or overridden by the operation of Section 109, and that the States have full and unlimited powers, apart from the Commonwealth Constitution.

The reply to this view would probably be that the Court would have to find some source for the powers of the States, if not in Section 107, then elsewhere, that those powers exist, by reason of the Constitutions of the States, which, after all, have as their basis Imperial legislation, and that there is no real difference between examining one Section of the same statute and another Section of a different statute passed by the same legislative authority. Further, it could be said that it is incorrect to state that, except as limited by the Commonwealth Constitution, the States have full and unlimited powers. Should the Commonwealth Parliament apply the Statute of Westminster to Australia, legislation could be enacted inconsistent with Imperial legislation, applying expressly to the Dominions and Colonies, if the matter fell within the ambit of one of the Commonwealth Parliament's powers. The determination as to whether such a matter fell within the Commonwealth Parliament's powers, it might be said, would not involve an *inter se* question, because in itself to determine that the Commonwealth had power would not affect the powers of the States, even to make them concurrent, because the States would have no power over the subject-matter in any event. And, further, it would in this case be necessary to look to the State Constitutions, read in conjunction with the Colonial Laws Validity Act, to determine the question.

To answer these views it is necessary to join issue on the facts. For the truth of the matter is that it is unnecessary to look at any source of power other than the power of the Commonwealth which is being interpreted, and yet still to determine an *inter se* question. For, in deciding whether the Commonwealth has or has not power, it is necessarily decided (whether the States have power or not) that, should the States happen to have power, then, in so far as the Commonwealth is found to have power, any power the States may have is converted from exclusive into concurrent power. And for the purpose of reaching this consideration it is unnecessary to examine or discover what the State powers are, and yet a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States is involved.[11]

11. It is not without some considerable doubts that the above conclusion is reached. However, I feel that it is implicit in the views of Dixon J. in *Nelson's* case, and fortified by the reasoning of Professor Bailey.

C. I. MENHENNITT, LL.M.

LIMITATIONS OF ACTIONS

The Lord Chancellor's Law Revision Committee was appointed on January 10, 1934, to consider and report (*inter alia*) "whether the statutes and rules of law relating to the limitation of actions require amendment or unification, and in particular to consider

the rules relating to acknowledgments, to part payments, the disabilities of plaintiffs, the circumstances affecting defendants which prevent the periods of limitation from beginning to run, and the scope of the rules as to concealed fraud." As the terms of reference cover a wide field in this difficult branch of the law, the Committee's Interim Report, published in *Weekly Notes*, January 2, 1937, is a welcome addition to the law. This Report is characterized by a conciseness and simplicity in the statement of existing law that befits the legal eminence of the personnel of the Committee, and, apart from the value of its recommendations, it is an authoritative repository of learning on one of England's greatest legal patchworks. It is not proposed, therefore, to vainly attempt to consolidate the Report, but to direct attention to its existence and to a few of its important features.

The ghosts of the forms of action still haunt the limitation statutes, and it is the first recommendation of the Committee that a uniform period of six years be adopted for all actions founded in tort and simple contract. As the longer period in specialty actions is not based on the forms of actions, but on the absence of evidentiary difficulties, it is submitted that a twelve-year period is justified and sufficient. The fixed time limit, running from a fixed date, is still favoured, but the alternatives of judicial discretion and the extension of the equitable doctrine of concealed fraud are commended. It is recommended that the test as to the commencement of the period, namely, has a complete cause of action arisen, be retained, although the practical difficulties inherent in the application of the test are fully realized. In this particular we witness again that hesitancy of English legal experts to promulgate general principles which seems due to the fetish of precedent or apprehension of the casuistry of the Judiciary.

For the purposes of limitations of actions it is recommended that the distinction between express and constructive trusts should be abolished, with the consequence that the exceptions in the Trustee Act[1] should be expressly made to extend to trustees holding on express or constructive trusts, including personal representatives. On the equity side it is further recommended—a commentary indeed on the claim that the Judicature Acts are confined to procedure—that the equitable doctrine of concealed fraud should be applicable alike to common law actions, and that a defendant should not be permitted to set up lapse of time which is due to his own fraudulent conduct. McCardie J.'s view in *Lynn v. Bamber*[2] is thereby approved for the future, although not specifically advanced as the present law.

To avoid interpretation niceties in the doctrine of acknowledgments of simple contract debts, as instanced in the decisions of the Court of Appeal and the House of Lords in *Spencer v. Hemmerde*,[3] the Committee advises that the doctrine as applied to specialties should be adopted for simple contracts. This much-needed reform would certainly facilitate dealings with specious debtors. The view of Lord Sumner in

1. Section 67 of our Act.
2. (1930) 2 K.B. 72.
3. (1922) 2 A.C. 507.

Spencer v. Hemmerde, that a new promise revives the old debt, but does not create a new one, is approved as a correct statement of the law, thereby intimating that it is time that this old controversy should be dropped.

Subject to the rules in Private International Law, which were thought so difficult as to merit separate consideration, the Committee recommends the retention of the rule that the remedy is barred, but the right not extinguished at the expiration of the period. The view that the effect of limitation should be to destroy the right does not receive the attention it would seem to merit. No good purpose is accomplished by adherence to old doctrines that foster stale demands and encourage reliance by creditors on the rules of acknowledgments. It would seem preferable to confine the operation of acknowledgments to continuing the period and to abandon their regenerative effects. The existence of an imperfect right in our Jurisprudence is too great deference to dichotomous categories.

The final recommendation of importance, the adoption of which is an equity due to the much-governed citizen in the Public Utility State, is that the period of limitation under the Public Authorities Protection Act 1893 be extended from six months to one year, and that there be a uniform period of two years for all actions for the recovery of penalties by information, except under the Taxation Acts.

The Report as a case for reform is in keeping with England's traditional legal conservatism, but the simplification that would accompany the adoption of its specific recommendations warrants the immediate attention of Parliaments here as well as in England.

As difficult as this branch of the law is in England, there are additional anomalies in Victorian law, and that with the least substance is the variation in the periods for actions against public authorities. The usual period is six months. Under the Customs Act, actions by a claimant for goods seized by a Collector must be brought within four months, otherwise the goods are deemed condemned; for other actions under this Act, the period is six months. For actions based on negligence in respect of streets, the period is forty days under the Local Government Act. The period is three months under the Lunacy Act, and under the Vegetation and Vine Diseases Act it is four months. There appears no valid reason why a uniform period of one year, in conformity with the Committee's Report on the Public Authorities Protection Act, should not be enforced here to avoid the destruction of well-founded claims by arbitrary time restrictions.

A further limitation difficulty in Victorian law is Section 210 of the Justices Act, which provides that ". . . all complaints for a civil debt recoverable summarily under this Act, or for a cause of action determinable summarily, shall be made within six years from the time when the matter of such complaint arose, and not afterwards." The framework of this Section is similar to the original Statute of Limitations,[4] and, on the ordinary rule of construction that when a Legislature adopts a provision or form already interpreted it also adopts that

4. 21 Jac. I c. 16 (1623).

interpretation, it would seem that the doctrine of acknowledgments applies to it. But under Section 60 of the Supreme Court Act, the limitation rules in Part VII of the Act are to apply in all courts "unless express provision is otherwise made," and in *Cooper v. Dawson*,[5] Madden C.J. expressed the opinion that Section 210 is such express provision otherwise made, thereby creating "a different system and extent of limitation." In *Victorian Producers, etc., Co. Ltd. v. Rye*,[6] Irvine C.J., at page 574, seemed prepared to go a step further, and suggested that the doctrine of acknowledgments does not apply to Section 210 at all. In an *obiter dictum* at page 574 he said: "I have very considerable doubt whether the doctrine of implied promise to pay a debt arising from an acknowledgment in writing has any application whatever to Section 210 of the Justices Act." On this view Section 210 not merely bars the remedy, but limits the jurisdiction of the Justices.

Nevertheless, the fact that the Justices Act does not mention acknowledgments does not impliedly exclude it. Section 88 (1) of the Supreme Court Act provides that, "except as expressly provided in this Division, nothing herein contained shall take away or lessen the effect of any acknowledgment," and the provisions made in the Division are merely machinery. As the Supreme Court Act itself does not make provision for the doctrine of acknowledgments, it would seem that its omission from the Justices Act is not express provision otherwise made as to it. This view is supported by three decisions of the Supreme Court of Victoria during the last century, namely, *R. v. Wells*,[7] *Ex parte Fossman*,[8] and *Ex parte Johnson*.[9] In the latter case, the effect of a part payment was fully argued, and the Full Court held that its effect was to start a new period even before the Justices. As the attention of Irvine C.J. does not appear to have been directed to these decisions, it would seem that they are still good law, even though they are based on the view that a part payment gives rise to a new debt—*cf.* Lord Sumner in *Spencer v. Hemmerde*.

The confusion over Section 210 is very real. Some Magistrates and Justices refuse to make Orders on debts more than six years old where there has been a part payment, holding that their jurisdiction is limited. Others, particularly in undefended cases, automatically make the Orders without considering the jurisdictional question. Our Justices Act gives greater powers than the English Summary Jurisdiction Act,[10] and as our Courts of Petty Sessions have extensive jurisdiction over causes of action also cognizable in the higher Courts, there does not appear to be any valid ground for holding that these adjudications stand on a different footing from judgments of the higher Courts. Further, Section 92 of the Justices Act provides that the defence of any Statute of Limitations must be notified specially.

5. (1916) V.L.R. 281.
6. (1927) V.L.R. 572.
7. (1867) 4 WW. & A'B. (L) 31. In this case it is said a part payment creates a new debt: this is opposed to *Spencer v. Hemmerde, supra.*
8. (1878) 4 V.L.R. (L) 55.
9. (1886) 12 V.L.R. 676.
10. 11 and 12 Vic. c. 43 (1843).

This Section would be supererogatory if Section 210 aimed at jurisdiction, and precluded the operation of the doctrine of acknowledgments. It is submitted that such is not the purpose of Section 210, and that it is merely express provision for a uniform period of limitation complementary to the Supreme Court Act.

CLIFTON McPHERSON.

RESULTING TRUSTS ARISING FROM THE ABSENCE OF CONSIDERATION

This note is directed at a long-standing controversy, the existence of which is often overlooked by teachers of the law within whose province it properly falls. More than one such, and more than one very learned text-book writer, has stated his opinion on it as though it were a matter on which there was general agreement, if not one which followed axiomatically from first principles. The question at issue concerns the effect of the Statute of Uses, estimates of which have varied from one which regards it as changing the whole course of English legal history to one which says that it merely added five words to a conveyance. Put shortly, it is this: does the expression of a Use in a voluntary conveyance negative not only the "resulting Use" which would be executed by the Statute, but also the presumption of a "resulting trust" if such presumption would otherwise arise? It is, of course, to be understood that there is no magic in the words "use" and "trust"; they have the same meaning technically, but I shall use the former when referring to one that is open to the operation of the Statute, and the latter for one that is not affected by it.

It is necessary to begin with a very brief outline of the historical background to the question. Just prior to the enactment of the Statute of Uses the concept of the Use had become so well recognized and so frequently applied that the Use was presumed to be separated from the legal estate in the land whenever there was no consideration for the conveyance; the result was that, if the beneficial owner was not so named in the conveyance, then the grantor retained in Equity his ownership of the land. The effect of the Statute in the cases to which it applied was to render the whole transaction a nullity; the Use in favour of the grantor was "executed," carrying the legal estate with it. Thus it was that a voluntary conveyance could only be effected if the Use in the land were expressly stated to be in the grantee.

There were several cases in which a Use arose which was not affected by the Statute; the one of most interest to us, which became of great importance later, was the "Use upon a Use." The second Use was originally regarded as void because inconsistent with the first (e.g., *Tyrrell's* case). Later, when the feudal dues lost their importance, somewhere about the year 1660, when the Statute which abolished military tenures was passed, Chancery began to enforce this second Use, which I am going to call a trust.