THE LAW COMMISSION

(LAW COM. No. 19)

PROCEEDINGS AGAINST ESTATES

ADVICE TO THE LORD CHANCELLOR UNDER SECTION 3(1)(*e*) OF THE LAW COMMISSIONS ACT 1965

Presented to Parliament by the Lord High Chancellor
by Command of Her Majesty
April 1969

LONDON
HER MAJESTY'S STATIONERY OFFICE
3s. 0d. net

Cmnd. 4010

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*

Mr. L. C. B. Gower.

Mr. Neil Lawson, Q.C.

Mr. N. S. Marsh, Q.C.

Mr. Andrew Martin, Q.C.

Mr. Arthur Stapleton Cotton is a special consultant to the Commission. The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Lacon House, Theobald's Road, London, W.C.1.

CONTENTS

LAW COMMISSION

PROCEEDINGS AGAINST ESTATES

Advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965 on a proposal for the reform of the law made by The Law Society and others

To the Right Honourable the Lord Gardiner,
the Lord High Chancellor of Great Britain

PART I—INTRODUCTION

In November 1965 The Law Society informed the Law Commission that their Council had had the " six months from probate " rule under consideration and thought that it should be reformed. This rule, laid down in section 1(3), as amended, of the Law Reform (Miscellaneous Provisions) Act 1934, in effect prohibits the bringing of proceedings in tort against the estate of a deceased person unless those proceedings had been instituted before the date of the death or were instituted within six months of the taking out of a grant of representation by the personal representatives of the deceased. If one of these conditions is not fulfilled, the right to bring an action becomes statute-barred.

2. A year later, the Solicitor to International Computers Ltd. also drew the Commission's attention to the hardship that can be caused by this rule and also to the unsatisfactory position revealed by the judgment of Diplock J. at first instance in *Airey* v. *Airey*.[1] Here it was held that proceedings in tort would not be statute-barred—however long the period that had elapsed since the cause of action originally accrued—provided that proceedings were brought within six months of the grant of representation.[2] It would be strange if a right of action which had become statute-barred could be revived by the grant of representation to the tortfeasor's estate.

3. The general law of limitation of actions (of which this rule is only a minor aspect) was not included in the First Programme of Law Reform of the Law Commission only because we believed that our resources would not be sufficient to enable us to undertake a thorough review of it in the near future. We did, however, draw the attention of the Committee on Personal Injuries Litigation under the chairmanship of Lord Justice Winn to the specific problem of limitation of actions against deceased tortfeasors, but that Committee doubted whether the matter fell within their terms of reference.[3] Accordingly, we decided that, in view of its importance, this aspect of the subject ought to be dealt with by us even if it were not possible to consider the whole topic of limitation of actions.

---

[1] [1958] 1 W.L.R. 729 at p. 734.

[2] This point was referred to by the Court of Appeal but left undecided: [1958] 2 Q.B. 300 at p. 315.

[3] 1968 Cmnd. 3691. Although for this reason the Winn Committee made no recommendations on the six months' rule, they nevertheless made a number of suggestions for reform which are contained in paragraphs 342–350 of their Report and which are dealt with in paragraphs 15 (*c*), (*d*) and n. 24 below.

4. This advice, therefore, is concerned in the first place with the limitation of actions in tort against deceased tortfeasors. As a consequence of the study on this subject, problems were raised in discussion concerning proceedings against estates generally. Accordingly, we also deal with the problems which may arise in any type of action where the death of the proposed defendant is unknown to the plaintiff or where his death is not followed by a grant of representation. Our advice in this respect is not confined to proceedings in tort.

5. In the course of this examination, in addition to The Law Society, we have consulted the Bar Council, the British Insurance Association, Lloyd's, the Masters of the Queen's Bench Division and the Scottish Law Commission. We are grateful for all the help we have received.

PART II—THE PRESENT LAW

6. The common law before 1934 was summed up in the maxim "*actio personalis moritur cum persona*": that is to say, the death of either the potential plaintiff or the potential defendant extinguished a right of action.[4] But this rule was subject to numerous exceptions, e.g., in the case of actions for breach of contract or for torts affecting property.[5] Actions for torts affecting the person could not be brought once the tortfeasor had died. However, this defect in the law became intolerable with the growth of the number of road accidents in the years following the first world war and in 1934 Lord Sankey L. C. referred this common law rule to the Law Revision Committee to consider how it might require revision in modern conditions. They reported[6] recommending abrogation of the maxim and, in consequence, the Law Reform (Miscellaneous Provisions) Act 1934 was passed. In section 1(1) of that Act it is provided that, upon the death of any person, all causes of action subsisting against or vested in the deceased survive against or for the benefit of his estate. The common law position was thus reversed with a few specific exceptions, viz., actions for defamation, seduction, enticement and damages for adultery, which continued to abate on death.

7. The Law Reform (Miscellaneous Provisions) Act 1934 enacted its own period of limitation for causes of action in tort which survive by virtue of section 1(1). In section 1(3) it was provided that:

> "No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either—
>
> (*a*) proceedings against him in respect of that cause of action were pending at the date of his death; or
>
> (*b*) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation."

That removed the mischief which it was sought to remedy, namely, that of the impossibility of suing a negligent car driver who was himself killed in the accident caused by his negligence. As the Report of the Law Revision Committee[7] shows, the time limit of six months after the taking out of representation,

[4] This rule must be distinguished from the common law rule that the death of a human being cannot be complained of as an injury in a civil court, which is subject to the exceptions created by the Fatal Accidents Acts 1846–1959.

[5] At common law the personal representatives could be sued for a contract debt owed by the deceased and for a tort committed by the deceased which resulted in the enrichment of his estate. S. 26 (5) of the Administration of Estates Act 1925 (replacing a provision in the Civil Procedure Act 1833) enabled an action to be maintained against the personal representatives for any tort committed by the deceased in respect of the plaintiff's property. A similar period of limitation to that contained in s. 1 (3) of the 1934 Act applied. It must be noted, however, that this was not a survival of a cause of action but a grant of a new right of action.

[6] Interim Report of the Law Revision Committee (1934 Cmd. 4540).

[7] See 1934 Cmd. 4540, paragraph 11. "We think that the law should be that the estate is liable, just as the deceased would have been, if he had not died, though it is desirable in the interests of the due administration of a deceased man's estate that there should be a period of limitation of six months after representation is taken out."

instead of a longer period, was chosen for fear that the possibility of late claims would delay the due administration of the estates of deceased tortfeasors.

8. As the years passed it came to be seen that the provision that proceedings could only be brought in respect of torts committed within six months before the alleged tortfeasor died was itself productive of hardship. Accordingly, the Law Reform (Limitation of Actions, &c.) Act 1954, section 4, abolished this requirement and repealed the relevant words in section 1(3)(*b*) of the 1934 Act.[8] The present position, therefore, is that an action in tort must either have been pending at the time of the death (that is to say, the writ must already have been issued) or it must be commenced not later than six months after the personal representative took out a grant of representation. No such special period applies to a cause of action in contract or any other action.

9. The normal periods of time within which an action must be brought are contained in the Limitation Act 1939 (as amended). Under section 2(1) of the 1939 Act the normal limitation period in tort and in contract is six years (unless the contract is under seal, in which case the period is twelve years). Where, however, the action is for damages for negligence, nuisance or breach of duty and the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, the period within which the action must be brought is three years.[9]

10. These limitation periods are extended in a number of cases:

(1) Under section 22 of the 1939 Act, if when any right of action accrues the plaintiff is under a disability (that is to say, is either an infant or of unsound mind), the action may be brought within six years (or three years in the case of personal injuries claims) after the disability ceases or the plaintiff dies, whichever first occurs.

(2) Section 23 of that Act provides for a fresh accrual of a cause of action upon an acknowledgment or part payment by the defendant (but this has no application to a claim for an unliquidated sum by way of damages).

(3) The running of the limitation periods may be postponed by virtue of section 26 if the right to bring an action is concealed by the fraud of the defendant or the action is based upon the fraud of the defendant or is for relief from the consequences of a mistake.

(4) Sections 1 and 2 of the Limitation Act 1963 enable a claimant in an action for damages for personal injuries to apply for the leave of the court to bring an action outside the normal three-year limitation period, provided that he does so within twelve months of discovering material facts of a decisive character.[10]

---

[8] The 1954 Act came after the Report of the Committee on The Limitation of Actions (the Tucker Committee) 1949 Cmd. 7740. That Committee recommended (paragraph 33) that proceedings should be maintainable in respect of a cause of action in tort which arose two years before the death of the deceased with a discretion in the court to extend the period to six years (which was in line with its main recommendation for the limitation period for actions in respect of personal injuries). This was not followed by Parliament.

[9] S. 2(1) of the 1939 Act as amended by s. 2(1) of the Law Reform (Limitation of Actions, &c.) Act 1954.

[10] This Act was passed to carry out the recommendations in the Report of the Committee on Limitation of Actions in Cases of Personal Injury (under the chairmanship of Mr. Justice Edmund Davies) which considered the law relating to cases where personal injuries or diseases were slow to manifest themselves (1962 Cmnd. 1829).

11. In so far as actions in tort are concerned, the limitation period (either the six or the three years) can be reduced by the operation of the " six months from probate " rule. If the prospective defendant dies, the writ must be issued within six months from the grant of probate or administration, however much of the normal period would have remained. This is undoubtedly so, but what is less certain is whether, once the right to bring an action in tort has become statute-barred as a result of the normal limitation period, it can be revived by the six months' rule. Diplock J., sitting at first instance in *Airey* v. *Airey*,[11] held in effect that the right to bring such an action could be revived. Section 32 of the Limitation Act 1939 provides that the Act shall not apply to any action for which a period of limitation is prescribed by any other enactment. Diplock J. held that section 1(3) of the Law Reform (Miscellaneous Provisions) Act 1934 prescribed such a period of limitation and that, therefore, the six-year period in section 2(1) of the 1939 Act was excluded by the six months' rule.

> " It would seem, therefore, that today, although so long as a tortfeasor lives no action can be brought against him for damages for personal injuries after three years have passed since the cause of action accrued, the moment he dies, however long after the cause of action arose, an action can be brought for the tort against his personal representative, since the only limitation period for such an action is six months after the appointment of his personal representative. A cause of action does not cease to exist because a limitation period has expired, and the original cause of action would therefore be one subsisting against the tortfeasor at the time of his death, and would survive against his estate by virtue of s. 1(1) of the Act of 1934."[12]

12. Subsequently the Court of Appeal also held[13] that the 1934 provision constituted a period of limitation and that, therefore, the six-year period prescribed by section 2 of the 1939 Act was excluded. The Court of Appeal accepted that, if the normal limitation period had not expired at the date of the tortfeasor's death and provided that the action was brought within the six months from grant of representation, the action could still be maintained even though it would by then have been statute-barred if the deceased were still alive. The normal period could thus be extended, but the Court expressly left undecided the question of whether it followed that actions which were statute-barred in the lifetime of the tortfeasor could revive on his death.[14]

13. In order that an action may be brought within the relevant limitation period it is only necessary that the writ should be issued before the expiration of the time limit although the actual proceedings may not be heard for some time. When an action is to be brought against a deceased person it must be commenced against his estate and, therefore, the writ must be issued against his personal representatives. This can cause difficulties in two respects:

(1) If the executors named in the will have not begun to carry out their duties and are not prepared to act, or if no letters of administration have been granted, there are no personal representatives against whom a writ can be issued. However, until letters of administration have

[11] [1958] 1 W.L.R. 729.
[12] Diplock J. at p. 734.
[13] [1958] 2 Q.B. 300.
[14] At p. 315.

been granted the property of the deceased vests in the President of the Probate, Divorce and Admiralty Division, and, therefore, in cases where the deceased dies intestate there is nothing to prevent the plaintiff from issuing a writ against the President. In any event, where there are no personal representatives the court has power to appoint any person as administrator, whether generally or in a limited capacity, where it appears to the court to be necessary or expedient.[15] Under this power the court may appoint an administrator[16] upon the application of an intending plaintiff who is unable to sue until such an appointment is made because there are no personal representatives willing to act.[17]

(2) It appears that a writ issued against a deceased person (naming him as a defendant) is a nullity as it is a general principle of High Court jurisdiction (other than in actions *in rem* in the Admiralty Division) that the court is able to exercise its jurisdiction over the person of the defendant. There is, however, no judicial authority directly supporting this proposition but if it be correct the writ could not be re-issued in an amended form or validly served and a fresh writ would have to be obtained.[18] If the prospective plaintiff and his advisers do not know that the defendant has in fact died this could result in the action becoming statute-barred because the date upon which the action will have commenced will be the date of the issue of the second writ.

---

[15] S. 162(1)(*b*) of the Supreme Court of Judicature (Consolidation) Act 1925 (as amended by s. 9 of the Administration of Justice Act 1928).

[16] Where the deceased has left a will, the order for administration will be with the will annexed.

[17] In the case of *In the Estate of Simpson* (*Deceased*) [1936] P. 40 the court appointed as administrator the nominee of an intending plaintiff who wished to sue upon a cause of action which survived by virtue of s. 1(1) of the 1934 Act but where the only persons entitled to a grant of letters of administration refused to act.

[18] Under R.S.C. O. 20 r. 5 (1965 revision), if the writ were valid, the court may give leave to amend it by correcting the name of a party notwithstanding that the application is made after the relevant period of limitation has expired. In addition, O. 15 r. 6 provides that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court is empowered to order any person who ought to have been joined as a party to be added as a party to the proceedings. In *Tetlow* v. *Orela Ltd.* [1920] 2 Ch. 24 Russell J. held that he had no power to substitute the name of a new plaintiff where a writ was issued on behalf of a plaintiff who had died before the issue of the writ, and it is likely that the same principle would be held to apply where a writ had been issued naming a deceased person as defendant.

PART III—THE NEED FOR REFORM

14. The present law as described above can produce hardship or injustice in practice in a number of ways:

(*a*) The six months' limitation period can be too short if the tortfeasor dies at the time of the accident or soon afterwards. In a case where the plaintiff has been very seriously injured or where the seriousness of the injury is slow to manifest itself (e.g., in the case of industrial disease or an apparently slight injury which later proves to be serious) the period may have expired before a writ can be issued. The six months' period seems unduly short when one remembers that the normal period is either three years or six.

(*b*) Any period brought into play merely because of the death of the defendant may work hardship or injustice. The plaintiff may well not know anything of the defendant or his affairs and, if he does not learn of the death, he may lose his remedy through no fault of his own or of his advisers. The effect, therefore, is that an abbreviated period of limitation begins to run owing to an event over which the plaintiff has no control and of which he or his solicitor might have no notice until he has irrevocably lost his right to bring the action.

(*c*) If a writ issued against a person who is in fact dead is a nullity, the practical difficulty of suing a tortfeasor who dies is unnecessarily increased. Where the prospective plaintiff does not know of the death, here is a trap into which he can easily fall and for which he will suffer in costs thrown away; if, further, the limitation period has expired he may suffer real hardship. It is true that in law it is uncertain whether the writ would be treated as a complete nullity and these legal doubts ought to be resolved. If the six months' rule were abolished, this consideration would become of greater importance because the issue of a writ is more likely to be delayed in actions in tort in respect of personal injuries than in other types of proceedings.[19]

(*d*) In practice, the " six months from probate " rule does little to hasten the completion of the administration of estates but, in the view of The Law Society, more frequently serves only to protect insurance companies. The Council of The Law Society commented to us as follows:

> " Claimants or their solicitors may be corresponding with an Insurance Company. Not only the claimant and his solicitors but frequently the Insurance Company also is unaware of the death of the tortfeasor. Even if the Insurance Company is aware of the death, it is not obliged to disclose it. The claimant and his solicitor may accordingly be completely without notice of an event which starts an abbreviated period of limitation running. This is a hidden trap for which the Council can see no sufficient justification."

[19] As to the extent of delay in starting personal injuries actions, see Section IX of the Report of the Committee on Personal Injuries Litigation.

(*e*) It is inconvenient to have a multiplicity of different limitation periods which increase the possibilities of error by legal advisers.

(*f*) The possible revival of the right to bring an action merely because the tortfeasor has died long after the normal period of limitation has expired is, as Diplock J. recognised in *Airey* v. *Airey*,[20] a very surprising consequence of the interaction of different statutory provisions. The judge remarked that " any remedy lies with Parliament and not with the courts ". The disadvantages of allowing proceedings, merely because of the tortfeasor's death, to be brought long after memory of the events on which they are founded has become clouded need no stressing.

(*g*) The cumbersome procedure of issuing a writ against the President of the Probate, Divorce and Admiralty Division or of applying for the appointment of an administrator where no personal representatives have been appointed is inconvenient in practice.

---

[20] [1958] 1 W.L.R. 729 at p. 734.

PART IV—POSSIBLE MODIFICATIONS OF THE SIX MONTHS' RULE

15. If the " six months from probate " rule were to be retained as a distinct limitation period, the inconveniences which arise from the present law could be reduced to a greater or lesser extent by one of the following palliatives:—

(*a*) a claimant whose action became statute-barred under the rule might be enabled to apply to the court, with due notice to the other parties affected, for leave to bring the proceedings. The court could be given a discretion to grant leave where it thought, in all the circumstances, that it was just and reasonable to do so, provided that the proceedings would be maintainable but for the " six months from probate " rule and that the court was satisfied that the applicant did not know of the tortfeasor's death in time to take effective action. Alternatively, on the analogy of sections 1 and 2 of the Limitation Act 1963, there could be a provision that the court should grant leave if the applicant could show that he had a *prima facie* case and that he did not know of the death of the tortfeasor.

As to the grant of a discretionary power, we agree with what was said by the Committee on the Limitation of Actions in Cases of Personal Injury, under the chairmanship of Mr. Justice Edmund Davies,[21] when dealing with a similar proposal:

> " . . . an unfettered discretion would encourage optimistic claimants to institute proceedings which in truth had no chance of success. . . . More serious is the objection based on the principle that the law should be certain and the area of judicial discretion therefore narrowed as far as is possible. We were impressed by the practically unanimous opposition of the legal witnesses to the conferring on the courts of a wide discretion. We think this opposition is well-founded: however conscientiously they may attempt to exercise their discretionary powers, different judges are bound to have different approaches to cases of apparent hardship, and to leave their discretionary powers entirely unfettered would, in our view, lead to undesirable divergencies of practice."

Although we think that the alternative solution is more attractive than the grant of a discretionary power, both suffer from the disadvantage that they would add a further complexity to this branch of the law in addition to the numerous existing limitation periods. Moreover, they would do nothing to solve the difficulties which arise when a writ is issued against a person who has in fact died without the plaintiff knowing of the death; nor would they avail the plaintiff who knows that the tortfeasor has died but is either incapable of instructing his advisers or thinks—mistakenly—that his injury is trivial.

[21] 1962 Cmnd. 1829, paragraph 31.

(*b*) It has been suggested to us[22] that the plaintiff's right to apply for leave to bring proceedings should be limited to cases where he did not know of the tortfeasor's death, provided the application was brought within one year of the death or the personal representatives knew or ought to have known of the existence of such a claim. This would at best be only a partial solution. There could still be hard cases where proceedings were not brought within one year of death and so far as the second proviso is concerned, it would be difficult to determine the date by reference to which the knowledge of the personal representatives would be determined and the means by which the plaintiff would be able to prove their knowledge. In principle it seems wrong that the state of knowledge of those who obtain a grant to the tortfeasor's estate should decide whether the plaintiff has a right of action or not.

(*c*) Insurers interested in resisting a possible claim for personal injuries could be placed under a duty to disclose the fact that the assured has died; if they continue to negotiate without doing this they could be held to be fraudulent.[23] We believe that cases in which insurers know of the tortfeasor's death and fail to inform the plaintiff's advisers are very rare and it does not seem worthwhile to legislate on this narrow basis. In any event the insurers could not be held to be fraudulent unless they knew of the death.

(*d*) Insurers might be deprived of the right to avail themselves of the protection afforded by the limitation period in section 1(3) of the 1934 Act.[23] This solution would appear to give rise to practical difficulties; for example, the plaintiff would not necessarily know before instituting proceedings whether the dead man was insured or whether the insurers accepted liability under any policy which might exist. He might, therefore, incur legal costs to no purpose. Moreover, it would seem undesirable that the plaintiff's right to bring his action would depend upon whether the defendant chose to insure, which again is something over which the plaintiff has no control. In any event, this suggestion could be no more than a partial solution of the problem.

(*e*) A system of registration of pending claims in the Probate Registry could be set up under which a plaintiff's solicitor could register the claim within six months of the cause of action arising.[24] The form of registration would give the names and addresses of the claimant and his solicitor, the name and address of the alleged tortfeasor and the place and date of the accident. This would ensure that those applying for a grant of probate or letters of administration would know of the claim; similarly, the plaintiff would be notified of any application for a grant of representation and consequently of the death of the tortfeasor.

---

[22] By Mr. K. Gottschalk, the Solicitor to International Computers Ltd.

[23] These suggestions were made by the Committee on Personal Injuries Litigation (see 1968 Cmnd. 3691, paragraphs 343, 346–8 and 349–50). Since these questions were only doubtfully within the terms of reference of the Committee, they did not feel justified in studying them with sufficient particularity to enable them to make positive recommendations.

[24] In their Report the Committee on Personal Injuries Litigation suggested, paragraph 350, after consultation with the President of the Probate, Divorce and Admiralty Division: "That whilst an arrangement enabling persons minded to sue X to be put on the Register, so as to receive notification of any grant in respect of X's estate, would involve new machinery in the Registry there would be no real difficulty in creating it. It would involve a new fee, but this need not be large to cover expenses."

It is clear that such a system would deal with many of the difficulties which arise, but it seems a laborious way of solving a problem which is a relatively small one. Moreover, it would not deal with the case of the intending plaintiff who is himself so seriously injured as to be unable to instruct his solicitor during the six-month period after the tortfeasor's death.

PART V—THE ABROGATION OF THE SIX MONTHS' RULE

16. The solution which we favour is the total abolition of the six months' rule, leaving claims against the estates of deceased tortfeasors to be subject to the general law of limitation. The death of a tortfeasor will neither curtail nor extend the time within which an action in tort may be brought and the law concerning limitation of actions in this respect will be assimilated to that which now applies to actions in contract. In addition, to deal with the difficulties mentioned in paragraph 14 above which may be met when a prospective defendant has died and either his death is unknown to the plaintiff and his advisers or probate or administration has not been granted, we propose the following remedies. We suggest that where his death was not known, a writ issued against the deceased person naming him as defendant should not be a nullity, and where his death was known but no probate or administration has been granted, a writ should be valid if issued against " the personal representatives of X deceased." In either case, the court should have power on the application of the plaintiff to order the substitution of the names of the personal representatives or, where no grant of representation has been made, the name of a representative defendant to be appointed by the court with authority to defend the action on behalf of the estate. This power need not be limited to actions in tort and, to prevent the situation arising where a plaintiff might have to abandon an alternative claim in contract, for example, or some plaintiffs might be able to proceed whilst others could not, this reform should apply to all causes of action.[25]

17. The time within which a cause of action in contract must be brought irrespective of the death of the defendant remains six years after the cause of action accrued and, as the Committee on Personal Injuries Litigation[26] pointed out, it seems anomalous that a different rule should apply to claims in tort. A possible factor supporting this distinction might be that in contract cases the claimant is more likely to be aware of a prospective defendant's death and the latter's personal representatives are more likely to know of the prospective claim. It might be less likely, therefore, that proceedings in contract would be delayed until the end of the limitation period.[27] But, even whilst the " six months from probate " rule still subsists, an estate might remain potentially liable for some time after grant of representation if the writ had been issued within the six months—once a writ has been issued it remains valid for service for a period of twelve months with the possibility of extensions thereafter and the actual proceedings might not be heard until a long time after the grant.

18. It is fair to assume that the reason for the creation of a distinct period of limitation in 1934 for claims against the estates of deceased tortfeasors was the

[25] cf. R.S.C. O. 15 r. 15 (1965 revision) which enables the court to appoint a person to represent the estate where in any proceedings it appears to the court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative. It is provided that any judgment will bind the deceased's estate to the same extent as if a personal representative had been a party to the proceedings.

[26] Paragraph 346 of their Report.

[27] Proceedings in tort other than in respect of a claim for personal injuries are also less likely to be delayed (for example, the extent of the injury is less likely to be slow to become apparent).

fear that the administration of their estates would be unjustifiably delayed.[28] If the protection afforded to personal representatives by this rule were abrogated, it might be objected that they would be unable to complete their administration of estates as rapidly as possible for fear of a late claim. However, solicitors are most likely to be familiar with the practical consequences and those whom we consulted did not believe that the abolition of the rule would cause serious delay. Moreover, the Masters of the Queen's Bench Division thought that little hardship or inconvenience would result. If the personal representatives have no knowledge of the pending claim, administration will not be delayed; even if a writ has been issued it is possible that this would not be brought to their attention until service is effected. In any event, in many of the cases the deceased will have been insured and the claim will in fact be handled by insurers. The possibility of delay under our proposal, therefore, occurs only when the deceased was not effectively insured and the personal representatives know that a claim may be made or that a writ has been issued. In such cases it is justifiable that there should be delay until the claim is disposed of.

19. The second objection which might be raised is whether undue hardship to the personal representatives or the beneficiaries of the estate might result if a successful claim can be brought long after the tortfeasor's death and the distribution of his estate. In theory the possibility of a claim against an estate which has already been distributed is increased by abolishing the " six months from probate " rule and by substituting the normal limitation period. In such cases when the defendant, who might have been the principal witness for the defence, has died, it might be more difficult to defend a claim, although the longer the action is delayed the greater difficulty the plaintiff might have in proving his claim. Since the Law Reform (Miscellaneous Provisions) Act 1934 was passed the limitation period in personal injury claims has been reduced from six years to three years by the Law Reform (Limitation of Actions, &c.) Act 1954 and there is an increasing tendency for liability in tort to be covered by insurance.[29] These are important factors to be taken into account in considering whether hardship would result.

20. The possibility of a late claim once an estate has been administered arises for consideration more especially in those cases where there might be an extension of the limitation period. For example, under section 22 of the Limitation Act 1939 where a cause of action accrues to a person under a disability (either because of infancy or unsoundness of mind) the limitation period is extended until six years (or three years in the case of personal injury claims) after the plaintiff ceases to be under a disability or dies, whichever first occurs. Similarly, under section 26 of the 1939 Act, the limitation period does not begin to run where the right of bringing an action is concealed by the fraud of the defendant or the action is based upon the fraud of the defendant or is for relief from the consequences of a mistake. In both cases, as in the case of claims in contract, the death of the defendant should not affect the right to bring an action and greater hardship is caused by restricting such a right. A further example of what is in effect an extension of the limitation period occurs under the Limitation Act 1963. By section 1 of that Act a claimant in a personal injuries case can apply for the leave of the court to bring proceedings within twelve

[28] See n. 7 above.

[29] e.g., products, employers, or personal liability insurance. Many cases will be covered by third party insurance which became compulsory under the Road Traffic Act 1930.

months of discovering material facts of a decisive character, however long after the expiry of the normal limitation period that may be. The most common examples of material facts of a decisive character being brought to light only after a considerable lapse of time are in cases of industrial diseases of a respiratory character such as pneumoconiosis and, although such cases have been known to become apparent as long as thirty years later, they most commonly arise where there would be no difficulty in obtaining payment of the damages because the tortfeasor was a corporation or was insured. Another type of case where material facts have recently been brought to light outside the time limit relates to the " thalidomide babies ".

21. If the deceased was covered by insurance for the event which gave rise to the claim in tort (for example, third party motor insurance)[30] no financial hardship will be caused either to the personal representatives or to the beneficiaries.[31] Whilst the insurance policy effected by the deceased remains valid his personal representatives will not be able to plead in answer to a claim that the estate has been fully administered because an asset, the insurance policy, will still remain in their hands. The claimant, therefore, will be able to establish, on proof of the deceased's tort, the liability of the estate and the amount of damages in an action against the personal representatives. The insurers will then be liable to reimburse them under the terms of the policy.

22. There remains, however, a small risk—at any rate in theory—that claims for damages in tort might be brought long after the tortfeasor's estate has been distributed and that hardship might result to the personal representatives or to the beneficiaries where there is no insurance to meet the claim. The personal representatives may protect themselves from liability by advertising for claims under section 27 of the Trustee Act 1925,[32] and if they distribute the estate after advertisement they are not liable to any person of whose claim they had no notice at the time of the distribution, but this is without prejudice to the right of any person to follow the property into the hands of any person other than a purchaser who may have received it.[33] The repeal of the six months' rule would not diminish this protection. In a case where the personal representatives have taken steps to protect themselves by advertising for claims, no hardship to them can be caused, and it seems that in proceedings of this kind for an unliquidated sum of damages the plaintiff ought to sue the beneficiaries directly in order to establish liability, rather than sue the personal representatives to establish the claim. The legal position is uncertain but there are *dicta* in the early case of *Clegg* v. *Rowland*[34] where the executor was held not to be a proper party to an action for unliquidated damages because he had no interest in

[30] Alternatively, the personal representatives might be able to insure the estate against claims. This cover can be made available although it is rarely resorted to, and, if it is to be effected at the cost of the estate, can probably only be made by the personal representatives with the agreement of the beneficiaries.

[31] In this context it should be mentioned that the British Insurance Association and Lloyd's both felt that the abrogation of the " six months from probate " rule would not have a great effect on insurers.

[32] S. 27(1) of the Trustee Act 1925 provides that the personal representatives may give notice of their intention to distribute the estate by advertisement in the London Gazette and in a daily London newspaper, and also if the property includes land not situated in London in a daily or weekly newspaper circulating in that area, requiring any person interested to send to the personal representatives within the time fixed in the notice (at least two months) particulars of his claim.

[33] S. 27(2).

[34] (1866) L.R. 3 Eq. 368 at p. 373.

resisting it. In any event, if liability is established the ability of the claimant to obtain damages will depend upon whether he has an equitable right *in personam* for a refund from the beneficiaries who have been paid out of the estate or whether he can trace the property of the deceased's estate and can enforce his judgment.[35] The extent of these remedies is uncertain but, in practice, they are probably limited by the equitable rules regarding delay and hardship. Thus, if a claimant, by failing to answer advertisements, allows the estate to be distributed and the beneficiaries to deal with it as their own, mixing it with their own resources, it is unlikely that he would be permitted to enforce his remedies against the beneficiaries. If the personal representatives have not taken the precaution of advertising under section 27 of the Trustee Act the claimant will be able to sue them directly and they will not be able to avail themselves of the protection afforded by that section. In certain circumstances, the personal representatives in turn would be able to have recourse against the beneficiaries whom they have paid out of the estate—but again the legal position is far from clear for lack of authority.

23. The possibility of such hard cases arising depends on an unlikely conjunction of circumstances:

(*a*) the proceedings were commenced after considerable delay;

(*b*) the defendant died sufficiently long beforehand for his estate to have been completely administered;

(*c*) the personal representatives were unaware of any claim before distributing the assets; and

(*d*) the deceased tortfeasor did not have a valid policy of insurance against liability for the claim in question.

In addition, one must bear in mind the difficulty of succeeding with any but a well established claim if made so late; yet it is the well established claim that is least likely to have escaped the notice of the personal representatives. On balance, we think that the small risk that remains for personal representatives and beneficiaries must be accepted; in the rare case where the personal representatives suspect that there might be a late claim not covered by insurance, they will, if well advised, seek the agreement of the beneficiaries to insure against the possibility.

[35] Discussed at length in *Re Diplock* [1948] Ch. 465 (C.A.) and under name of *Ministry of Health* v. *Simpson* [1951] A.C. 251.

PART VI—SUMMARY OF RECOMMENDATIONS

24. Accordingly, we make the following recommendations designed to deal with the practical defects of the law mentioned in paragraph 14 above:—

(*a*) The rule that proceedings in tort may not be commenced more than six months after the grant of representation to the estate of a deceased tortfeasor should be abolished so that proceedings after his death may be brought at any time before the expiration of the normal limitation period.

(*b*) The death of a tortfeasor should not operate to revive the right to institute proceedings when the normal period of limitation has expired before the death.

(*c*) Where the plaintiff does not know of the death of the proposed defendant, a writ issued within the normal limitation period against a deceased person should not be a nullity, but the court should have power, upon the application of the plaintiff when he learns of the death (if application is made during the period in which the writ is effective for service) to order the substitution of the names of the personal representatives of the deceased or, if no grant has been made, to substitute the name of a representative defendant.

(*d*) If the plaintiff knows that the defendant is dead but no grant of representation has been made, he should be able to issue a writ within the normal limitation period against " the personal representatives of X deceased " and the court should have power, on application by the plaintiff (during the period in which the writ is effective for service), to substitute the names of the personal representatives to whom a grant is subsequently made or, in the absence of such a grant, the name of a representative defendant.

25. The first two recommendations, which relate to actions in tort only, would be carried out by Clause 1 of the Draft Bill set out in Appendix I; the last two (which apply to all proceedings and are not confined to proceedings in tort) would be carried out by Clause 2 and the Rules to be made thereunder. Appendix II contains an outline of what is envisaged in relation to the Rules of Court to be made under Clause 2 of the Bill.

(*Signed*) LESLIE SCARMAN, *Chairman.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary.*
28*th February* 1969.

APPENDIX I

Draft Proceedings Against Estates Bill

With Explanatory Notes

DRAFT

OF A

B I L L

TO

Repeal section 1 (3) of the Law Reform (Miscellaneous Provisions) Act 1934 and to make provision for facilitating proceedings against the estates of deceased persons.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Limitation of actions in tort against estate of deceased.

1.—Subsection (3) of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 (which imposes restrictions on the proceedings maintainable in respect of a cause of action in tort which by virtue of that section has survived against the estate of a deceased person) and sections 4 and 7(2) of the Law Reform (Limitation of Actions, &c.) Act 1954 (which relaxed those restrictions) are hereby repealed.

Clause 1 (*Limitation of actions in tort against estate of deceased*)

This clause gives effect to recommendations (*a*) and (*b*)[36] by repealing section 1(3) of the Law Reform (Miscellaneous Provisions) Act 1934. That subsection provided that no proceedings in tort which have survived against the estate of a deceased person (by virtue of section 1(1) of that Act) would be maintainable unless they were pending at the date of his death or [were in respect of a cause of action which arose not earlier than six months before his death and] proceedings were taken not later than six months from the grant of representation. The requirement in square brackets was repealed by section 4 of the Law Reform (Limitation of Actions, &c.) Act 1954, which will also be repealed by this clause. Section 7(2) of the 1954 Act is a transitional provision which will cease to have any effect when clause 1 becomes law.

After the coming into force of this Act, proceedings in tort will no longer be statute-barred six months after the grant of representation (unless, by virtue of clause 3(3), the proceedings were already statute-barred, whether because of the six months' rule or the general limitation provisions, before the commencement of this Act). The time within which the action must be brought (three or six years from the date on which the cause of action accrued, with the possibility of extension or postponement of the period) will be unaffected by the death of the tortfeasor in respect of all causes of action in tort except defamation, seduction, enticement or damages for adultery. Since section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 was expressed not to apply to these excepted proceedings, they will continue to abate upon the death of the plaintiff or defendant.

Section 32 of the Limitation Act 1939 provides that the 1939 Act shall not apply to any action for which a period of limitation is prescribed by any other enactment. In *Airey* v. *Airey*[37] it was held that section 1(3) of the 1934 Act constituted such a period of limitation (six months from the grant of representation) which as a result excluded the provisions of the 1939 Act. In that case Diplock J. held that, provided the action was brought within six months from the grant of representation, the action could be revived however long a period had elapsed since the cause of action accrued, and, although the point was left open by the Court of Appeal, the Court affirmed that the limitation period could be extended in cases where this had not expired before the death of the tortfeasor. After the repeal of section 1(3) of the Act of 1934 these anomalies in the statutory provisions can no longer arise.

[36] For a summary of the recommendations see paragraph 24 above.
[37] [1958] 1 W.L.R. 729 (Diplock J. and C.A.), [1958] 2 Q.B. 300 (C.A.).

Proceedings against estate of deceased.

2.—Rules of court made under section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 or section 102 of the County Courts Act 1959 may make provision:—

(*a*) for enabling proceedings against the estate of a deceased person to be commenced (whether by the appointment of a person to represent the estate or otherwise) notwithstanding that no grant of probate or administration has been made and to be continued against the personal representatives where such a grant is made after the commencement of the proceedings;

(*b*) for enabling proceedings purporting to be commenced against a person who has died to be treated as having been commenced against his estate and to be continued accordingly against his personal representatives or a person appointed in pursuance of any provision made under paragraph (*a*) of this section.

Clause 2 (*Proceedings against estate of deceased*)

This clause enables Rules to be made to give effect to recommendations (*c*) and (*d*) and by itself does not change the substantive law. Unlike clause 1, the ambit of this clause is quite general and is not confined to proceedings in tort.

The effect of clause 2 is to grant the further two powers mentioned in it to the appropriate Rule Making Committee as if they were contained in section 99 of the Supreme Court of Judicature (Consolidation) Act 1925 or section 102 of the County Courts Act 1959. The detailed application of this clause to proceedings will be provided by the Rules, and only when Rules of Court have been made by the appropriate Committees for the Supreme Court and the County Court will proceedings in those courts be affected by the clause.

Where a writ is issued against a person who has in fact died (naming him as defendant) clause 2(*b*) provides that the proceedings will be treated as being against the estate of the deceased. Before the action can be heard it will be necessary for there to be a defendant. This will either be the personal representatives, or where there are none, a representative defendant. Treating the action as against the estate of the deceased will make it clear that in the latter case any judgment obtained against the representative defendant is binding upon the estate, and if personal representatives are subsequently appointed they will be bound by the judgment.

Citation, commencement, transitional provision and extent.

3.—(1) This Act may be cited as the Proceedings Against Estates Act 1969.

(2) This Act shall come into force at the expiration of a period of three months beginning with the date on which this Act is passed.

(3) Section 1 of this Act shall apply in relation to causes of action arising before as well as in relation to causes of action arising after the commencement of this Act, but not so as to enable any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.

(4) This Act does not extend to Scotland or to Northern Ireland.

Clause 3 (*Citation, commencement, transitional provision and extent*)

Subsection (2)

Three months have been allowed to enable the provisions of the Act to become known.

Subsection (3)

Clause 1 (the repeal of the " six months from probate " rule) will apply to causes of action in tort which accrued before or after the date this Act comes into force. However, if the right to bring the action had already become statute-barred before this Act comes into effect, either because of the six months' rule or because of any defence under the Limitations Acts, the right will not be revived. Without this provision personal representatives, who may have distributed an estate knowing a claim in tort was possible but who waited until after six months from the grant of representation before distributing, would not be protected.

There is no need to have a corresponding transitional provision for clause 2 since that clause cannot take effect until the Rules (which cannot have retrospective operation) are made.

Subsection (4)

The Law Reform (Miscellaneous Provisions) Act 1934 and the amendment to section 1(3) of that Act by the Law Reform (Limitation of Actions, &c.) Act 1954 only apply to England and Wales. So far as the law of Scotland is concerned, there is a three-year period of limitation in personal injuries cases, but there is no rule analogous to the " six months from probate " rule. In Northern Ireland the six months' rule is now contained in section 9(3) of the Statute of Limitations (Northern Ireland) 1958, in which the opportunity was taken to prevent the situation which arose in *Airey* v. *Airey* from occurring there.

APPENDIX II

PROBLEMS WHICH REMAIN TO BE DEALT WITH BY RULES OF COURT

1. The following difficulties which are not resolved by the clauses in Appendix I remain to be dealt with by the Rules of Court to be made under Clause 2 of the Draft Bill:

(*a*) where the plaintiff does not know that the defendant is dead and, consequently, within the normal limitation period issues his writ against the dead man;

(*b*) where the plaintiff issues his writ against the defendant, who has, unknown to him, died and where, after the issue of the writ, the plaintiff becomes aware of the death but there is no grant of representation; or

(*c*) where the plaintiff knows that the defendant is dead but where no grant has been made and is not made within the normal limitation period.

2. Where these situations exist, a would-be plaintiff may suffer injustice. Thus, if a writ issued against a deceased person is a nullity in law (though the legal position here is not clear beyond doubt),[38] the result could be that his right to bring the action may become statute-barred before he discovers the fact of the defendant's death. It seems right, therefore, that the Rules should enable the court, where a writ has been issued *bona fide* against a dead man, to substitute for his name the names of his personal representatives or, if there are none, a representative defendant.

3. The appointment of a representative defendant where no grant of representation has been made will in fact produce the same result as the appointment of an administrator *ad litem* but will obviate an independent application. It is suggested that the Rules of Court should include provision that the plaintiff, upon an application for the appointment of a representative defendant, must give notice of his application:

(*a*) to any insurers of the deceased who have an interest in the proceedings, and

---

[38] There is no provision in the Rules of Court concerning a writ issued against a deceased person. It is generally thought that such a writ would be a nullity. This is supported by the facts that:

(i) the writ is a Royal Command addressed to a person and unless that person is alive he cannot comply with the command;

(ii) a writ, in order to be effective, must be served upon the person to whom it is addressed; if there is no such person he cannot be served;

(iii) if the person against whom process is directed desires to dispute the claim, he must enter an appearance and serve a defence, and if he does not exist he cannot do this;

(iv) unless there is service on an existing person (or an order for substituted service) the plaintiff cannot proceed further with his action.

There is, however, no authority directly establishing that a writ issued against a deceased person is completely void, although as regards actions commenced in the name of a plaintiff who has died before the issue of the writ, see *Tetlow* v. *Orela Ltd.* [1920] 2 Ch. 24 where Russell J. held that he had no power to substitute the name of a new plaintiff (following *Clay* v. *Oxford* (1866) L.R. 2 Exch. 54).

(*b*) any person interested in the estate of the deceased (e.g., the next of kin entitled on an intestacy),

if he knows or has reason to suspect the existence of such persons. If the plaintiff has no such knowledge, the Rules might provide that the court, upon an *ex parte* application, may give directions about the giving of notices by the plaintiff, whether by advertisement or otherwise, to parties who may be interested in the deceased's estate. It is suggested that the representative defendant might be:—

(i) a person mutually agreed between the plaintiff and interested insurers, or acceptable to such insurers, or

(ii) a person who as next of kin or otherwise is interested in the estate of the deceased, or

(iii) failing these alternatives, the Official Solicitor or some other nominee defendant acceptable to the parties or, in default of agreement, nominated by the court, who would act on the usual terms as to costs.

Printed in England by Her Majesty's Stationery Office
at St. Stephen's Parliamentary Press

(325732) Dd. 142032 K16 5/69

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London W.C.1
13A Castle Street, Edinburgh EH2 3AR
109 St. Mary Street, Cardiff CF1 1JW
Brazennose Street, Manchester M60 8AS
50 Fairfax Street, Bristol BS1 3DE
258 Broad Street, Birmingham 1
7 Linenhall Street, Belfast BT2 8AY

Government publications are also available through any bookseller

SBN 10 140100 0