23).

3. In section 5, an Explanation should be added to the effect that erroneous legal advice given by a legal practitioner is a sufficient cause within the meaning of the section for admitting an appeal or application after the expiry of the period of limitation (other than an application for execution), if certain conditions are satisfied (paragraph 5.14).

4. Section 7 (legal disability of one person) should be redrafted to eliminate the ambiguity caused by the present use of the expression "time will not run" (paragraph 7.9).

5. Section 10, Explanation (which provides that for the purposes of the section any property comprised in certain endowments is deemed to be property vested in trust for a specific purpose and the manager of the property is deemed to be the trustee) should be extended to Sikh and Jain endowments. Further, two new sub-sections should be added to the section, to deal with the case where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as a share on a distribution of trust property made in good faith (paragraph 10.8).

6. Section 11 (suits on foreign contracts) should be widened so as to cover—(a) proceedings other than suits, and (b) all causes of action arising in a foreign country (instead of being confined to foreign contracts, as at present) (paragraph 11.20).

7. In section 12 (exclusion of time in legal proceedings), the following changes should be made:—

(a) the marginal note should be revised as recommended (paragraph 12.13);

(b) the Explanation should be revised by redrafting it so as to provide that any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be regarded as time requisite for obtaining the copy within the meaning of the section (paragraph 12.13);

(c) a new Explanation should be added to provide for a situation where there is a legal impediment to the preparation of a decree or order on account of a direction in the judgment or non-compliance with a direction or other legally permissible reason (paragraph 12.13);

(d) the expression "decree" for the purposes of this section should be defined to include the last paragraph of the judgment, where a copy of such paragraph is proposed to be used under Order 20, rule 6A, Code of Civil Procedure, 1908 (paragraph 12.13);

(e) a clarificatory Explanation should be added, declaring that the section applies to proceedings before quasi-judicial tribunals (paragraph 12.13).

8. In section 13 (exclusion of time taken in prosecuting an application for leave to sue or appeal as a pauper), the expression "indigent person" should be substituted for the expression "pauper" (paragraph 13.4).

9. In section 14 (infructuous legal proceedings), the following amendments should be made:—

(a) The explanation should be enlarged, so as to provide that the time reasonably necessary for performing journey from the place where the former civil proceeding was pending to the proper court is deemed to be time during which the former civil proceeding was pending (paragraph 14.23).

(b) A new sub-section (2A) should be inserted in section 14, to provide that in computing the period of limitation for any appeal, the time during which the appellant has been prosecuting with the diligence another civil proceeding, whether in a court of first instance or in a court of appeal or revision against the same party for the same relief, shall be excluded, where such a proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it (paragraph 14.23).

(c) In order to remove the controversy as to the combined applicability of sections 4 and 14, an Explanation should be added to section 4 to provide that for the purposes of that section, the word 'court' includes a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain the suit, appeal or application, as the case may be, provided the suit, appeal or application was prosecuted in good faith in that court.

(Paragraph 14.23, read with paragraph 4.3.).

10. With reference to section 15 (defendant's absence from India), amendments should be made as under:—

(a) An Exception should be inserted below section 15(5), to the effect that section 15(5) does not apply to a period during which both the parties were residing in one and the same foreign country and the plaintiff was aware of such residence of the defendant and there were, in the foreign country, properly constituted courts or tribunals to which the parties had, or could have had, recourse for enforcing the cause of action (paragraph 15.19).

(b) An Explanation should be added to the section to provide that the attachment of a decree does not amount to a stay of execution (paragraph 15.19).

(c) Another Explanation should be added to provide that a defendant shall not be deemed to be absent from India during any period during which he had to the plaintiff's knowledge, a duly constituted agent in India

authorised to institute and defend legal proceedings on his behalf in India (Paragraph 15.19).

(d) As recommended by the Law Commission in its 13th Report on the Indian Contract Act, 1872, a new section should be inserted in that Act (the Contract Act) for resolving the controversy relating to the position of a decree obtained against one promisor out of a number of joint promisors (paragraph 15.19).

11. In section 17 (fraud and mistake), an Explanation should be inserted to provide that for the purposes of this section, "fraud" includes conduct on the part of the defendant or the opposite party, as the case may be, towards the plaintiff or the applicant, as the case may be, which, having regard to some special relationship between the parties, was unconscionable (paragraph 17.17).

12. In section 19 (part payment of a debt), the following amendments should be made:—

(a) By suitable re-drafting, it should be emphasised that the section is confined to a suit or application for the recovery of a debt or legacy (paragraph 19.12).

(b) The present Explanation to the section should be enlarged so as to provide that the Explanation covers every type of immovable property, and also to provide that it covers not only the case of a mortgage, but also the case of a charge-holder in possession of the property (paragraph 19.12).

(c) Annex Explanation should be added to section 19, to provide that where payment on account of a debt or interest on a legacy is sought to be made by a negotiable instrument, then the tender of the negotiable instrument if accepted by the payee in such payment, amoutns to "payment" of the amount for the purposes of this section, whether or not the negotiable instrument is subsequently honoured (paragraph 19.12).

13. In section 21 (effect of subsequent addition of parties), the following changes should be made:—

(a) The provisions of the section (at present confined to suits), should be extended to the addition of a party after the making of an application (paragraph 21.34).

(b) An Explanation should be inserted below sub-section (1), to provide that a person is deemed to have been made a party when the application for making him a party is made to the court. This will be subject to the present proviso to section 21(1), empowering the court to direct, in case of a mistake made in good faith, that as regards a newly added party the proceedings shall be deemed to have been instituted on any earlier date (paragraph 21.34).

(c) By amending section 21(2), it should be provided that the section does not apply to a suit or application by or against the members of a joint Hindu family to enforce a right or liability relating to the affairs of the joint Hindu family, where one or more of the members of the family, not originally impleaded, is, in the course of the suit or application, brought on the record at the instance of the other party (paragraph 21.34).

14. Section 22 (continuing wrongs) should be re-drafted so as to provide that it applies in the case of a continuing breach of contract and in the case of a wrong independent of contract, and also that it applies whatever be the relief claimed (paragraph 22.13).

15. Section 23 (act not actionable without special injury) should be amended by substituting the words "specific damage" for the words "specific injury", and also by adding an Explanation to the effect that the section applies to a wrong which constitutes a breach of contract, as also to an act which constitutes a wrong independent of contract (paragraph 23.15).

16. With reference to section 29 (savings regarding section 25, Contract Act, special and local laws, proceedings under a law relating to marriage and divorce and the Easements Act), the following recommendations have been made:—

(a) Section 29(3) should be re-drafted as under:

> "(3) Save as otherwise provided in any *enactment* for the time being in force *providing for the dissolution of a marriage by a decree of divorce, or for the grant of other matrimonial relief*, nothing in this Act shall apply to any suit or other proceeding *under any such enactment.*" (Paragraph 29.32).

(b) The Central Government should take action for specifically repealing the provisions in the erstwhile French and Portguese Civil Codes governing limitation in force in the Union territories of Pondicherry and Goa respectively, after ensuring that no legal hiatus is created by such a repeal (Paragraph 29.17).

(c) The State Governments of Tamil Nadu and Kerala should examine the points raised in certain judgments (referred to in Chapter 29), concerning the period of limitation provided by the Travancore Limitation Act (IV of 1100 N.E.), with a view to ensuring that no hardship is caused by the extended period of limitation allowed by section 20(1) of the Act in relation to deeds of further charge (paragraph 29.23).

Articles 1 to 5 : Suits relating to accounts

17. No changes are recommended in articles 1 to 5 (Chapter 31).

Articles 6 to 55 : Suits on contracts.

18. Article 7 (suit for wages not otherwise expressly provided for) should be amended as under:—

(a) where the suit is for relief consequential on the setting aside of an order of dismissal or removal (from service), the starting point for limitation should be the date when the dismissal or removal (from service) is set aside (paragraph 32.8).

(b) an Explanation should be added to provide that "wages" includes salary and pension (paragraph 32.8, reads with paragraph 32.3).

19. Articles 10 and 11 (certain suits against carriers of goods for compensation should be revised as recommended in detail (paragraph 32.17).

20. A new article 22A should be inserted to deal specifically with a suit for money deposited under an agreement that it shall be payable on the expiry of a stipulated period, including the money of a customer in the hands of his banker so payable. The time limit should be 3 years, to be computed from the date of expiry of the stipulated period (paragraph 32.35).

Articles 56 to 58 : Suits relating to declarations

21. In article 57 (the general article relating to suits to obtain declaration about invalidity, etc. of an adoption), the first column should be confined to suits to obtain such a declaration where no further relief is sought (paragraph 33.29).

22. Article 58 (suit to obtain any other declaration) should also be confined to a suit in which the plaintiff does not seek further relief (paragraph 33.35).

Articles 59-60 : Suits relating to decrees and instruments

23. As regards article 60 (suit to set aside a transfer of property made by the guardian of a ward), in order to resolve the controversy as to the coverage by the article of a *de facto* guardian, attention has been drawn to the 83rd Report of the Law Commission on the Guardians and Wards Act, 1890. In paragraph 4.13 of that Report a recommendation has been made for adding to section 4(2) of that Act, a suitable Explanation which will make it clear that a *de facto* guardian is included within the definition of "guardian" in that Act. Implementation of this recommendation is expected to eliminate the controversy on the subject in relation to the Limitation Act also (paragraph 34.6).

Articles 61 to 67 : Suits to immovable property

24. No changes are recommended in articles 61 to 67 (Chapter 35).

Articles 68 to 71 : Suits relating to movable property

25. No changes are recommended in articles 68 to 71 (Chapter 36).

Articles 72 to 91 : Suits relating to tort.

26. In regard to article 72 (suit for compensation for doing or omitting to do an act alleged to be in pursuance of any enactment in force for the time being), the recommendation made by the Law Commission in its 3rd Report (Report on the Limitation Act, 1908) to increase the period of limitation from one year to three years is re-iterated (paragraph 37.6).

27. Article 74 (suit for compensation for a malicious prosecution) should be amended in regard to the starting point of the period of limitation. At present, the starting point is expressed as under:—

"When the plaintiff is acquitted or the prosecution is otherwise terminated."

The recommendation made is to insert the word "finally" before the word "terminated" (paragraph 37.17).

28. Article 75 (suit for compensation for libel) and article 76 (suit for compensation for slander) should be replaced by one single articles, providing a time limit of one year for a suit for compensation for defamation. The starting point

should be—"when the defamatory statement is published, or where the defamatory statement is not published in a permanent form, when it comes to the knowledge of the plaintiff" (paragraph 37.26).

29. Article 77 (suit for compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter) should be revised as under; so as to eliminate the element of loss of service:—

"77. For compensation for *seduction:* One year. When the *seduction occurs.*" (paragraph 37.33).

30. Article 78, which prescribes a period of limitation of one year for a suit "for compensation for inducing a person to break a contract with the plaintiff," should be amended by adding the word "wrongfully" before the words "inducing a person to break a contract with the plaintiff" (paragraph 37.37).

31. Article 79 (suit for compensation for illegal, irregular and excessive distress) should be amended so as to alter the starting point of limitation. At present the starting point is the date of the distress. This should be revised so as to substitute the date of release of the distress (paragraph 37.43).

32. Article 80 (suit for compensation for wrongful seizure of movable property under legal process) should be revised so as to alter the starting point of limitation. At present, the starting point is the date of the seizure. This should be revised so as to substitute the date of release from the seizure (paragraph 37.43).

33. Articles 81 to 83 (certain suits under the Legal Representatives' Suits Act, 1855 and the Indin Fatal Accidents Act, 1855) may be examined when the Indian Sucession Act, 1925 is taken up for revision (paragraph 37.50).

34. Article 88 (suit for compensation for infringing copyright or any other exclusive privilege), which provides a time limit of three years; to be computed from the date of the infringement, should be revised in two directions.

(i) In the first place, the nature of the suit (in the first column of the article) should be described as a suit "for compensation for infringing copyright or right to other intellectual property, or any other exclusive privilege, or for restraining such infringement".

(ii) Secondly, the period of limitation (three years) should be counted not from the date of the infringement (as at present), but from the date when the infringement first becomes known to the plaintiff (paragraph 37.64).

35. Article 90 (suit for compensation for injury caused by an injunction wrongfully obtained) should be enlarged so as to cover compensation for injury caused by an attachment wrongfully obtained (paragraph 37.68).

Articles 92 to 96 : Suits relating to trusts and trust property

36. Articles 94, 95 and 96 (suits to set aside a transfer of property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment made by a manager thereof for a valuable consideration and suits by such a manager to recover possession of such property which has been transferred by a previous manager for valuable consideration) should be extended so as to cover Sikh and Jain endowments (paragraps 38.8 and 38.11).

Articles 97 to 112 : Suits relating to miscellaneous matters

37. Article 98 (suit by a person against whom an order referred to in Order 21, rule 63, C.P.C. or Order 21, rule 103, C.P.C. or under section 28 of the Presidency Small Cause Courts Act, 1882 has been made, to establish the right which he claims to the property comprised in the order) should, in its first column, be revised so as to apply to a suit by a person against whom an order referred to in Order 21, rule 58(5), C.P.C. has been made or an order under section 28 of the Presidency Small Cause Courts Act, 1882 has been made, to establish the right which he claims to the property comprised in the order, where such a suit is permissible in law. The amendment has been recommended in the light of the altered scheme of the relevant provisions in Order 21, rules 58 to 63 of the Code of Civil Procedure, 1908 after the amendment of the Code in 1976 (paragraph 39.11).

38. Article 99 (suit to set aside a sale by a civil or revenue court or a sale for arrears of Government revenue or for any demand recoverable as such arrears) should, in its first column, be revised so as to describe the suit as a suit to set aside—

(a) a sale by a civil or revenue court, including a sale of the coparcenary property of a Hindu undivided family governed by the Mitakshara law in execution of a decree obtained against the father, or

(b) a sale for arrears of Government revenue or any demand recoverable as such arrears. (paragraph 39.18)

39. Article 100 (suit to alter or set aside any decision or order of a civil court in any proceeding other than a suit for any act or order of an officer of Government in his official capacity) prescribes a time limit of one year, to be computed from the date of the final decision or order by the court or the date of the act or order of the officer, as the case may be. The third column should be revised, so as to substitute the following as the starting point:—

"The date of communication of the final decision or order by the court, or the date of communication of the act or order of the officer or, where there has been no such communication, the date on which the plaintiff first had knowldge of the act or order of the officer, as the case may be". (paragraph 39.23).

40. Article 102 (suit for property which the plaintiff had conveyed while insane) should be revised by increasing the present period of three years to six years (paragraph 39.30).

41. Article 110 (suit by a person excluded from a joint family property to enforce a right to share therein) should be in the first column verbally amended by describing the suit as one by a person, "totally and absolutely excluded" from a joint family property, to enforce a right to share therein (paragraph 39.46).

Article 113 : Suits for which there is no prescribed period

42. No change is recommended in article 113 (the residuary article relating to suits) (Chapter 40).

Articles 114 to 117 : Appeals

43. Article 114 (appeal from an order of acquittal) should be revised, by making verbal changes as recommended (paragraph 41.2).

(Chapter 44—Summary of Recommendations.)

44. Article 115 (appeals under the Code of Criminal Procedure, 1973, from certain sentences and orders) should be revised, by making verbal changes as recommended (paragraph 41.4).

45. Article 116 (appeals under the Code of Civil Procedure, 1908) provides for two different periods of limitation for civil appeals from decrees and orders. The period, at present, is—

(a) 90 days for appeal to a High Court; and

(b) 30 days for appeal to any other High Court.

The recommendation made in the Report of the Law Commission in its 3rd Report (Report on the Limitation Act, 1908) was to reduce the period for appeal to the High Court to 30 days. The recommendation is re-iterated in the present Report (paragraph 41.6).

Article 118 to 136 : Applications in specified cases

46. Article 118 (application for leave to appeal and defend a suit under summary procedure) prescribes a time limit of 10 days, to be computed from the date when the summons is served. There is a proposal by the Government of Maharashtra for increasing the period to 30 days, connected with a proposal to simplify the provisions of the Code of Civil Procedure, 1908 relating to summary procedure (Order 37, C.P.C.) so as to reduce the various stages of trial under that procedure. The Commission is of the view that the proposal of the State Government may be viewed favourably in principle, and if the working of the amended procedure in the State of Maharashtra (when the amendment materialises) is found to be successful, a similar amendment can be taken up on an all-India basis in the Code of Civil Procedure, 1908 and in article 118, Limitation Act, 1963 (paragraph 42.7).

47. In the discussion relating to article 119 (certain applications under the Arbitration Act, 1940), the recommendation made in the 76th Report of the Law Commission, page 53 (Report on the Arbitration Act, 1940) for amending section 30(b) of that Act, in order to clarify the scope of the expression "or is otherwise invalid" has been re-iterated in the present Report (pragraph 42.12).

48. Article 127 prescribes a period of limitation of 60 days for an application to set aside a sale in execution of a decree, including any such application made by a judgment debtor. [This is the position after the amendment of the article in 1976]. However, in Order 23, rule 92(2), Code of Civil Procedure, 1908, the time limit for making the requisite deposit for setting aside the sale is 30 days, thereby creating a discrepancy with article 127 of the Limitation Act. The discrepancy between the two sets of provisions should be removed by increasing the time limit in Order 21, rule 92(2) of the Code of Civil Procedure to 60 days (paragraph 42.35).

49. Article 130 (application for leave to appeal as a pauper, made to various courts) should be amended—

(a) by prescribing, in the second column, the same period of limitation as is applicable to the appeal in respect of which the leave is sought, and

(b) by substituting, for the word "pauper", the words "indigent person" (paragraph 42.43).

(Chapter 44 Summary of Recommendations.)

50. Article 131 (application to a court for revision) at present provides that the period of limitation (90 days) is to be computed from the date of the decree, order or sentence sought to be revised. The recommendation is that the period should be computed from the date when the applicant for revision had knowledge of the decree, order or sentence (paragraph 42.46).

51. Article 132 (application to a High Court for certificate of fitness to appeal to the Supreme Court under the specified provisions of the Constitution) should, in its first column, be revised by carrying out certain verbal changes as recommended in the Report— a recommendation made in view of the changed phraseology of the relevant constitutional provisions (paragraph 42.49).

52. Article 133 (application to the Supreme Court for special leave to appeal) should be revised as recommended, in view of certain anomalies brought out in regard to cases where the High Court had orally refused the grant of a certificate of fitness on the very date on which the judgement sought to be appealed from was pronounced by the High Court (paragraph 42.56).

Article 137

Applications for which no specific period is provided

53. No changes are recommended in article 137 (Chapter 43).

K.K. MATEHEW.....*Chairman*
NASIRULLAH BEG.....*Member*
J.P. CHATURVEDI.....*Member*
P.M. BAKSHI.....*Member*
(Part-time)

Dated: February 28, 1983.

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