

THE PROPOSED STATUTE OF LIMITATIONS

Mr. Frank Olive, Chairman of the Property Section of the Indiana State Bar Association, some time ago appointed Mr. Verne Cawley of Elkhart, Mr. Leo Gardner of Indianapolis and Mr. Bernard C. Gavit of Bloomington as a committee to prepare a comprehensive revision of the Indiana statutes of limitations. The committee has been ably assisted in this project by Mr. Harry B. Littell, at that time a senior student in the Indiana University School of Law. A comparative study of the subject prepared by him was published in 21 Ind. L. J. 23-43 (1946). A tentative draft of the proposed bill has been presented to two meetings of the State Bar Association and it is planned that a final draft will be presented for consideration at the January meeting of the Association. A copy of the proposed statute with supporting notes follows:

INTRODUCTION

This report is submitted in conjunction with the accompanying proposed Statute of Limitations. It does not purport to be, however, an exhaustive analysis of the proposed statute. In general, it attempts:

1. to point out analogous sections in the present statute and if necessary to compare those sections with the ones proposed;
2. to point out new sections which have no analogy in the existing statute and to explain their inclusion within the proposed statute;
3. to make a comparison, where necessary, with the statutes of other states.

The background for the proposed statute has been a study of the statutes of all the states. This study was centered principally on the substantive time-periods allowed, but an absorption of the form and mechanical features of each statute was to some extent unavoidable.

Again it is necessary to point out that this report is intended only as an explanation, and not as an argumentative justification, of the proposed statute.

ARRANGEMENT OF SECTIONS

Following the enacting and policy section (§1), the sec-

tions may be grouped under eight divisions in the following order:

1. Construction of Act; Definitions (§2-5)
2. General Provisions (§§6-20)
3. Real Actions - Limitations (§§21-28)
4. Personal Actions - Limitations (§§29-41)
5. Disabilities (§§42-50)
6. Miscellaneous (§§51-54)
7. Real Property-Marketable Title Statute (§§55-64)
8. Repealer (§65)

This arrangement was made mainly for clarity. It is submitted that general rules pertaining to all limitations should be grouped together and should precede the sections setting forth the specific limitations. It is also desirable to have all matters pertaining to disabilities grouped together. In the statutes of most states sections pertaining to real actions and personal actions are grouped together and the former are usually set forth first.

The proposed thirty-five year Marketable Title Statute has been incorporated into the present statute. Although its position in the statute might better be within the sections relating to limitations on real actions, it is thought that being placed at the end of the statute would cause it to stand out and would present a better idea of unity among the nine sections pertaining to that subject.

A Bill for an Act Entitled:

An act concerning limitations of the time for commencing civil actions and prescribing the effect of certain disabilities.

Section 1. Be it enacted by the General Assembly of the State of Indiana: that, it is the intention of the legislature to achieve the primary purpose of limiting the time in which actions must be commenced, namely to cause a speedy settlement of all claims and disputes, by prescribing shorter periods for the commencing of actions and by making all actions and all parties, including the State, its agencies, and political subdivisions, subject to the limitations.

Comment. Of the propositions stated to compose the purpose and policy of the proposed act only the second, that the limitations shall be effective against the State, represents a departure from what would be otherwise an ordinary revision of an existing statute. However,

it is necessary to point out that the proposed act is a complete revision, not just an amendment, of the existing statute.

Section 2. Agreement to a Different Limitation. - All actions shall be commenced within the times prescribed herein. Any agreement or stipulation specifying or permitting a different time shall be void, but such an agreement or stipulation shall not otherwise invalidate the transaction or instrument of which the invalid agreement or stipulation is a part. This section shall not apply to contracts of insurance.

Comment. This section is implied in the statutes of all states and specifically included in many. It is not stated in the present statute. The exception in favor of insurance contracts is made in view of the existing statutes pertaining to limitations on presentment of notice of claim.

Section 3. All Actions Limited. - The time for commencing every action is limited; and every action not specifically enumerated in this act or otherwise limited as provided in section four shall be included under the section provided for "all actions not otherwise limited".

Comment. At one time only certain causes of action had limitations. It is now recognized that all civil actions are or should be, limited. There are still several states whose statutes prescribe that only actions enumerated in the statute are limited.

Section 4. When Other Limitations Are Valid. - If a limitation is specifically provided in a statute creating a cause of action, such limitation shall be valid and controlling notwithstanding that it is not included within this act. Causes of action created by federal legislation wherein suit is permitted in state courts shall be included within the meaning of this section.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) § 2-603. This section states the second sentence of § 2-603 in a more specific, although slightly longer, form.

Section 5. Definitions. - As used in this act the term "real property" includes any interest in land, tenements, hereditaments, and chattels-real; the term "personal property" includes money, goods, chattels, evidences of debt, and choses in action.

Where the State of Indiana is referred to, all agencies and political subdivisions of the State shall be included.

The enumeration of a series of specific terms shall not exclude other specific terms of the same class as the specific terms enumerated.

Section 6. Limitations Applicable to the State. - The limitations prescribed herein shall apply to actions by the State of Indiana or by a foreign state. Savings in favor of disabilities shall apply to actions against the State or a foreign state. The limitations shall not apply to actions brought by the United States.

Comment. This section restates as a rule the policy set forth in section one. Eighteen states now permit the Statute of Limitations to run against the state; two more allow it to run concerning real actions only; four more concerning personal actions only. Cf. Ind. Stat. Ann. (Burns, 1933) §§ 2-613, 3-1411.

Section 7. Only Limitations of this State Applicable. - The limitations of this State shall be applicable and controlling in all actions regardless of where the cause of action accrued, arose, originated, or became complete.

Comment. This section conforms to the usual Conflict of Laws principle. Statutes of Limitations are usually considered "procedural" and being a part of the procedural law of the forum will govern. However, in a few cases, the Statute of Limitations has been considered "substantive"—this section will then obviate the often very close question of the law of which State governs in this situation.

Section 8. When Action Is Commenced. - An action is commenced when a complaint is filed. Sec. 55, Ch. 38 of the Acts of 1881 (Spec. Sess.) [Burns' 1933, 2-802] is repealed insofar as it prescribes a different time for the commencements of an action.

Comment. This is intended to follow the Federal rule on when an action is commenced.

Section 9. Concealment of Cause of Action. - If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitations after the discovery of the cause of action.

Comment. This is Ind. Stat. Ann. (Burns, 1933) § 2-609. Many states limit the provision to "concealed by fraud." Although there may be little distinction in fact, it is submitted that the terminology of the Indiana statute is more suitable.

Section 10. Effect of War. - When one of the parties to an action is a citizen of a country with which the United States is or has been at war, the period of the war or emergency as declared by the United States shall not be a part of the period allowed for bringing an action.

Comment. Common in many states. Not in the present Indiana statute.

Section 11. Party Restrained from Commencing Action. - If a party is temporarily restrained from commencing an action, or if a court is temporarily prohibited from hearing an action, the time during which a party is restrained or a court is prohibited shall not be a part of the period allowed for commencing action.

Section 12. Limitations Must Be Pleaded. - In order to be used as a defense, the Statute of Limitation must be specifically pleaded as a bar. Nothing herein shall prevent an amendment of pleadings to include the Statute of Limitations.

Comment. Not in present statute. Found in statutes of many other states. Like several other sections, these propositions have been accepted by the courts but have not been enunciated in a statute. It is believed that they have a place in a "complete" statute.

Section 13. Counter-claim, Set-off. - A counter-claim or set-off which was not barred at the time action was commenced by the plaintiff shall be a valid counter-claim or set-off notwithstanding that it becomes barred before being asserted by the defendant.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-1036.

Section 14. New Promise to Remove Bar. - After a cause of action is barred by the limitations set forth herein, a new promise in order to be effective in removing the bar must be in writing and signed by the promisor.

Comment. Substantially the same as Ind. Stat. Ann. (Burns, 1933) § 2-610.

Section 15. Indorsement Noting Partial Payment. - An indorsement noting partial payment of a promissory note or of any contract or promise to pay money shall not be a sufficient writing to remove or to prevent the bar, except when the indorsement is signed by the maker or the person to be charged.

Nothing contained in this section shall take away or lessen the effect of any payment made by any person; but no indorsement or memorandum of any payment made upon any instrument of writing, by or on behalf of the party to whom the payment shall purport to be made, shall be deemed sufficient to exempt the case from the provisions of this Act.

Comment. Substantially the same as Ind. Stat. Ann. (Burns, 1933) §2-612, except the first sentence places this section on a parity with Section 14 of the proposed statute.

Section 16. New Promise-Whom Affected. - A new promise after action is barred is effective only against the person so promising and shall not bind a joint-debtor, joint-promissor, co-surety, joint-administrator, joint-contractor, or any other person who was formerly liable on the same cause of action with the person making the new promise.

Comment. Substantially the same as Ind. Stat. Ann. (Burns, 1933) §2-611.

Section 17. Effect of Payment by Joint-Debtor, Etc. - If one joint-debtor or any person jointly or severally liable on a cause of action shall make a payment after the cause of action is barred, the other persons formerly jointly or severally liable shall not be liable to the person making payment. This provision applies also to persons in the relation of principal-surety.

Comment. Substantially the same as Ind. Stat. Ann. (Burns, 1933) §2-615.

Section 18. New Promise before Bar. - A new promise for a valuable consideration before the action is barred shall cause the statute to start running anew, but the action shall be on the new promise and not the old. In order for an indorsement noting partial payment to be effective as a new promise under this section, in addition to the requirement of a valuable consideration it must be signed by the maker or the person to be charged.

Comment. This is intended to settle the problem whether suit should be on the old or new promise. It is recognized that this pertains more to the substantive law of contracts, and it is not considered a "necessary" section of the act.

Section 19. Limitations Continue to Run When Once Started. - Except as otherwise provided in this act, once the limitation begins to run on a cause of action, no subsequent event will stop or interrupt the running of the limitations.

Comment. Another recognized rule but not stated in the present statute. In this connection, it might be pointed out that the present exceptions for stopping the running of the statute when the defendant is a non-resident or absent from the State [Ind. Stat. Ann. (Burns, 1933) §2-606] have been omitted. If the defendant can be served with process there is no reason why the statute should not run; if the defend-

ant is a resident of another state, the plaintiff should go to that state to settle his claim or bring his action.

Section 20. When Cause of Action Accrues. - Except as specifically provided herein, the cause of action in any action shall accrue from the time when all of the elements or conditions constituting such cause of action have come into existence.

Comment. This section may also be considered as "academic." It is not a necessary section but adds to the completeness of the act.

Section 21. Real Property: Actions Concerning Title or Possession. - All actions concerning title to, or possession of, real property shall be commenced within six years.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-602 (cl. 6). The reduction from twenty to six years brings Indiana below the average of all states (many of whom also still have very long periods for real actions); but it brings us into line with the trend of lowering limitations on this action and it also tends to achieve the primary purpose of a Statute of Limitations as set out in section one of the proposed act.

Section 22. Real Property: Action by the State. - All actions concerning title to, or possession of, real property brought by the State shall be commenced within ten years; but causes of like nature in which the State is a party defendant shall be commenced within six years.

Comment. It is not uncommon where the statute runs against the state to allow the state a longer period. This is true of real actions only. Cf. California, Idaho, Nevada, New York, North Carolina, and others.

Section 23. When Limitations not Applicable to Real Property of the State. - The limitations of this act shall not apply to an interest in real property of the State devoted to uses of public thoroughfares, including highways, streets, alleys, and sidewalks.

Comment. Even in those states where the Statute runs against the state, it is not unusual to find some exemptions in favor of certain property of the state. Just how far these exemptions are to extend is a matter of policy, as is the primary question whether there are to be any exemptions in favor of the state.

Section 24. Recovery of Real Property Sold by Order of Court. - All actions attacking the validity of a sale of real property pursuant to an order of a court, whether by direct

judgment or order of sale or on execution in satisfaction of a judgment, shall be commenced within one year.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-602 (cls. 3, 4). Only a dozen states make a distinction between recovery of real property sold by court order and recovery of real property in other cases. The reasons for desiring a judicial sale of realty to become conclusive in as short a time as possible are numerous.

Section 25. Adverse Possession; Payment of Taxes not Required. - Nothing in this Act shall relieve any adverse possessor or claimant from proving all the elements of title by adverse possession now required by law, except that an adverse possessor or claimant in order to establish his adverse title or claim need not have paid any taxes or assessments falling due on property claimed during the period he claims to have possessed the same adversely. Section 1, Ch. 42 of the Acts of 1927 [Burn's 1933, 3-1314] is repealed.

Comment. It is believed that Ind. Acts 1927, c. 27, Ind. Stat. Ann. (Burns, 1933) §3-1314 is undesirable. An attempt to put into statutory form a definition of the elements of adverse possession, although found in several states, was also thought inadvisable.

Section 26. Mortgages, Vendor's Liens: Limitation: When Cause Accrues. - All actions to foreclose mortgages or vendor's liens on real property shall be commenced within six years. The cause of action shall accrue from the date the debt secured by such mortgage or vendor's lien is due, or in case of debts paid by installments, from the date the last installment is due. Insofar as this Act is concerned, an acceleration clause shall have no effect upon the time when the cause of action accrues, but the time when the debt or last installment is ultimately due shall control.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-623. The provision relating to an acceleration clause is thought desirable to prevent uncertainty in the case of a purchaser from either the mortgagor or mortgagee.

Section 27. Mortgages, Vendor's Liens: Due Date of Debt not Shown. When Cause of Action Accrues. - If the mortgage or vendor's lien, or the record thereof, does not show the due date of the last installment, the cause of action shall accrue from the date of execution of the mortgage or lien; and in the event this date is also omitted, then the cause of action shall accrue from the date of the recording of the mortgage or the lien.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-624.

Section 28. Mortgages, Vendor's Liens: Affidavit to Show Due Date. - If the mortgage or vendor's lien, or the record thereof, does not show the due date of the last installment, the holder of the mortgage or lien may at any time within six years from the date of execution of the mortgage or lien, or from the date of recording if the record does not show the date of execution, file for record in the same office where the mortgage or lien is recorded, an affidavit setting forth the due date of the mortgage or lien or the date of the last installment. The recorder shall note the filing of the affidavit on the record of the mortgage or lien and shall show where in the record books such affidavit may be found. The effect of such an affidavit when recorded shall be the same as if the due date was originally stated in the mortgage or lien. The affidavit shall be prima facie evidence of the truth of the statements therein.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-625. The clause in the present sections §§2-624-2-625 authorizing the recorder upon request of the record owner to certify that the mortgage or vendor's lien has become satisfied by lapse of time has been intentionally omitted. Such a certification would be in fact ineffectual and perhaps misleading.

Section 29. Injury to, Trespass upon Real Property. - All actions for injury to, detention of, or trespass upon real property shall be commenced within three years.

Section 30. Rents, Profits, for Use of Real Property. - All actions to recover rents, profits, or for the use of real property shall be commenced within three years.

Comment. §§29-30. Cf. Ind. Stat. Ann. (Burns, 1933) §2-601 (cls. 2,3).

Section 31. Personal Property: Injury to, Recovery of Possession. - All actions for injury to, detention of, or recovery of possession of personal property shall be commenced within three years.

Section 32. Written Contracts. - All actions founded upon written contracts shall be commenced within six years.

Section 33. Promissory Notes, Bills of Exchange, Etc. - All actions upon promissory notes, bills of exchange, or any contract to pay money shall be commenced within six years.

Section 34. Oral Contracts. - All actions founded upon

contracts not in writing shall be commenced within three years.

Section 35. Accounts. - All actions upon accounts shall be commenced within three years. The cause of action in an action upon an account shall accrue from the date of the last transaction causing an item in the account, which, in an action upon a balance due of a mutual, open, and current account, shall be the date of the last transaction on either side.

Section 36. Three-year Limitations. - The following actions shall be commenced within three years:

1. Actions against a public officer for misfeasance, malfeasance, or non-feasance; or actions upon the bond or against the surety of a public officer for the same causes.
2. Actions against an executor or administrator or against the bond or surety of an executor or administrator.
3. Actions for relief against fraud.
4. Actions upon a liability created by statute, except for forfeiture of a penalty.

Section 37. Two-Year Limitations. - The following actions shall be commenced within two years:

1. Actions for injury to the person, including actions for assault, battery, false imprisonment, wrongful death, seduction, and criminal conversation.
2. Actions for malpractice growing out of professional services of lawyers and of physicians, surgeons, dentists, hospitals, sanitariums, and other institutions wherein medicine is practiced.

Section 38. One-Year Limitations. - The following actions shall be commenced within one year:

1. Actions for injury to the character of a person, including libel, slander, and malicious prosecution.
2. Actions to enforce or recover upon a mechanic's lien. The cause of action shall accrue from the date of filing notice of the lien.
3. Actions to recover forfeiture of a penalty by statute, whether recovery is sought by an individual or the State.

Section 39. Action to Contest a Will. - All actions to contest the validity of any will or to resist the probate thereof shall be commenced within one year. The cause of action shall accrue from the date the will is offered for probate. No longer period shall be allowed for infants, insane persons, or persons absent from the State.

Section 40. Municipal Improvement Liens. - All actions to enforce or to recover upon a lien created by assessments for municipal improvements shall be commenced within four years. The cause of action shall accrue from the date such assessment is due, or in case of assessments paid by installments, from the date the last installment is due.

Section 41. All Actions Not Otherwise Limited. - All actions or suits not otherwise limited by the provisions of this act shall be commenced within five years.

Comment, §§31-41. Little comment is needed on these sections which prescribe limitations on personal actions. In most instances, the periods have been shortened but only in three causes of actions has there been a drastic reduction: 1. written contracts, 2. municipal improvement liens, 3. "all other actions."

Concerning written contracts [Section 32 and 33, cf. Ind. Stat. Ann. (Burns, 1933) §2-602, cls. 5, 6], Indiana has been brought into conformity with the other states. The same is true of "all other actions" (Section 41; cf. Ind. Stat. Ann. (Burns, 1933) §2-603).

Section 39 is intended to change the present Ind. Stat. Ann. (Burns, 1933) §7-504 so as to make the one-year limitation effective as to every contestant. The present section (§7-504) allows three years to infants, persons of unsound mind, and persons absent from the state.

Concerning municipal improvement liens (Section 40; cf. Ind. Stat. Ann. (Burns, 1933) §§2-620-2-621) the distinction between assessments payable at one time and those payable by installments have been dropped except that the cause of action does not accrue in the installment cases until the due date of last installment. Under the proposed section the lien would cease and the action become barred at the same time.

In general, compare Ind. Stat. Ann. (Burns, 1933) §§2-601-2-602; 2-604; 2-618-2-621; 2-627.

Section 42. Disabilities. - The following disabilities shall be included within the meaning of this act:

1. Infancy
2. Insanity

However, no person shall be considered to be under a disability who is in the custody of a guardian, either legal or natural.

Comment. This is the most direct approach to the problem of

excluding minors and insane persons who are in custody of guardians from the ordinary protections afforded persons considered to be under a disability. Under the proposed section the meaning of disability is narrowed so as to exclude such persons altogether. Making this exclusion has been an almost unanimous request from the members of the bar.

Section 43. Disabilities: When Effective. - A disability must exist at the time a cause of action accrues in favor of the person under the disability in order to be effective to extend the time within which an action must be commenced.

Section 44. More Than One Disability. - When a person is under more than one disability at the time a cause of action accrues in his favor, all disabilities existing at the time the cause of action accrues must be removed before the extension of time provided in section fifty-one begins to run.

Section 45. Disabilities in Successive Persons. - Disabilities in successive persons in whose favor a cause of action has accrued may not be tacked.

Comment, §§43-45. These general provisions state accepted rules and are found in the statutes of many states. These rules have been adopted in Indiana through the courts but they have not been set out in a statute.

Section 46. Disabilities: Extension of Time after Disability Ceases. - Any person under a disability at the time a cause of action in his favor accrues may commence his action within two years or within the number of years otherwise prescribed for such action, whichever is shorter, after the disability ceases.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-605. The reason for the clause requiring an action to be commenced in less than two years after the disability ceases where the limitation for the action is less than two years is obvious. Otherwise a person under a disability would be entitled to a longer period after the disability ceases than one never under a disability. Some states set two standards for disabilities: one for real actions and one for personal actions allowing a longer extension for real actions. It is submitted that the Indiana practice allowing the same extension for both is the better.

Section 47. When Disability Ceases before Normal Limitation Has Expired. - When a person is under a disability at the time a cause of action in his favor accrues, but the disability ceases before the normal limitation for such cause of action has expired, such person may commence his ac-

tion within times provided in section fifty-one or within the time otherwise prescribed for such action, whichever is longer.

Comment. This section is also mainly academic inasmuch as it is a rule followed by the courts but not stated in statutory form.

Section 48. Duty of Guardian. - It shall be the duty of the guardian, whether legal or natural, of an infant or of an insane person to assert all claims and causes of action which have accrued in favor of his ward.

Comment. Since this duty of a guardian is not specifically set forth in our statutes pertaining to a guardianship (see Ind. Stat. Ann. (Burns, 1933) §§8-114, 8-207) it was thought advisable to include it expressly in view of the changed definition of "disability" and the effect of this and the following sections generally.

Section 49. Action to Compel Assertion of Claim. - Any person who is or may be subject to suit or claim by a person under a disability may bring an action against the person under the disability in whose favor a cause of action has arisen to compel the assertion of the claim and may require the court to appoint a guardian ad litem to assert the claim or cause of action on behalf of the person under a disability. Service of process shall be made in the same manner as if the person subject to a claim were bringing an action against the person under a disability.

Comment. This section, along with the other important changes in this field of disabilities, has been requested by the bar.

Section 50. Judgement Final. - Where a person under a disability is represented by a guardian, whether natural, legal or guardian ad litem, in an action brought against him or brought by a person under a disability through such a guardian, the judgement in any such action shall be final and the same as if the person were not under a disability; and no cause of action or right to review or to set aside any such judgement shall remain to such a person because of the disability.

Comment. The purpose of this section is to allow the cause of action of a person under a disability to be litigated completely and to cut off the right to review or appeal. The effect of sections 42, 48 and 49 of the proposed act would make it possible for any claim of a person under a disability, in the present meaning of that word, to be litigated. This section merely amounts to a declaration that such litigation shall be final. Were such litigation not final, the value of the preceding sections would be doubtful.

Section 51. Death of Party; Additional Time. - Where it is provided that a cause of action survives, if any person in whose favor or against whom a cause of action has accrued, dies within one year before the expiration of the time limited for the action, the cause of action which survives either to or against his representative may be commenced within one year from the death of the party; but if the party dies any time before one year from the expiration of the time limited for the action, the action must be commenced within the regular time prescribed for such action.

Comment. Cf. Ind. Stat. Ann. (Burns, 1933) §2-607. Time reduced from one and one-half years to one year.

Section 52. Judgement Presumed Satisfied. - A judgement of any court of the United States, of this State, or of any other State shall be conclusively presumed satisfied after twenty years.

Section 53. Action to Renew Judgement Abolished. - An action shall not be brought in any court of this State to renew a judgement of any court of this State of the United States, or of any foreign State.

Comment, §§52-53. The time for enforcing a judgment has been left at twenty years but the action to renew a judgment has been abolished. This will give a successful plaintiff from twenty to twenty-six years in which to secure satisfaction of a judgment, which is thought to be quite sufficient. These two sections are included instead of reducing the time in which a judgment must be enforced but permitting renewal judgments.

Section 54. Extension of Time to Causes Now Accrued. - Any cause of action which has accrued before the effective date of this act and which would become barred by the provisions of this act at once or before one year from the effective date because of reduction in time for bringing actions may be commenced within one year from the effective date of this act.

Comment. It has been held that a revision of limitations may be made effective as to existing causes of action, provided that a reasonable time is permitted after the new limitations become effective to assert the existing causes of action. Just how long is a reasonable time can never be definitely said. Thirty days has been held reasonable and six months insufficient. However, a year is thought surely to be sufficient to uphold the constitutionality of making the act effective to existing causes of action.

Section 55. Claims over Thirty-Five Years Old Affecting Real Property. - Except as provided in the following sections, no action affecting the possession or title of real property shall be commenced which is founded upon either:

1. An unrecorded instrument executed more than thirty-five years prior to the commencement of the action, or
2. An instrument recorded more than thirty-five years prior to the commencement of the action which is held by a person not in possession, either himself or through a tenant, at the time the action is commenced, or
3. A transaction, act, event, or omission occurring more than thirty-five years prior to the commencement of the action.

This section shall not be construed to extinguish any interests which are inherent in the provisions and limitations contained in the muniments of title of the record title owner nor to give a record title owner any estate or interest in real property greater than that which the muniments of his title purport to convey.

Comment. Cf. Wis. Acts 1941, c. 293, §1. The number of years (35) was adopted arbitrarily. A final determination of this figure is a matter of policy. Michigan allows 40 years, Wisconsin 30, Minnesota 50.

Section 56. Filing Notice to Maintain Claim. - The provisions of Section 55 shall be ineffective to the extent contained in the following sections, if within the thirty-five year period there is filed for recording a verified notice of a claim of interest in real property and an action is commenced thereon as prescribed in the following sections.

Comment. Cf. Wis. Acts 1941, c. 293, §1; Mich. Acts 1945, No. 200, §3. It has been thought desirable to split the contents of section one of the Wisconsin act into several sections for one reason to make the sections shorter and easier to read. The last sentence of section one of the Wisconsin act which read "Such notice filed after the expiration of the thirty years shall likewise be effective, except as to the rights of a purchaser for value of the real estate or any interest therein which may have arisen prior to such filing," has not been included in the proposed act. Such a provision it seems in part defeats the purpose of the act which, while primarily is to protect purchasers for value, is also to give the record title holder a marketable title which he can rely on without regard to occurrences more than thirty-five years in the past unless a notice of claim has been filed.

Section 57. Notice of Claim: Requirements; Manner of

Filing. - The notice of claim to be effective and to be entitled to record shall contain:

1. A complete and accurate description of all land affected by the claim,
2. The full name of the claimant or claimants,
3. The full name of the present record owners of the land, if known,
4. A complete description of the instrument or transaction (act, event, or omission) upon which the claim is founded, with the date, volume, and page of recording if it be recorded.

The notice of claim shall be filed for record in the office of the recorder of the county or counties where the land described therein is situated. The recorder shall record full copies thereof in the same manner that deeds are recorded and he shall be entitled to fees for the recording thereof as are charged for recording deeds. In indexing such notices the recorder shall enter such notice in the grantee indexes of deeds under the names of the claimants appearing in such statements, and under the names of the present (grantee) record owners of the land, if known.

Comment. Cf. Mich Acts 1945, No. 200, §5. The most difficult job in setting up a provision for recording a notice of claim is to provide a manner of giving actual notice to a purchaser and the record title owner. It is true that constructive notice by recording will suffice but any recording should as near as possible try to provide actual notice. It is obvious that the focal point is in the indexing. The difficulty of giving actual notice in this situation is not easy to overcome. An attempt has been made to insure actual notice by indexing the notice under the name of the actual record title holder. The number of cases when this person is not known or not ascertainable should be very few. It is submitted that this problem merits close attention and that the proposed section be strengthened if possible or changed if necessary to provide a recording which will give actual notice. Otherwise the act will be of doubtful benefit to a purchaser who cannot discover whether a notice of claim has been recorded.

Section 58. Notice of Claim: Effect of Recording. - The filing of a notice of claim of interest shall extend for one year from the date of filing the time in which an action founded upon the instrument or transaction set forth in the notice may be commenced. If an action is not commenced on the claim set forth within one year from the time of filing, it shall be completely barred and all rights under such notice shall terminate.

Comment. Cf. Minn. Acts 1943, c. 529, §2. How many years a recording shall extend the time for commencing action, and whether or not a re-recording should be allowed, are of course matters of policy. The Minnesota act allows one year, the Illinois act ten years. The number of years in Wisconsin and Michigan (the latter by implication) is the same as the number of years originally allowed for recording. The Wisconsin act specifically authorizes a re-recording. The Michigan act is silent on this matter but it is thought that such authorization is implied. (See, 44 Mich. L.R. 45, 54).

Section 59. Marketable Title after Thirty-Five Years. Record Ownership. - A record title owner who has unbroken chain of title for thirty-five years and against whose title no notice of claim has been filed shall have a marketable title to such land. Any purchaser for value of the land or of any interest therein shall take free of any claim not filed for record as required by this act. Although the record title owner need not himself be in actual possession of the real property, the provisions of this act are inoperative if the real property is in hostile adverse possession of another person. This section shall be construed to mean that the record title owner shall have a marketable title of that interest in the real property which the muniments of his title purport to convey to him.

Comment. Cf. Mich. Acts 1945, No. 200, §1, 3. This section is included as an optional section. In effect, it states in positive form what has been stated in section one of the proposed act in negative form. However, if it is thought desirable to state the whole statute in positive rather than negative form, more will have to be done than merely substituting this section for section one.

The Michigan act goes to some length to describe in whose favor the statute may operate. It is believed that it would be simpler to extend the act in favor of all record title owners, with the exception of those whose lands are in hostile adverse possession of another. The requirement found in the Michigan act that there must have been a conveyance to the present record holder or to the person from whom he claims within the forty year (Michigan) period in order to have an unbroken chain of title has not been included in the proposed act.

Section 60. Other Statute of Limitations not Affected. - This act does not extend nor lessen the right to commence any action beyond the time at which such right is barred by any other statute, nor does it affect the acquisition of title to real property by adverse possession.

Comment. Cf. Wis. Acts 1941, c.293, §3; Mich. Acts 1945, No. 200, §7.

Section 61. Disability, Lack of Knowledge. - No dis-

ability or lack of knowledge of any kind on the part of anyone shall suspend the running of the thirty-five year periods. A notice of claim of interest in real property may be filed for record by the claimant or by any person acting on behalf of any claimant who is (1) under a disability, or (2) unable to assert the claim on his own behalf, or (3) one of a class but whose identity cannot be established or is uncertain at the time of filing such notice for record.

Comment. Cf. Mich. Acts 1945, 46.200, §3; Wis. Acts 1941, c.293, §4. It should be evident that it makes no difference whether the record title holder knows or does not know of any outstanding claims before they are recorded. (See also the comment on section 64 of the proposed act.)

Section 62. To Whom not Applicable. - This act shall not bar any lessor or his successor as reversioner of his right to possession on expiration of any lease by reason of failure to file notice; nor shall it bar any mortgagee or his successor of his rights under a mortgage extending for more than thirty-five years by reason of failure to file notice.

Comment. Cf. Mich. Acts 1945, No. 200, §4. Probably the act would be construed not to affect the interests excepted in this section. However, it is thought desirable to state them.

Section 63. Construction of Act. - Sections 55 through 62 of this act shall be construed to effect the legislative purpose of simplifying and facilitating land transaction by allowing person dealing with the record title owner to rely on the record title covering a period of not more than thirty-five years prior to the date of such dealing; and to that end to extinguish all claims to an interest in the real estate being dealt with, the existence of which claims arise out of or depend on any act, transaction, event, or omission which occurred prior to the thirty-five year period, unless within the thirty-five year period there has been filed for record a notice of the claim as provided in this act. The claims extinguished shall include any and all interests of any nature including statutory rights given in lieu of dower or curtesy, reversions, tax deeds, rights as heirs or under wills, and whether such claims are asserted by a person for himself or for another, whether such person is within or without the state, whether such person is natural or corporate, private or governmental.

Comment. Cf. Wis. Acts 1941, c.293, §4; Mich. Acts 1945, No. 200,

§6. This is in many respects the most important section in the act. As was pointed out before, the Wisconsin and Michigan acts would appear to be dissimilar were it not that the sections in each act construing the legislative intent are for most purposes identical. Minnesota has also an almost identical section in its act.

Section 64. Extension of Time to Existing Claims. - No interest or claim shall be barred by the provisions, Sections 55 through 63, of this act until the lapse of two years (one year) from its effective date. Any interest or claim which would be otherwise barred upon passage or before the lapse of two years (one year) may be preserved and kept effective by filing for record a notice of claim as required by this act within the two year (one year) period after passage.

Comment, §§55-64. In general. Sections 55 to 64 comprise what was originally drafted as a separate statute. In view of the fact that it is closely allied to the Statute of Limitations, and in fact may appropriately be considered as a part thereof, it has been engrafted as a whole into the present act.

The general sources from which these sections were constructed are Mich. Acts 1945, No. 200 and Wis. Acts 1941, c. 293, Wis Stat. (1941) §330.15. Comparable acts of other states were not overlooked. (See, Ill. Acts 1941, v. I, p. 854; Minn. Acts 1943, c. 320; Iowa Code (1939) §11024; Ind. Acts 1941, c. 141, Ind. Stat. Ann. (Burns, Supp. 1942) §2-626.)

The chief difference between the Michigan and Wisconsin acts lies in the fact that the latter is a part of the Statute of Limitations while the former is not. Both are directed toward the same purpose as is evident from the section of each statute setting forth the intention of the legislature. It is therefore a matter of policy, or of choice, whether the "positive" or "negative" approach is made to the subject.

For the most part the proposed act is drafted in the negative form, i.e., as a Statute of Limitations. It is believed that the Wisconsin act approaches the subject more directly and with less confusion of meaning than the Michigan act. An attempt has been made to include the desirable features of both and in more than one instance the ideas and terminology of the Michigan statute have been incorporated into the proposed act.

Comment. Cf. Mich. Acts 1945, No. 200, §9. The provision for a two year (one year) period after the effective date should save any question of constitutionality of the statute even though it operates on existing interests. See Aigler, "Clearance of Land Titles—A Statutory Step" (1945) 44 Mich. L.Rev. 45, 55. It might be well to compare the comment (1941) 17 Ind. L.J. 176 which raises the question of the validity of a statute which is operative "retrospectively on vested property rights." This comment also discusses the question of what are "vested property rights." At least one thing is certain—the intention of this proposed act is to accomplish exactly what the author of the comment interprets was not the intention of the legislature in passing the 1941 act.

As Aigler points out, Statutes of Limitations have always been held constitutional—and likewise they may operate on existing claims providing a “reasonable” time is allowed to assert these claims after passage of the act.

Section 65. Repealer. - All laws or parts of laws in conflict with this act are repealed and the following laws are specifically repealed: Acts 1881, Chapter 38, sections 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 54; Acts 1909, Chapter 137, sections 3, 4, 6, 7; Acts 1923, Chapter 113, section 1; Acts 1937, Chapter 97, sections 1, 2, 3; Acts 1941, Chapter 141, section 1; Acts 1941, Chapter 116, section 1; Acts 1927, Chapter 42, section 1 [which are listed in Burns as 2-601 through 2-627; 2-1036; 3-1314].

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Comment. It is believed desirable to repeal specifically the former acts constituting the Statute of Limitations, especially since some of the existing sections have been intentionally omitted. The general repealing clause (“all conflicting laws”) following the specific repeals is of doubtful value. Likewise, the repeal of portions of Ind. Stat. Ann. (Burns, 1933) §§2-802, 7-504, which do not form a part of the Statute of Limitations, presents a problem of validity.