

LIMITATION OF ACTIONS ACT, 1936.

No. 2268 of 1936.

An Act to consolidate the Acts relating to the limitation of actions and other legal proceedings.

[Assented to 13th August, 1936.]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows :

Short title.

1. This Act may be cited as the “Limitation of Actions Act, 1936”.

Repeals.

2. This Act is a consolidation of the enactments set out hereunder, and those enactments are repealed :—

The Limitation of Suits and Actions Act, 1866-7, No. 14 of 1866-7—The whole Act.

The Supreme Court Act, 1878, No. 116 of 1878—Paragraph II. of section 6.

The Trustee Act, 1893, No. 586 of 1893—Sections 45 and 46

Interpretation.

3. (1) In this Act, unless the context otherwise requires, or some other meaning is clearly intended—

“action” includes legal proceedings of all kinds :

“land” includes messuages and all other corporeal hereditaments, and any estate or interest in any land :

“person” includes any number of persons, any body corporate or collegiate, and any class of creditors :

“person through whom another person claims” means any person by through or under or by an act of whom the person so claiming became entitled to the estate or interest claimed as heir issue in tail successor

Imperial Legislation: SOUTH AUSTRALIAN COMPANY V. THE CORPORATION OF THE CITY OF PORT ADELAIDE (1914) S.A.L.R. 16; 10 Austl. Digest 504. The Nullum Tempus Act (9 Geo. 3 c. 16) relating to the limitation of proceedings by the Crown for the recovery of land, is in force in South Australia.

special or general occupant executor administrator
legatee husband assignee appointee devisee or other-
wise:

“rent” includes all services for which a distress may be
made and all annuities or periodical sums of money
charged upon any land.

(2) This Act shall be construed subject to The Real Property
Act, 1886.

Limitation of proceedings for recovery of land or rent.

4. No person shall make an entry or distress or bring an
action to recover any land or rent but within twenty years
next after the time when the right to make that entry or
distress or to bring that action first accrued to him or to some
person through whom he claims.

Limitation in
actions for
recovery of
rent or land.
14, 1866-7,
s. 4.
U.K. 3 and 4
Will. 4 c. 27,
s. 2.

5. The right to make an entry or distress or bring an action
to recover any land or rent shall be deemed to have first accrued
at the time prescribed in the following sections of this Act.

Time of
accrual of
right of action.
14, 1866-7, s. 5.
U.K. 3 and 4
Will. 4 c. 27,
s. 3.

6. When the person claiming any land or rent or some
person through whom he claims has in respect of the estate
or interest claimed been in possession or in receipt of the
profits of that land or in receipt of that rent, and has while
entitled thereto been dispossessed or has discontinued that
possession or receipt, then the right to make an entry or distress
or bring an action to recover the land or rent shall be deemed
to have first accrued at the time of the dispossession or dis-
continuance of possession or at the last time at which any
such profits or rent were or was so received.

Where
claimant has
been in
possession
and discon-
tinued
possession.
14, 1866-7, s. 6
U.K. 3 & 4
Will. 4 c. 27,
s. 3.

7. When the person claiming any land or rent claims the
estate or interest of a deceased person who continued in
possession or in receipt of the profits of that land or in receipt
of that rent in respect of the same estate or interest until
his death and was the last person entitled to such estate
or interest who has been in such possession or receipt, then
the right to make an entry or distress or bring an action to
recover the land or rent shall be deemed to have first accrued
at the time of the death of that person.

Case where
person in
possession has
died.
14, 1866-7, s. 7.
U.K. 3 and 4
Will. 4 c. 27,
s. 3.

s. 4. NIXON v. REYNOLDS (1869) 3 S.A.L.R. 142; 13 Austn. Digest 141. In an action of
ejectment, held that upon proof by the plaintiff of a deed title it is for the
defendant to show title by possession in order to resist it, and not for the plaintiff
to prove that the defendant has no such title.

HARVEY v. WILLIAMS (1883) 18 S.A.L.R. 8; 13 Austn. Digest 124. Absence from the
State is not a disability which prevents time from running against the plaintiff
in an action for recovery of land.

Case where
land alienated.
14, 1866-7, s. 8.
U.K. 3 and 4
Will. 4 c. 27,
s. 3.

8. When the person claiming any land or rent claims in respect of an estate or interest in possession granted appointed or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being in respect of the same estate or interest in possession or in receipt of the profits of the land or in receipt of the rent, and no person entitled under that instrument has been in such possession or receipt, then the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time when the person claiming as aforesaid or the person through whom he claims became entitled to such possession or receipt by virtue of that instrument.

Future
estates.
14, 1866-7, s. 9.
U.K. 3 and 4,
Will. 4, c. 27,
s. 3.

9. When the estate or interest claimed has been an estate or interest in reversion or remainder or other future estate or interest and no person has obtained possession or receipt of the profits of the land or receipt of the rent in respect of that estate or interest, then the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have accrued at the time when that estate or interest became an estate or interest in possession.

Forfeiture or
breach of
condition.
14, 1866-7,
s. 10.
U.K. 3 and 4
Will. 4 c. 27,
s. 3.

10. When the person claiming any land or rent or the person through whom he claims has become entitled by reason of any forfeiture or breach of condition, then the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time when that forfeiture was incurred or that condition was broken.

Where
advantage of
forfeiture is
not taken by
remainder-
man.
14, 1866-7,
s. 11.
U.K. 3 and 4.
Will. 4 c. 27,
s. 3.

11. When any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition has first accrued in respect of any estate or interest in reversion or remainder, and the land or rent has not been recovered by virtue of that right, then the right to make an entry or distress or bring an action to recover that land or rent shall be deemed to have first accrued in respect of that estate or interest at the time when it became an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Mortgage.
14, 1866-7,
s. 12.
U.K. 7 Will. 4,
and 1 Vict. c.
28, s. 1.

12. When any person is entitled to or claims under any mortgage of land, then the right to make an entry or distress, or bring an action to recover the land shall be deemed to have first accrued at the time of the last payment of any part of the principal money or interest secured by that mortgage, although more than twenty years may have elapsed since the time when the right to make the entry or distress or bring the action first accrued.

13. In respect of an estate or interest in reversion, the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued when that estate or interest became an estate or interest in possession by the determination of any estate or estates in respect of which such land was held or the profits thereof or the rents were received, notwithstanding that the person claiming the lands or some person through whom he claims has at any time previous to the creation of the estate or estates which have determined, been in possession or in receipt of the profits of the land or in receipt of the rent.

Reversioner to have a new right.
14, 1866-7, s. 13.
U.K. 3 and 4 Will. 4 c. 27, s. 5.

14. For the purposes of this Act the administrator of a deceased person claiming the estate or interest of that person shall be deemed to claim as if there had been no interval between the death of the deceased person and the grant of the letters of administration.

Administrators.
14, 1866-7, s. 14.
U.K. 3 and 4 Will. 4 c. 27, s. 6.

15. When any person has been in possession or in receipt of the profits of any land or in receipt of any rent as tenant at will, the right of the person entitled subject thereto or of the person through whom he claims to make an entry or distress or bring an action to recover that land or rent shall be deemed to have first accrued either at the determination of that tenancy at will or at the expiration of one year next after the commencement of that tenancy, at which time that tenancy shall be deemed to have determined: Provided that no mortgagor or *cestui que trust*, shall be deemed a tenant at will within the meaning of this section to his mortgagee or trustee.

Where land subject to tenancy at will.
14, 1866-7, s. 15.
U.K. 3 and 4 Will. 4 c. 27, s. 7.

16. When any person is in possession or in receipt of the profits of any land or in receipt of any rent as tenant from year to year or other period without any lease in writing, the right of the person entitled subject thereto or the person through whom he claims to make an entry or distress or bring an action to recover that land or rent shall be deemed to have first accrued at the determination at the first of such years or other period or at the last time any rent has been received whichever first happens.

Tenancy from year to year.
14, 1866-7, s. 16.
U.K. 3 and 4 Will. 4 c. 27, s. 8.

17. When—

(a) any person is in possession or in receipt of the rents and profits of any land or in receipt of any rent by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards is reserved; and

(b) the rent reserved by that lease has been received by some person wrongfully claiming to be entitled

Where rent amounting to twenty shillings, reserved by a lease in writing, wrongfully received.
14, 1866-7, s. 17.
U.K. 3 and 4 Will. 4 c. 27, s. 9.

to the land or rent in reversion immediately expectant on the determination of that lease ; and

- (c) no payment in respect of the rent reserved by the lease has afterwards been made to the person rightfully entitled thereto,

the right of the person entitled to such land or rent subject to such lease or of the person through whom he claims to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at the time at which the rent so reserved was first so received by the person wrongfully claiming as aforesaid ; and no such right shall be deemed to have first accrued upon the determination of the lease to the person rightfully entitled.

Entry not to
be possession.
14, 1866-7,
s. 18.
U.K. 3 and 4
Will. 4 c. 27,
s. 10.

18. No person shall be deemed to have been in possession of any land merely by reason of having made an entry thereon.

Continual
claim.
14, 1866-7,
s. 19.
U.K. 3 and 4
Will. 4 c. 27,
s. 11.

19. No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or bringing an action.

Possession of
joint tenant.
14, 1866-7,
s. 20.
U.K. 3 and 4
Will. 4 c. 27,
s. 12.

20. When any one or more of several persons entitled to any land or rent as joint tenants or tenants in common has been in possession or receipt of the entirety or more than his or their individual shares of that land or the profits thereof or of that rent for his or their own benefit or for the benefit of any persons other than the persons entitled to the other shares of that land or rent, that possession or receipt shall not be deemed the possession or receipt by the persons entitled to those other shares.

Effect of
acknowledg-
ment by
person in
possession.
14, 1866-7,
s. 22.
U.K. 3 and 4
Will. 4 c. 27,
s. 14.

21. When any acknowledgment of the title of the person entitled to any land or rent has been given to him or his agent in writing signed by the person in possession or in receipt of the profits of that land or in receipt of such rent, then—

- (a) that possession or receipt of or by the person by whom that acknowledgment was given shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving the same ; and

s. 18. *DARWENT v. LLOYD* (1870) 4 S.A.L.R. 134. Observations as to what constitutes possession. *Seemle*, a series of trespasses on the land of another is not possession. There must be some conduct by which the owner would know that his title is in jeopardy.

- (b) the right of the last-mentioned person or any person claiming through him to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at and not before the time at which the acknowledgment or the last of the acknowledgments, if more than one, was given.

22. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession has been barred by the determination of the period limited by this Act and applicable to the case, and that person at any time during that period has been entitled to any other estate interest right or possibility in reversion remainder or otherwise in or to the same land or rent, no entry distress or action shall be made or brought by that person or any person claiming through him to recover that land or rent in respect of such other estate interest right or possibility unless in the meantime the land or rent has been recovered by some person entitled to an estate interest or right which has been limited or taken effect after or in defeasance of such estate or interest in possession.

Effect on
future estates
when estate
in possession
barred.

14, 1866-7,
s. 23.
U.K. 3 and 4
Will. 4 c. 27,
s. 20.

23. When the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the land or rent has been barred by the expiration of the period limited by this Act and applicable to the case, no such entry distress or action shall be made or brought by any person claiming any estate interest or right which the tenant in tail might lawfully have barred.

Tenants in
tail and
remainder-men.

14, 1866-7,
s. 24.
U.K. 3 and 4
Will. 4 c. 27,
s. 21.

24. Where a tenant in tail of any land or rent entitled to recover that land or rent has died before the expiration of the period limited by this Act and applicable to the case, no person claiming any estate interest or right which the tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover the land or rent but within the period during which, if the tenant in tail had so long continued to live, he might have made that entry or distress or brought that action.

Possession
adverse to
a tenant in
tail to run
against a
remainder-man.

14, 1866-7,
s. 25.
U.K. 3 & 4
Will. 4 c. 27,
s. 22.

25. (1) In every case of a concealed fraud, the right of any person to bring equitable proceedings for the recovery of any land or rent of which he or any person through whom he claims has been deprived by that fraud shall be deemed to have first accrued at and not before the time when that fraud was or with reasonable diligence might have been first

Concealed
fraud.

14, 1866-7,
s. 27.
U.K. 3 & 4
Will. 4 c. 27,
s. 26.

known or discovered: Provided that nothing in this section shall enable any owner of lands or rents to bring equitable proceedings for the recovery of those lands or rents on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of that fraud and who at the time when he made the purchase did not know and had no reason to believe that any such fraud had been committed.

(2) In this section "equitable proceedings" means any proceedings of a kind which before the passing of the Supreme Court Act, 1878 could have been brought by way of a suit in equity.

Saving
jurisdiction
of equity.
14, 1866-7,
s. 28.
U.K. 3 and 4
Will. 4 c. 27,
s. 27.

26. Nothing in this Act shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act.

Time when
mortgagor
barred.
14, 1866-7,
s. 29.
U.K. 3 and 4
Will. 4 c. 27,
s. 28.

27. (1) When a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring an action to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or his right of redemption has been given to the mortgagor or some person claiming his estate or to the agent of the mortgagor or of that person in writing signed by the mortgagee or other person claiming through him.

(2) If such an acknowledgment has been given no such action shall be brought but within twenty years next after the time at which that acknowledgment or the last of those acknowledgments if more than one, was given.

(3) When there is more than one mortgagor or more than one person claiming through the mortgagor or mortgagors, such an acknowledgment if given to any of those mortgagors or persons or his or their agent shall be as effectual as if it had been given to all such mortgagors or persons.

(4) Where there is more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees such an acknowledgment signed by one or more of those mortgagees or persons—

(a) shall be effectual only as against a party signing as aforesaid and a person claiming any part of the

mortgage money or land or rent by from or under him and any person entitled to any estate or interest to take effect after or in defeasance of his estate or interest; and

- (b) shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against any person entitled to any other undivided or divided part of the money or land or rent.

(5) Where any mortgagee or any such person as aforesaid has given such an acknowledgment and is entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment with interest of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of that divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage.

28. At the determination of the period limited by this Act to any person for making an entry or distress or bringing an action, the right and title of that person to the land or rent for the recovery whereof that entry distress or action might have been made or brought within that period, shall be extinguished.

Extinction of rights at end of period of limitation.

14, 1866-7,
s. 30.
U.K. 3 and 4
Will. 4 c. 27,
s. 24.

29. The receipt of the rent payable by any tenant from year to year or other lessee shall as against such lessee or any person claiming under him (but subject to the lease) be deemed to be the receipt of the profits of the land for the purposes of this Act.

Receipt of rent to be deemed receipt of profits.

14, 1866-7,
s. 31.
U.K. 3 and 4
Will. 4 c. 27,
s. 35.

30. No devolution on intestacy, discontinuance, or warranty which may happen or be made shall take away or defeat any right of entry or action for the recovery of land.

No descent, warranty, etc., to bar a right of entry.

14, 1866-7,
s. 32.
U.K. 3 and 4
Will. 4 c. 27,
s. 39.

Claims for trust property or breach of trust.

31. Subject to the next following section—

- (a) where any land or rent is vested in a trustee on any express trust, the right of the beneficiary or any person claiming through him, to bring an action against the trustee or any person claiming through him, to recover the land or rent, shall be deemed to

Application of Act to express trusts.

586, 1893,
s. 45.

have first accrued at, and not before, the time at which the land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against that purchaser and any person claiming through him :

- (b) no claim of a beneficiary against his trustee, in respect of any property held on an express trust, or in respect of any breach of an express trust, shall, subject to the next following subsection, be barred by any statute of limitations :
- (c) no action or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the money, legacy, or arrears would be recoverable if there were not any such trust.

Further provisions as to application of Act to trusts.
586, 1893, s. 46.

32. (1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—

- (a) All rights and privileges conferred by this Act shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in the action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.
- (b) If the action or other proceeding is brought to recover money or other property, and is one to which no other provision of this Act applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead lapse of time as a bar to the action or other proceeding, in the like manner and to the like extent as if the action or other proceeding had been an action for money had and received ; and that so this Act shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any

beneficiary unless and until the interest of such beneficiary is an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceedings in which the judgment or order was obtained and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings begun after the twenty-third of December, eighteen hundred and ninety-three, and shall not deprive any executor or administrator of any right or defence to which he was then entitled under any then existing statute of limitations.

Recovery of money charged on land and legacies.

33. (1) No action or other proceeding shall be brought to recover any money secured by any mortgage judgment or lien or otherwise charged upon any land or rent at law or in equity or any legacy but within twenty years next after a present right to receive that money has accrued to some person capable of giving a discharge for or release of the money, unless in the meantime some part of the principal money or some interest thereon has been paid or some acknowledgment of the right thereto has been given in writing signed by the person by whom the money is payable or his agent, to the person entitled thereto or his agent.

Money charged upon land and legacies.

14, 1866-7,
s. 33.
U.K. 3 and 4
Will. 4 c. 27,
s. 40.
U.K. 37 and
38 Vict. c. 57,
s. 8.

(2) If any such payment is made or acknowledgment is given, no such action or proceeding shall be brought but within twenty years after such payment or acknowledgment or the last of such payments or acknowledgments if more than one was made or given.

Actions on specialty.

34. All actions for rent reserved by any lease by deed and all actions of covenant or debt upon any bond or other specialty or upon any judgment or recognizance shall be commenced and sued within twenty years next after the cause of action accrued or the recovery of the judgment and not after: Provided that if any acknowledgment has been made either by writing signed by the party liable by virtue of the deed bond specialty judgment or recognizance or his agent or by part payment or part satisfaction of any principal or interest being then due thereon, any person entitled to any such action may bring

Limitation of action on specialty.

14, 1866-7,
s. 35.
U.K. 3 and 4
Will. 4 c. 43,
ss. 3 and 5.

s. 33. *In re WHITE; BAKEWELL v. WHITE* (1917) S.A.L.R. 193; 8 Austn. Digest 1050; 13 Austn. Digest 42. A decree for general administration of the assets of a deceased person has the effect of stopping time from running against all creditors whose claims were not already barred at the date of the decree.

an action for the money remaining unpaid and so acknowledged to be due within twenty years after that acknowledgment by writing or part payment or part satisfaction.

Actions on simple contract and in tort.

Actions on simple contract and in tort.
14, 1866-7, s. 36.
U.K. 21 James 1 c. 16, s. 3.
U.K. 4 and 5 Ann c. 16, s. 17.
U.K. 3 and 4 Will. 4 c. 42, s. 1.
U.K. 19 and 20 Vict. c. 97, s. 9.

35. The following actions namely :—

- (a) actions founded upon any simple contract express or implied, or upon any award where the submission is not by specialty :
- (b) actions of account or for not accounting :
- (c) actions which formerly might have been brought in the form of actions called actions on the case :
- (d) actions or other proceedings to recover arrears of rent where the letting is not by deed :
- (e) actions to recover arrears of interest in respect of any sum of money charged upon any land or rent or arrears of interest in respect of any legacy :
- (f) actions to recover damages in respect of any such arrears of rent or interest :
- (g) actions for seamen's wages :
- (h) actions for money levied on a *fieri facias* or for an escape :
- (i) actions for direct injuries to real or personal property :
- (j) actions for taking away detention or conversion of property goods or chattels :
- (k) actions for libel malicious prosecution arrest or seduction and any other actions which would formerly have been brought in the form of actions called trespass on the case :

shall, save as otherwise provided in this Act, be commenced within six years next after the cause of action accrued and not after.

s. 35. CROMBIE v. CROMBIE (1901-3) S.A.L.R. 147; 13 Austr. Digest 24. Held that where the plaintiff paid money under a contract which the defendant subsequently refused to perform, the time for bringing an action to recover the money ran from the date of refusal and not of payment.

EXECUTOR, TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LIMITED v. THOMPSON (1919) 27 C.L.R. 162; 25 A.L.R. 406; 13 Austr. Digest 40. Where a new oral agreement to pay an old debt is made for valuable consideration, an action can be brought at any time within six years from the day fixed for payment under that agreement.

FALZON v. ADELAIDE DEVELOPMENT COMPANY LIMITED (1936) S.A.S.R. 93. Time runs against the plaintiff from the time when he first had the right to bring his action.

36. All actions for assault trespass to the person menace battery wounding or imprisonment shall be commenced within three years next after the cause of such action accrued but not after.

Assault and other injuries to the person.
14, 1866-7,
s. 37.
U.K. 21
Jac. 1 c. 16,
s. 3.

37. All actions for slander and all actions for penalties damages or sums of money given to any party by any statute in force at or after the commencement of this Act shall be commenced within two years next after the cause of action accrued, but not after.

Slander and penalties.
14, 1866-7,
s. 38.

38. Where any Act or law in force on the fourteenth day of January eighteen hundred and sixty-seven (the day of the commencement of the Limitations of Suits and Actions Act, 1866-7) requires that actions of any kind mentioned in any of the last three preceding sections must be brought within any period being less than six months from the time when the cause of action arose, any action of that class may notwithstanding that Act or law be brought at any time not later than six months from the time when the cause of action arose.

Extension of period of limitation under other Acts.
Cf. 14, 1866-7,
s. 39.

39. If any person against whom there is any such cause of action as is referred to in section 35, 36, or 37 of this Act was at the time when the cause of action accrued absent from the State the party entitled to the action may commence it within the time limited by this Act after the return of that person from beyond the seas as if that had been the time at which the cause of action accrued.

Absence from State of person liable.
14, 1866-7,
s. 41.
U.K. 4 and 5
Ann c. 16,
s. 19.

40. When any such cause of action as is referred to in section 35, 36, or 37 of this Act has accrued against two or more joint debtors the party entitled to the action shall not be entitled to any additional time within which to commence any action against any such joint debtor who was within the State at the time when the cause of action accrued by reason only that any such joint debtor was at that time absent from the State: and the party so entitled shall not be barred from commencing and prosecuting an action against any joint debtor after his return to the State by reason only that judgment has already been recovered against any joint debtor who was within the State when the cause of action arose.

Absence from State of a joint debtor.
14, 1866-7,
s. 41.
U.K. 19 and
20 Vict. c. 97,
s. 11.

s. 37. *MORT v. BRADLEY* (1916) S.A.L.R. 129; 13 Austn. Digest 22. Held that s. 37 does not apply to damages against a co-respondent guilty of adultery. Damages in s. 37 means damages or sums of money in the nature of penalties.

TYLEY AND ANOTHER v. DOUGHERTY (1932) S.A.S.R. 307; 13 Austn. Digest 31. The period of limitation of an action for slander by an infant, begins to run only from the time of the cessation of disability.

s. 38. *HUNT v. SHANKS* (1918) S.A.L.R. 254; 13 Austn. Digest 23. The court interpreted s. 39 of 14, 1866-7, and declared its meaning to be as now expressed in s. 38 of the present Act.

Payment by a contractor.

1-4, 1866-7,
s. 42.
U.K. 19 and
20 Vict. c. 97,
s. 14.

41. Where there are two or more co-contractors or co-debtors whether bound jointly only or jointly and severally or executors or administrators of any co-contractors, no such co-contractor or co-debtor or executor or administrator shall lose the benefit of this Act so as to be chargeable in respect or by reason only of payment of any principal interest or other money by any other such co-contractor co-debtor executor or administrator.

Effect of oral acknowledgment.

14, 1866-7,
s. 43.
U.K. 9 Geo. 4
c. 14, s. 1.

42. (1) In any action of debt or other action in the nature of an action founded upon simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract whereby to take any case out of the operation of this Act, or deprive any party of the benefit thereof, unless that acknowledgment or promise is made or contained by or in some writing to be signed by the party to be charged thereby or by his agent.

(2) Where there are two or more joint contractors or executors or administrators of any contractors no such joint contractor executor or administrator shall lose the benefit of this Act so as to be made chargeable by or in respect only of any written acknowledgment or promise made and signed by any other or others of them.

(3) Except as expressly provided in this Act nothing in this Act shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever.

Indorsements of payment.

14, 1866-7,
s. 45.
U.K. 9 Geo. 4
c. 14, s. 3.

43. No indorsement or memorandum of any payment written or made upon any promissory note bill of exchange or other writing by or on behalf of the party to whom that payment was made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of this Act.

Simple contract debts by way of set-off.

14, 1866-7,
s. 46.
U.K. 9 Geo. 4
c. 14, s. 4.

44. This Act shall apply to the case of any debt or simple contract alleged in the way of set-off on the part of any defendant either by his defence or notice or otherwise.

Persons under disability.

Persons under disability.

14, 1866-7,
ss. 47, 48.
U.K. 3 and 4
Will. 4 c. 42,
s. 4.

45. (1) If at the time when the right of any person to make an entry or distress or bring any of the actions mentioned in this Act first accrued that person was an infant idiot lunatic or of unsound mind, then that person or the person claiming

s. 42. *HODGKISS v. RIVAZ* (1876) 10 S.A.L.R. 79; 13 Austn. Digest 36. Held that a letter from a debtor stating that he was not in a position to make any arrangement for settling the debt, was not an acknowledgment from which a promise to pay could be inferred.

EXECUTOR TRUSTEE & AGENCY CO. OF S.A. LTD. v. THOMPSON (1919) 27 C.L.R. 162; 25 A.L.R. 406; 13 Austn. Digest 40. Where an oral agreement for payment of a debt is made on fresh consideration, s. 42 does not apply, and time will run from the making of the agreement.

through him may notwithstanding that the period of limitation fixed by this Act has expired make an entry or distress or bring an action within the time limited by this Act after his coming to full age or becoming of sound mind or his death, whichever first happen.

(2) No entry distress or action to recover any land or rent shall be made or brought by any person who at the time when his right to make an entry or distress or bring an action to recover any land or rent first accrued was under any such disabilities, or by any person claiming through him, but within forty years next after the time at which such right first accrued although the person under disability or the persons claiming through him may have remained under one or more of such disabilities during the whole of those forty years.

46. No person shall be entitled to any further time beyond the period fixed by this Act within which to make an entry or distress or bring any action, by reason only that he was at the time when the right to make an entry or distress or to bring the action accrued, absent from the State or imprisoned.

Imprisonment
or absence of
person
entitled to
action.
14, 1866-7.
s. 49.
U.K. 19 and
20 Vict. c. 97.
s. 11.