FACULTY OF ADVOCATES

Comments from the Faculty of Advocates

to

Prescription (Scotland) Bill: Call for Evidence

The Faculty is grateful to the Committee for the opportunity which has been given to it to offer some additional observations in the light of the evidence given to the Committed on 27th March, 2018. There are two matters on which it would wish to focus attention.

The first of these relates to clause 7 of the Bill, a matter about which, to judge from the questions asked by them, the members of the Committee might welcome more information.

Clause 7 is a proposed amendment to the present section 8 of the 1973 Act. That relates to property rights other than those rendered imprescriptible by virtue of schedule 3 to the Act. To illustrate the kind of situation to which the amended section 8 would apply, in our original submission, we used the example of an action designed to establish a right to a servitude which had not been exercised for 19 years when the action was raised. At present, the words which are to be repealed by sub-clause 7(2) of the Bill put a stop to any possibility of the right sought to be established prescribing during the pendency of the action. But on the repeal of those words, it will become possible for the right which is the subject of the action to prescribe whilst the action is on foot. This result is obviously undesirable, and to counter it, the Bill makes the provisions it does in sub-clause 7(3). These mirror the provisions which are to be inserted in section 7 of the Act, extending the prescriptive period until the end of any litigation on an obligation which would otherwise prescribe during the pendency of that litigation. Whilst those provisions seem to us to be likely to work successfully in the context of section 7, we doubt their efficacy in the different one of the present section 8.

It is worth bearing in mind that section 7 as amended will apply to personal rights which will tend to be enforced by an action seeking payment, damages or some form of performance. At the end of a successful action, the pursuer will obtain a decree for, say, damages, and that decree will constitute a new source of obligation with which the defender has to comply. That new obligation will give rise to a new prescriptive period. It does not therefore matter that the obligation sued upon has now prescribed for it has been superseded by the new obligation to pay under the decree.

But where, in our example, a servitude is sought to be made out in Court, the decree sought by the pursuer will not be an executory one, but a declarator of the existence of the servitude. Such a decree does not place the person against whom it is granted under an obligation to pay any money or perform any act; it merely declares the existence or otherwise of a given state of affairs. It does not constitute a new source of obligation. Any obligation on the defender to act in a given way in light of the pursuer's success in an action on a servitude raised well within the prescriptive period derives not from the decree but from the legal consequences of the state of affairs declared by that decree, i.e., the

underlying servitude declared by the decree to exist at the date of that decree. The same is true of the declaratory decree in the same type of action raised at a date which resulted in the twenty year prescriptive period expiring whilst the action was still running. So if, in the latter case, the legal right to a servitude declared prescribes at the conclusion of the action, the declarator obtained by the pursuer in that action becomes instantly out-dated and irrelevant as other than a historical document recording what once was the state of matters as between the parties. That happens because the successful conclusion of the pursuer's action caused his declared right to be extinguished immediately thereafter and, with it, any correlative obligation on the part of the defender to act in accordance with the legal obligations which arise out of the former declared state of facts in relation to persons in his position. Hence the remark in our earlier comments that the paradox that on the terms of the amended section 8, success in such an action would entail practical failure. Whilst the defender might have been subject to an interim interdict to stop him from acting in a way which denied the pursuer's servitude rights, on the extinction of the servitude by virtue of the conclusion of the action, no such interdict could be maintained as the defender would commit no civil wrong in acting so as to deny the servitude – the new sub-sections 8(1A) and (1B) would have extinguished the former servitude rather pointlessly declared by the Court.

This, as we commented earlier and in our evidence to the Committee, cannot be the intention of the legislature, and we believe that clause 7 of the Bill needs to be rethought in order to avoid it.

Our second point relates to the question of the ability of parties to contract out of those provisions of the Act which set out the basic rules in prescription. As will have already become evident, the Faculty would not support the view expressed by some of those who gave evidence at the Committee's hearing on 27th March, that parties should be free to contract out of prescription for as long as they wanted, whether that be by way of contractual provision entered into before any dispute has arisen (such as in a standard form clause of that contract an alleged failure to comply with which turns out to give rise to the dispute which ultimately breaks out) or afterwards.

We have already outlined our reasons for opposition to the idea that parties should be allowed to contract out of prescription in advance. If permitted, we fear that this will simply become a widespread avoidance of the legislation operated as a matter of course by organisations able to make use of their commercial negotiating power to manipulate the operation of prescription to their advantage. The standard form clause will become so common that parties potentially damaged by it will not notice it until it is too late. We would therefore support the view that any contracting-out of prescription by contract which is to be permitted should be limited to agreements of tightly limited duration entered into once the dispute has broken out and which are directed to that dispute alone.

We understand that it has been suggested that the ability to contract out of prescription on an open ended basis should be allowed because parties can contract for a given limitation period by way of contractual limitation clause. There is a danger that this line of argument may confuse and induce misapprehension. It ought not too readily to be assumed that a contractual limitation clause can be equated to a contractual prescription clause such as is struck at by the current section 13 and by clause 13 of the Bill.

It should be borne in mind that a contractual limitation provision only bars the taking of court action to enforce an obligation; a contractual prescription clause seeks to alter the date at which the obligation is extinguished. A contractual limitation clause, therefore, cannot increase the time for which an obligation exists or an action to enforce the same can be brought; it can only shorten the period during which an action can be raised. If an action is raised (even though it be within the period allowed by a contractual limitation clause) after the point at which prescription has struck under the Act, it will be dismissed because the obligation on which the action is founded has been extinguished and the action is pointless. Moreover, if a party whose rights of enforcement are cut down by a limitation clause should receive money (as through accidental over-payment of some other bill) to which he would be entitled in virtue of an extant obligation on which he is prevented from suing by a

clause of limitation in a contract, he can set that money off or defend any action for repayment which might be raised against him by reference to the obligation to pay him which he cannot sue to enforce. Had the obligation prescribed, no such set-off or defence would be possible. Contracting out of prescription is therefore more drastic in its effects than is a contractual limitation period cutting down the time within which an action can be brought in court or an arbitration instituted to enforce some obligation.

It has to be accepted that, by barring court action or arbitration after a short period (e.g. two years from the practical completion of a building), contractual limitation clauses effectively preclude the making of a "relevant claim" which would interrupt short negative prescription. In this respect, contractual limitation clauses do interfere with the operation of prescription and, in effect, shorten it. For this reason, some degree of equiparation between contractual limitation clauses and contractual prescription clauses may be possible. Comparison of section 13 with the operation of contractual limitation clauses might perhaps lead to the conclusion that the latter should be controlled as are contractual attempts to shorten prescription directly, as they can have the same undesirable results. But for the reasons set out in the preceding paragraph, one cannot argue from the current permissibility of contractual limitation to the conclusion that contractual clauses contracting out of the law of prescription should likewise be permitted. In other words, if contractual prescription should not be allowed, then perhaps neither should contractual limitation. But there is, in our view, no convincing argument in the opposite direction, which would be that if contractual limitation is permitted, then so should contractual prescription.

We should reiterate our support for the placing of strict limits on the use of "standstill" agreements, if those are to be permitted. As we commented in evidence, if not limited, these may be expected to be used tactically to "string along" an unwary pursuer and may degenerate into a mechanism whereby procrastination is allowed ultimately to cause the kind of stale claim which it is part of the function of prescription to prevent.

The last point we would make is something of an afterthought. We think that there would be merit in requiring that any agreement under the new section 13 to extend the prescriptive period should be entered into in writing. This will ease proof of the agreement and help to avoid satellite disputes about whether, and if so, in what terms, the extension was agreed.