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SOVEREIGN IMMUNITY FROM STATUTES OF LIMITATION IN MARYLAND

I. INTRODUCTION

When do Maryland's statutes of limitation bind government?¹ Private parties sued or prosecuted by government must answer this question before pleading limitations as a defense. This comment offers guidance to practitioners faced with this problem, considers the policies underlying the present system, and suggests legislative changes.

Most of Maryland's statutes of limitation are silent about their applicability to government.² Although the General Assembly has the power to apply limitations to government when it sees fit,³ it has to a large extent left these decisions to the courts. Working in this legislative void, Maryland's courts have adopted and applied the common-law doctrine of *nullum tempus occurrit regi* (time does not run against the crown).⁴

The *nullum tempus* doctrine upholds the supremacy of sovereign immunity⁵ over statutes of limitation. As is well known, the doctrine of sovereign immunity shields government from lawsuits by private citizens; unless sovereign immunity is absent or waived, courts will simply refuse to entertain suits by private plaintiffs against a government. *Nullum tempus* works in the same way. It permits government at all levels to ignore statutes of limitation, because courts adhering to the doctrine will refuse to hear pleas of limitations against gov-

1. The term "government" refers in this comment to all governmental entities in Maryland, including the state, counties, cities, towns, and their agencies and subunits. The term "state" refers to all departments and agencies of the state of Maryland, and the term "local government" refers to all governmental entities other than the state.

2. See Appendix, which lists Maryland's statutes of limitation by their order of appearance in the Annotated Code with references to where in this comment they are discussed.

3. *State v. Cadwalader*, 227 Md. 21, 24, 174 A.2d 786, 787 (1961).

4. *Central Collection Unit v. Atlantic Container Line, Ltd.*, 277 Md. 626, 629 n.3, 356 A.2d 555, 557 n.3 (1976).

5. Some prefer the term "governmental immunity." See, e.g., *Austin v. Mayor of Baltimore*, 286 Md. 51, 53, 405 A.2d 255, 256 (1979) (asserting that "governmental" is more accurate adjective because immunity applies to non-sovereign local governments as well as to the sovereign state). I use the older term "sovereign immunity" because it refers to the essential attribute of government that makes immunity plausible in the first place, i.e., the government's sovereign monopoly of the use of force. Additionally, "governmental immunity" is associated with the narrower subject of immunity from tort claims. See BLACK'S LAW DICTIONARY 626 (5th ed. 1979).

ernment by private defendants. In fact, *nullum tempus* is simply an application of sovereign immunity to the narrow area of limitations law.

Adherence to sovereign immunity can lead to unjust results.⁶ Thus, in recent years, the General Assembly has limited sovereign immunity in tort and contract in an effort to secure substantial justice for citizens wronged by government. *Nullum tempus* does not apply in these waiver situations. Although such waivers have eliminated the most pernicious effects of *nullum tempus*, pockets of sovereign immunity remain. Because there is no logic in permitting government to flout limitations laws through sovereign immunity, *nullum tempus* should be abolished. The problem is one for the legislature to resolve, by severing the common-law link between sovereign immunity and statutes of limitation embodied in the *nullum tempus* doctrine and replacing the doctrine with a comprehensive statutory scheme.

II. UNDERLYING POLICIES IN HISTORICAL CONTEXT

The policies underlying sovereign immunity bear no logical relation to those supporting statutes of limitation. Little wonder, therefore, that *nullum tempus*, the offspring of that union, should be difficult to justify.

A. Sovereign Immunity

Immunity from private lawsuits, called "one of the highest attributes of sovereignty," is the product of a long and obscure evolution.⁷ Several rationales have been offered over the centuries for holding government immune from lawsuits.⁸

6. See, e.g., *Austin*, 286 Md. at 78-85, 405 A.2d at 269-73 (Cole, J., dissenting) (recommending that court abrogate common-law immunity as defense in tort action) and cases cited therein.

7. *Dunne v. State*, 162 Md. 274, 288-89, 159 A. 751, 757, *appeal dismissed and cert. denied*, 287 U.S. 564 (1932), quoted in *Washington Suburban Sanitary Comm'n v. Pride Homes, Inc.*, 291 Md. 537, 544, 435 A.2d 796, 800 (1981); R. WATKINS, *THE STATE AS A PARTY LITIGANT* 1 (1927). How sovereign immunity came to be applied after 1776 to American governments, over which no monarch presided, has been called "one of the mysteries of legal evolution." Borchard, *Government Liability in Tort*, 34 *YALE L.J.* 1, 4 (1924).

8. Other minor theories justifying sovereign immunity have also been advanced. The Maryland Court of Appeals noted Prosser's summary:

the absurdity of a wrong committed by an entire people; . . . the very dubious theory that an agent of the state is always outside of the scope of his authority and employment when he commits any wrongful act; . . . and the inconvenience

1. *The Crown Can Do No Wrong*.⁹—A monarch guided by divine, omniscient providence can perforce do no wrong. Suits against the crown are therefore unthinkable, because they would thwart God's will. Perpetuated by Blackstone,¹⁰ this doctrine survived the decline of royal power and helped clothe the modern democratic state with sovereign immunity in England and America.¹¹ The United States Supreme Court and Maryland Court of Appeals¹² have explicitly rejected this theory, rendering it archaic and of historical interest only.

2. *Impracticality of Suing the Sovereign*.—Sovereign immunity often garners support because no temporal authority is superior to government; thus, it might seem difficult to fashion a forum in which the sovereign could be tried.¹³ The Supreme Court has upheld sovereign immunity "on the logical and practical ground that there can be no legal right as against the authority that makes the law on

and embarrassment which would descend upon the government if it should be subject to such liability.

Godwin v. County Comm'rs, 256 Md. 326, 332, 260 A.2d 295, 298 (1970) (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 125, at 1001 (3d ed. 1964)).

According to Blackstone, every monarch needed to be distinguished from the royal subjects, not only by outward pomp and circumstance, but by "ascribing to him certain qualities as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation." 1 W. BLACKSTONE, *COMMENTARIES* 241 (Garland Publishing facsimile ed. 1978). As a result, the masses, who are "apt to grow insolent and refractory," should view the monarch as a "superior being and . . . pay him that awful respect, which may enable him with greater ease to carry on the business of government." *Id.* It appears that neither the United States nor Maryland adopted this theory. See also *Godwin*, 256 Md. at 330-31, 260 A.2d at 297 (1970) (quoting BROWNE'S BLACKSTONE'S COMMENTARIES [W.H. Browne ed. 1941] at 77).

9. This policy, surprisingly, is an historical latecomer. It was only when the feudal system gave way to the modern state that the crown became the state, "combin[ing] Divine attributes with temporal authority." R. WATKINS, *supra* note 7, at 11.

10. *Godwin*, 256 Md. at 330-31, 260 A.2d at 297 (1970) (quoting BROWNE'S BLACKSTONE'S COMMENTARIES [W.H. Browne ed. 1941] at 77).

11. R. WATKINS, *supra* note 7, at 11-12 (England); *id.* at 51 (America); see also *Booth & Rench, Ex'rs of Swearingen v. United States*, 11 G. & J. 373, 376-77 (Md. 1841).

12. *Langford v. United States*, 101 U.S. 341, 343 (1879); *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979). In the United States, the impeachment provisions of the Constitution belie the comparable notion that a President can do no wrong. *Langford*, 101 U.S. at 343.

13. Roman monarchs and emperors enjoyed personal immunity for this reason during their incumbency, though not necessarily thereafter. R. WATKINS, *supra* note 7, at 2-4. The early monarchs of England, although they sometimes wrangled "as common persons in the courts," could not be sued without permission; the crown, as head of the feudal system, enjoyed the traditional exemption from prosecution in one's own court. *Id.* at 6-7. However, Watkins notes that a gross injustice by the crown could be redressed in the crown's own courts. *Id.* at 8-9 (citing BRACTON, *DE LEGIBUS ANGLIAE*, f. 5 b. ed. Travers Twiss, 1878).

which the right depends."¹⁴ However, the modern republican form of government, with its separation of governmental powers and its explicit recognition that the people are the source of power, has to a large extent solved this problem by holding each branch of government accountable to the others and to the people.¹⁵

3. *Preservation of Public Assets.*—This argument assumes that government holds its assets as a public trust and may not distribute them without approval. To permit lawsuits against government, with concomitant damage awards occasioned by the acts of unauthorized wrongdoers, would betray that public trust. Government's assets under this theory are as crown jewels that must be protected by the lockbox of sovereign immunity.

An historical variation on this theory is the idea that immunity from creditors' suits was a practical necessity for the survival of insolvent ex-colonies that were trying to form a stable union after the American Revolution.¹⁶ Modern Maryland decisions recognize preservation of public assets as one of the primary reasons for retaining sovereign immunity.¹⁷

4. *Government's Need for Efficiency and Control.*—According to this rationale, the prospect of lawsuits inhibits government personnel in deciding and acting in the public interest. In 1868 the Supreme Court pointed out the "inconvenience and danger" that would result in the absence of sovereign immunity: "It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition

14. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.).

15. This system demonstrated its practicality most recently in *United States v. Nixon*, 418 U.S. 683 (1974), in which the judiciary ordered the chief executive to provide tape recordings subject to a subpoena in the Watergate affair.

16. *R. WATKINS*, *supra* note 7, at 52-54; *Austin v. Mayor of Baltimore*, 286 Md. 51, 80, 405 A.2d 225, 270 (1979) (Cole, J., dissenting).

17. *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979); *Duncan v. Koustensis*, 260 Md. 98, 102-04, 271 A.2d 547, 549-50 (1970) (sovereign immunity of school board). Indeed, so strong is this policy that the Court of Appeals uses the danger to public assets as a litmus test in interpreting whether a statute grants a complete waiver of sovereign immunity. *Washington Suburban Sanitary Comm'n v. Pride Homes*, 291 Md. 537, 545, 435 A.2d 796, 801 (1981). *See also infra* notes 56-58 and accompanying text (discussing *Pride Homes*).

Although at least one decision has posited this "trust fund theory" as an alternative to "sovereignty in its pristine form," *Goldberg v. Howard County Welfare Bd.*, 260 Md. 351, 355, 272 A.2d 397, 399 (1971), distinguishing the two does not seem profitable in the present context.

of the means required for the proper administration of government."¹⁸ The Maryland Court of Appeals has held that "to subject the state to the coercive control of its own agencies . . . would so hamper and impede the orderly exercise of its executive and administrative powers as to prevent the proper and adequate performance of its governmental functions."¹⁹

5. *Judicial Inertia*.—Some early Supreme Court decisions offer no theoretical justification for sovereign immunity but simply assert its validity as "universally received opinion,"²⁰ as a maxim long established and "universally assented to,"²¹ or as "an established principle of jurisprudence in all civilized nations."²²

B. Statutes of Limitation

Ancient Jewish, Athenian, and Roman law provided in some form for limitations of actions.²³ Early English common law provided no exact time limits on actions,²⁴ although certain common-law doctrines had a practical effect apparently similar to that later achieved by limitations.²⁵ English lawmakers took the first halting steps toward limitations by barring actions that accrued prior to certain notable events, such as the coronation of a monarch; the effect of these statutes diminished with each passing year, however, because actions accruing after the notable event remained unbarred.²⁶

England enacted the first modern statute of limitation in 1540.²⁷ A subsequent English act in 1623²⁸ entrenched the doctrine

18. *The Siren*, 74 U.S. 152, 154 (1868).

19. *Mayor of Baltimore v. State ex rel. Blueford*, 173 Md. 267, 271, 195 A. 571, 573-74 (1937).

20. *Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821).

21. *Hill v. United States*, 50 U.S. 385, 389 (1850).

22. *Beers ex rel. Platenius v. Arkansas*, 61 U.S. 527, 529 (1857); see also *Godwin v. County Comm'rs*, 256 Md. 326, 332, 260 A.2d 295, 298 (1970).

23. J. ANGELL, *A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY* 7 (4th ed. 1861).

24. H. WOOD, *A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY* 2 (1883).

25. At common law, the death of either party terminated actions in tort. *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1178 (1950) [hereinafter *Developments in the Law*]. Also, nonpayment of a debt for twenty years raised a presumption that it had been paid, shifting to the plaintiff the burden of establishing nonpayment. H. WOOD, *supra* note 24, at 3 n.1. Trial by wager of law, which permitted defendants to clear themselves by their own oaths and that of eleven compurgators, also operated as a check on stale claims. *Id.* at 3, 4 n.1; J. ANGELL, *supra* note 23, at 15.

26. J. ANGELL, *supra* note 23, at 11-12; H. WOOD, *supra* note 24, at 4.

27. 32 Hen. 8, ch. 2. See W. FERGUSON, *THE STATUTES OF LIMITATION SAVING STATUTES* 7 (1978). Although Bracton wrote, "*omnes actiones in mundo infra certa tempora limita-*

and provided the basic limitations law for Maryland and the rest of America for more than two centuries.²⁹ The Supreme Court affirmed the constitutionality of American limitations laws in 1827.³⁰

One commentator has noted:

The statute of limitations reflects a decision that the interest of a would-be plaintiff in a remedy is, at some point, less important than the interest of the threatened defendant in repose, and that society's interest in compensating victims is, at some point, less important than society's interest in closing the books.³¹

This passage highlights some of the justifications that have been advanced for statutes of limitation:

1. *Protection of Defendants' Interests.*—An early English court pointed out that “[l]ong dormant claims have often more of cruelty than of justice in them.”³² The Maryland Court of Appeals has held that “the primary consideration underlying statutes of limitations is

tionem habent” (all actions in the world are limited within certain time periods), thus suggesting a common-law origin for statutes of limitation, Coke maintained that legislatures created the doctrine of limitations. *Id.* at 9 (citing BACON'S ABRIDGEMENT 461 (G. William ed. 1811)). See also H. WOOD, *supra* note 24, at 2 n.7 (contending that the truth of Bracton's statement is extremely doubtful). 32 Hen. 8, ch. 2 was the first limitations law to dictate a “fixed interval between the accrual of the right and the commencement of the action.” H. WOOD, *supra* note 24, at 5.

28. 21 Jac. 1, ch. 16. See also W. FERGUSON, *supra* note 27, at 11 (text of statute in Appendix D, at 515); J. ANGELL, *supra* note 23, at 12. This was the first English statute to limit actions on contracts. J. ANGELL, *supra* note 23, at 13; Williams, *The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC*, 52 GEO. WASH. L. REV. 67, 69 (1983); Note, *Maryland Statutes of Limitation*, 8 MD. L. REV. 294, 296 (1944).

29. *Central Collection Unit v. Atlantic Container Line, Ltd.*, 277 Md. 626, 627-28, 356 A.2d 555, 556 (1976); J. ANGELL, *supra* note 23, at 11, 16; H. WOOD, *supra* note 24, at 5; Note, *supra* note 28, at 296.

30. *Ogden v. Saunders*, 25 U.S. 213, 348-49 (1827).

31. Williams, *supra* note 28, at 69-70. The passage concludes: “The statute of limitations operates without regard to the merits of the controversy, and that is its point: time waits for no one, not even those with meritorious claims.” *Id.* at 70.

32. *A'Court v. Cross*, 130 Eng. Rep. 540, 541 (1825). Statutes of limitation address the defendant's overriding need for access to evidence, including live testimony, before it is lost, destroyed, or forgotten. See W. FERGUSON, *supra* note 27, at 43. Plaintiffs, of course, may also benefit from fresh memories and recent evidence, but they determine when suit is filed; if in the absence of limitations they choose to risk the loss of evidence by filing years after the wrong, the risk is theirs. See *id.* at 43-44. See also H. WOOD, *supra* note 24, at 7; Williams, *supra* note 28, at 69-70. This reasoning has been applied to actions concerning real property, J. ANGELL, *supra* note 23, at 10 (“[i]t is unquestionably the natural tendency of time, to obscure and extinguish the direct evidence of title”) (emphasis in original) and contracts, *id.* (asserting time's tendency to erase evidence of debt's discharge).

one of fairness to the defendant, that he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'³³ This policy carries special weight in criminal proceedings, in which the defendant's life and liberty depend on the reliability of the evidence.³⁴

Further evidence that limitations exist primarily to protect defendants' interests may be found in those cases that permit defendants to lift the bar of limitations by acknowledging or promising to pay a time-barred debt;³⁵ the law would not give defendants such a waiver power if the purpose of limitations were to protect plaintiffs or the public.³⁶ Statutes of limitation also protect the reliance interests of real property owners who build improvements on land.³⁷

2. *Protection of Public's Interests.*—As a side effect, limitations benefit the public. For example, limitations may be used to quiet title to real property³⁸ and thus prevent waste.³⁹ Some suggest that limitations prevent "innumerable and perpetual litigations"⁴⁰ and protect trade and commerce.⁴¹

3. *Punishment of Plaintiffs.*—"[T]he indolence of those who are dilatory in recovering their property, and claiming what is due them, should be punished," said one nineteenth-century commentator.⁴² Another has stated that statutes of limitation were "partly established for the punishment of the creditor."⁴³

33. *Doughty v. Prettyman*, 219 Md. 83, 92-93, 148 A.2d 438, 443 (1959) (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944)). See also *Developments in the Law*, *supra* note 25, at 1185 ("The primary consideration underlying [statutes of limitation] is undoubtedly one of fairness to the defendant."). Cf. *Reed v. Sweeney*, 62 Md. App. 231, 235, 488 A.2d 1016, 1018 (1985) ("the Maryland cases make it clear that a statute of limitations is designed to protect a potential defendant from 'surprise' actions which inhibit his ability to fashion a defense because of the litigation's temporal distance from the disputed occurrence").

34. *Developments in the Law*, *supra* note 25, at 1186.

35. Note, *supra* note 28, at 297; see also H. WOOD, *supra* note 24, at 79.

36. W. FERGUSON, *supra* note 27, at 43.

37. *Id.* at 42-43.

38. *Pancoast v. Addison*, 1 H. & J. 350, 356 (Md. 1802); see also W. FERGUSON, *supra* note 27, at 41.

39. J. ANGELL, *supra* note 23, at 9.

40. *Id.* at 8; see also Williams, *supra* note 28, at 69. Cf. *Developments in the Law*, *supra* note 25, at 1185 (citing desire to relieve the courts of the "burden of adjudicating inconsequential or tenuous claims").

41. H. WOOD, *supra* note 24, at 2-3 n.7; see also *Developments in the Law*, *supra* note 25, at 1185.

42. J. ANGELL, *supra* note 23, at 8.

43. H. WOOD, *supra* note 24, at 7.

C. *Nullum Tempus*

The doctrine that time does not run against the crown is an "ancient maxim of the common law."⁴⁴ The Supreme Court has observed that the true reason for *nullum tempus* is "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers."⁴⁵ In other words, government's tardiness in filing suits should not prevent the augmentation of public assets through recovery of judgments in court. Another Supreme Court opinion has suggested that if a lawsuit is filed late, it is because "the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects."⁴⁶ In Maryland, the Court of Appeals has said, "the doctrine that limitations do not run against the State stems from the theory of sovereign immunity."⁴⁷ Thus, each argument accepted in Maryland in favor of sovereign immunity also supports *nullum tempus*.

III. *NULLUM TEMPUS*: A PRACTITIONER'S GUIDE

In the simplest situation, a statute overrules the common law by expressly subjecting government to limitations.⁴⁸ Absent such a statute, the common law frees government from obeying statutes of limitation.⁴⁹ However, when sovereign immunity is absent or waived for government-defendants, a reciprocal waiver of immunity from limitations occurs for government-plaintiffs in that particular

44. J. ANGELL, *supra* note 23, at 30; *see also* H. WOOD, *supra* note 24, at 89 n.1, 92. England modified the doctrine with 21 Jac. 1, ch. 5 and 9 Geo. 3, ch. 16, which set sixty-year limits on the crown's rights to recover various interests in real property. J. ANGELL, *supra* note 23, at 30-31; H. WOOD, *supra* note 24, at 89 n.1.

When suing in state court, the federal government is clothed with the state's immunity from limitations. *See* Central Collection Unit v. Atlantic Container Line, Ltd., 277 Md. 626, 628, 356 A.2d 555, 556-57 (1976); Booth & Rench, Ex'rs of Swearingen v. United States, 11 G. & J. at 373, 377 (Md. 1841). Sureties subrogated to the state's right to collect debt are also immune from limitations. American Bonding Co. v. National Mechanics Bank, 97 Md. 598, 607, 55 A. 395, 398 (1903); *see also* Atlantic Container, 277 Md. at 628-29, 356 A.2d at 557; *cf.* Orem v. Wrightson, 51 Md. 34, 46 (1879) (surety subrogated to state's rights of priority in debt collection).

45. United States v. Hoar, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.).

46. Hoar, 26 F. Cas. at 330.

47. Washington Suburban Sanitary Comm'n v. Pride Homes, Inc., 291 Md. 537, 544, 435 A.2d 796, 801 (1981).

48. J. ANGELL, *supra* note 23, at 31; H. WOOD, *supra* note 24, at 88-89. *See, e.g., infra* notes 81-107 and accompanying text (discussing criminal actions and tax collection).

49. Nor are laches imputable to the government. J. ANGELL, *supra* note 23, at 32; H. WOOD, *supra* note 24, at 91.

type of case. The case of *Washington Suburban Sanitary Commission v. Pride Homes, Inc.*,⁵⁰ illustrates this reciprocity principle.

A. *The Pride Homes Decision*

In *Pride Homes* the Maryland Court of Appeals held that, despite a legislative waiver of immunity from lawsuits, a state agency retained its immunity from the defense of limitations. The sanitary commission sued Pride Homes in tort, after normal limitations had expired, for piling dirt twenty feet deep over a right-of-way easement owned by the commission. The dirt pile had fractured a sewer line and caused sewage backups in houses. Pride Homes asserted limitations as a defense,⁵¹ arguing that the commission lost sovereign immunity—including immunity from limitations—when its code was changed to provide a source of money to satisfy judgments and fund settlements in suits against it.⁵²

Because sovereign immunity is of such fundamental importance, reasoned the court, waivers of immunity must be strictly construed. Nowhere in the waiver of the commission's immunity could the Court of Appeals find any "indication of an intent to waive the attribute of sovereignty relative to limitations."⁵³ Absent such an intent or an explicit waiver, *nullum tempus* governed,⁵⁴ allowing the commission to pursue its action against Pride Homes despite having filed suit after the limitations period had expired.

While denying the plaintiff relief in this case, the court strongly implied that a more extensive waiver of sovereign immunity might include a limitations waiver, even without explicit mention. The court first stressed that such waivers must emanate from the legislature, either expressly or by necessary implication.⁵⁵ The court then contrasted the waiver in the sanitary commission's code—which sim-

50. 291 Md. 537, 435 A.2d 796 (1981).

51. The opinion does not reveal how long after the limitation deadline the suit was filed. *Id.*

52. *Id.* at 542-44, 435 A.2d at 799-800. See MD. ANN. CODE art. 29, § 1-201 (1986) for the codification of the Washington Suburban Sanitary District Code cited in *Pride Homes*.

53. 291 Md. at 544-45, 435 A.2d at 801.

54. See *Ulman v. Charles St. Ave. Co.*, 83 Md. 130, 145, 34 A. 366, 369 (1896) (time runs against the state "'only where the State or public are expressly included'") (quoting *Tainter v. Mayor of Morristown*, 19 N.J. Eq. 46, 59-60 (1868)).

55. 291 Md. at 542-44, 435 A.2d at 799-800. See also *Bradshaw v. Prince George's County*, 284 Md. 294, 300, 396 A.2d 255, 259 (1979) ("any waiver of immunity must emanate from the legislature"). Neither the state nor its agencies may waive sovereign immunity by failing to plead the defense. *Board of Educ. v. Alcrymat Corp.*, 258 Md. 508, 516, 266 A.2d 349, 353 (1970).

ply provided a means of collecting funds to defend suits—with the legislative waiver of sovereign immunity as a defense to contract actions against the state.⁵⁶ The sanitary commission waiver, the court stated, is a “far cry” from the contract waiver. The contract waiver *requires* the state to budget sufficient funds to cover judgments,⁵⁷ whereas the commission’s waiver provides only a means of *requesting* such funds from a county council.⁵⁸ By using the contract waiver as a model of breadth, the court implied that in contract cases the legislature must have contemplated waiving sovereign immunity relative to limitations as well as immunity from lawsuits.

Pride Homes shows the rigid link between sovereign immunity and statutes of limitation embodied in *nullum tempus*. “[T]he doctrine that limitations do not run against the State stems from the theory of sovereign immunity,” declared the court.⁵⁹ Thus, sovereign immunity provides the foundation for *nullum tempus*. When sovereign immunity has been waived, *nullum tempus* ceases to apply, and government will be bound by statutes of limitation. The doctrine of *nullum tempus* may thus be termed a reciprocity theory, since a waiver of sovereign immunity engenders a reciprocal waiver of immunity from limitations whenever government is a *plaintiff* in the type of action in which its immunity as a *defendant* has been waived.⁶⁰

In order to know whether limitations bind a government-plaintiff, therefore, the practitioner must determine whether immunity has been waived for government-defendants in the particular type of action being litigated. The following sections review the status of immunity for *nullum tempus* purposes in various categories of actions. When statutes of limitation expressly bind government, that too is noted.

B. Guide by Category of Case

1. *Contracts*.—The state is forbidden by statute from raising the defense of sovereign immunity in suits “based on a written con-

56. MD. STATE GOV'T. CODE ANN. §§ 12-201 through 12-204 (1984 & Supp. 1986).

57. “To carry out this subtitle, the Governor shall include in the budget bill money that is adequate to satisfy a final judgment that . . . is rendered against the State.” *Id.* at § 12-203 (Supp. 1986).

58. 291 Md. at 545, 435 A.2d at 801: “As we recognized in *Katz [v. Washington Suburban Sanitary Comm'n]*, 284 Md. 503, 397 A.2d 1027 (1979), an individual may recover a judgment against the Commission but not be able to collect upon it because the county council may not see fit to put the funds in the budget.”

59. 291 Md. at 544, 435 A.2d at 801.

60. *Nullum tempus* is also defeated when sovereign immunity is absent in the first place, rather than waived. See *infra* note 130 and accompanying text.

tract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee."⁶¹ Similar immunity waivers apply to counties,⁶² and the code requires counties to fund judgments.⁶³ According to *Pride Homes*, discussed above, these waivers are probably sufficient to defeat *nullum tempus*.⁶⁴

Since waivers of immunity are to be strictly construed, these statutes leave sovereign immunity intact for contract actions (1) not in writing, (2) not executed by a state official or employee, or (3) not executed in the scope of authority.⁶⁵

The practitioner may also need to determine whether a lawsuit is "based on a written contract" when government seeks special remedies emanating from the legislature rather than from contract language. This category of statutes includes the limitation on the time for holders of certificates of sale to foreclose their rights of redemption;⁶⁶ for health insurance issuers to attempt to void policies for negligent misstatements by the insureds;⁶⁷ for buyers of mo-

61. MD. STATE GOV'T CODE ANN. § 12-201(a) (Supp. 1986).

62. MD. ANN. CODE art. 25, § 1A (1981 & Supp. 1986) (commission counties); *id.* at art. 25A, § 1A (chartered counties); *id.* at art. 25B, § 13A (code counties).

63. *Id.* at art. 25, § 1A(d) (Supp. 1986) (commission counties); *id.* at art. 25A, § 1A(d) (chartered counties); *id.* at art. 25B, § 13A(d) (code counties).

64. The contract waiver did retain immunity from suits for punitive damages, MD. STATE GOV'T CODE ANN. § 12-201(b) (Supp. 1986); the practical effect of this retention is debatable, however, since Maryland courts cannot grant punitive damages in pure breach of contract actions. *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 529, 366 A.2d 7, 11 (1976).

The contract situation is not without its anomalies, however. Contract suits often include unjust enrichment counts, from which government still retains immunity; thus, were the government to file, beyond the three-year limit, a two-count suit in contract and unjust enrichment, the court would be constrained to dismiss the contract count while retaining the unjust enrichment count. *See Mass Transit Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 780-81, 471 A.2d 1121, 1128 (1984).

Also, under the common law, local governments exercising governmental functions are liable for breach of contract damages only up to the time of cancellation; in other words, consequential damages are denied to private suitors. *Leese v. Baltimore County*, 64 Md. App. 442, 477-78, 497 A.2d 159, 177-78 (1985). Unless the government were to request prebreach and postbreach damages in separate counts, a court would have to reject a limitations defense by a private defendant against a contract claim asking for both types of damage. Why? Because under *nullum tempus*, private defendants cannot plead limitations in causes of action to which the government is immune from suit. This raises a curious question: Could the court force the government to amend its pleading and bifurcate the damage claims, so that the private defendant could successfully plead limitations as a defense to the claim for prebreach damages? *See also infra* notes 77 & 80.

65. *Leese*, 64 Md. App. at 478-79, 497 A.2d at 177-78.

66. Two years from the date of the certificate of sale. MD. TAX-PROP. CODE ANN. § 14-833 (1986 & Supp. 1986).

67. Two years from policy issuance date. MD. ANN. CODE art. 48A, § 441 (1986).

tor vehicles to sue for violations of the Automotive Warranty Enforcement Act;⁶⁸ for tenants to sue landlords for charging excessive security deposits;⁶⁹ and for policy holders to sue insurance companies for failure to pay claims.⁷⁰ This category also includes limitations on time to sue for violations of the Maryland Securities Act;⁷¹ violations of the Credit Grantor Revolving Credit Provisions;⁷² violations of the Credit Grantor Closed End Credit Provisions;⁷³ as well as suits for usury.⁷⁴

2. *Torts.*—The Maryland Tort Claims Act⁷⁵ waives the state's immunity from suit for nonintentional torts and provides as effective a guarantee of funding for judgments as is provided under the contract waiver.⁷⁶ Under the *Pride Homes* mandatory funding test, therefore, the Maryland Tort Claims Act appears to waive sovereign immunity so thoroughly as to evidence a legislative intent that limitations be waived reciprocally for that same kind of action.⁷⁷

The legislature permits chartered counties to waive sovereign immunity,⁷⁸ but by and large, counties retain immunity when exer-

68. Three years from date of original delivery of vehicle. MD. COM. LAW CODE ANN. § 14-1501(l) (Supp. 1986).

69. Two years from termination of tenancy. *Id.* at § 8-203(b)(3) (1981).

70. Three years from due date of written proof of loss. MD. ANN. CODE art. 48A, § 450 (1986).

71. Three years from sale or purchase of security, or one year from certain other violations or discoveries, whichever is earlier. MD. CORPS. & ASS'NS CODE ANN. § 11-703(f) (1985).

72. Six months from date credit extension repaid in full. MD. COM. LAW CODE ANN. § 12-919 (1983).

73. Six months from satisfaction of loan. *Id.* at § 12-1019.

74. Six months from satisfaction of loan. *Id.* at § 12-111.

75. MD. STATE GOV'T CODE ANN. §§ 12-101 through 12-109 (1984 & Supp. 1986).

76. The Tort Claims Act waives immunity to judgments "to the extent of insurance coverage" under the State Insurance Program. *Id.* at § 12-104(a) (Supp. 1986). The State Insurance Program, MD. STATE FIN. & PROC. CODE ANN. §§ 9-101 through 9-107 (1985)), provides in turn that claims under the Tort Claims Act shall be insured "[t]o the extent that funds are available in the State budget." *Id.* at § 9-105(c). The State Insurance Program statute makes it clear that the General Assembly requires that the budget provide for the necessary insurance. *See id.* at § 9-102(b)(1) (stating intent to insure as fully as permitted by law); § 9-103(b)(3) (stating intent that the state budget include sufficient appropriations to provide sufficient reserves to cover losses under § 9-105(c), which provides for payments under the Tort Claims Act).

77. If a government agency were to sue out-of-time in two counts, one for negligence and one for intentional interference with contractual relations, would the court deny defendant's plea of limitations on the intentional tort count, which requires malice (immunity not waived), but grant a plea of limitations on the negligence count (immunity waived)? *See also supra* note 64, *infra* note 80.

78. MD. ANN. CODE art. 25A, § 5(CC) (1981).

cising governmental functions.⁷⁹ Thus, the practitioner must again try to determine whether the government-plaintiff is suing on a cause of action for which immunity has been waived for government-defendants.⁸⁰

3. *Criminal Actions.*—The legislature has expressly bound government with limitations periods ranging from thirty days to five years for a variety of criminal actions,⁸¹ including prosecutions for Sabbath-breaking and drunkenness;⁸² the collections of any fine, penalty, or forfeiture;⁸³ misdemeanors not punishable by confinement in the penitentiary;⁸⁴ unlawful use of driver's license or using false name when applying for driver's license;⁸⁵ extortion;⁸⁶ violations of certain election laws, conflict of interest laws, criminal malfeasance, misfeasance, or nonfeasance in office of government officers, or conspiracy to commit any of these offenses;⁸⁷ welfare offenses and Medicaid fraud;⁸⁸ violations of the Equal Pay Act;⁸⁹ unemployment insurance laws;⁹⁰ income tax laws;⁹¹ and antitrust provisions.⁹² Another statute limits the time for the state executive to commence proceedings to extradite a person of unsound mind.⁹³

79. See *infra* notes 129-40 and accompanying text.

80. If in the same suit a county sued a private defendant out-of-time for negligence (immunity not waived) and breach of contract (immunity waived), would the court be bound to deny a plea of limitations on the negligence count while granting it on the contract count? See *supra* notes 64 & 77 and accompanying text.

81. Many crimes, including murder, rape, and robbery, have no limitations period, and thus prosecutions may be brought at any time. *State v. Brown*, 21 Md. App. 91, 93 n.3, 318 A.2d 257, 259 n.3 (1974).

82. Thirty days from date of offense. MD. CTS. & JUD. PROC. CODE ANN. § 5-106(c). A 30-day limit is also provided for certain alcoholic beverage sale offenses in Allegany County. *Id.* at § 5-106(d).

83. One year from date of offense. *Id.* at § 5-107.

84. One year from date of offense. *Id.* at § 5-106(a).

85. Two years from date of offense. *Id.* at § 5-106(b).

86. Five years from date of offense for extortion generally, MD. ANN. CODE art. 27, § 562B (1982), extortion by state or local officer or employee generally, *id.* at § 562C, and extortion by state or local officer or employee against another such employee, *id.* at § 562D.

87. Two years from date of offense. MD. CTS. & JUD. PROC. CODE ANN. § 5-106(e)-(f) (1984).

88. Three years from date of offense. *Id.* at § 5-106 (g)-(h).

89. Three years from date of offense. MD. CODE ANN. art. 100, § 55D(b) (1985).

90. Three years from date of offense. *Id.* at art. 95A, § 17(g).

91. Three years from date of offense. *Id.* at art. 81, § 321.

92. Four years from date of offense. MD. COM. LAW CODE ANN. § 11-207(d) (1983).

93. One year from flight to another jurisdiction. MD. ANN. CODE art. 41, § 2-305 (1986).

4. *Tax Collection and Related Activities.*—The legislature has also imposed limitations on government ranging from one to seven years in areas related to collection of taxes, including the making of property tax assessments or abatements;⁹⁴ sale of property at tax sale;⁹⁵ collection of tax after a receiver or trustee is appointed;⁹⁶ assessment of additional taxes due;⁹⁷ collection of tax on escaped property;⁹⁸ actions to recover motor vehicle fuel tax;⁹⁹ suits for retail sales taxes¹⁰⁰ and use taxes;¹⁰¹ suits for tax assessed within applicable assessment limitation;¹⁰² collection of property taxes;¹⁰³ actions to collect tax imposed within seven-year limit for making assessments;¹⁰⁴ and suits for taxes when no other limitations are provided,¹⁰⁵ including situations when receivers or trustees have been appointed to complete collection within the first seven years.¹⁰⁶ Another statute extends the time for bringing collection actions when one's civil defense activities have interfered with the ability to file one's tax return.¹⁰⁷

5. *Real Property.*—*Nullum tempus* probably holds government immune from statutes of limitation designed to ensure the reliability of the land record system. At issue are statutes imposing time limits for commencing judicial proceedings to challenge formal requisites

94. One year after report of assessment or abatement is filed, or one year after due date of such report, whichever is later. MD. TAX-PROP. CODE ANN. § 14-1103(c) (1986 & Supp. 1986).

95. Two years from date of tax arrearage. *Id.* at § 14-808(a) (1986). The limit in St. Mary's and Calvert counties is one year. *Id.* at § 14-808(b).

96. Two years from date of appointment of trustee or receiver, if collector previously failed to collect tax and if receiver or trustee was appointed within seven-year period specified in MD. TAX-PROP. CODE ANN. § 14-1101(a) (1986). *Id.* at § 14-1101(c).

97. Three years from due date or filing date of tax return, whichever is later. MD. ANN. CODE art. 81, § 309 (1980).

98. Tax may be collected for no more than three years prior to placement on tax rolls. MD. TAX-PROP. CODE ANN. §§ 8-417(c) (1986), 14-1103(b) (Supp. 1986).

99. Four years from due date. MD. ANN. CODE art. 56, §§ 135, 154(a) (1983).

100. Four years from due date. *Id.* at art. 81, § 342(a).

101. Four years from due date. *Id.* at § 393.

102. Seven years from date of assessment. *Id.* at § 212(c) (Supp. 1986).

103. Seven years from due date. MD. TAX-PROP. CODE ANN. §§ 14-864, 14-1101(a) (1986 & Supp. 1986).

104. Seven years from date tax imposed. *Id.* at § 14-1101(b) (1986). The limitations period for imposing the taxes in the first place is found in *id.* at § 14-1101(a).

105. Seven years from due date. MD. ANN. CODE art. 81, § 212 (Supp. 1986).

106. Seven years from due date, with extension of two years from date of trustee or receiver appointment. *Id.* at § 212(a).

107. The limitations period is extended for nine months plus the length of the civil defense emergency period. MD. ANN. CODE art. 16A, § 27 (1981 & Supp. 1986).

of a granting instrument;¹⁰⁸ for contingency to occur creating possibility of reverter;¹⁰⁹ for commencing an action to recover land or enter on it due to breach of condition or termination of a fee-simple determinable estate;¹¹⁰ for landlord to claim rent or reversion of property when rent goes unpaid;¹¹¹ and for buyer not in possession of land to commence action under a recorded contract against one not a party to the contract.¹¹²

A line of cases holds that the state is not subject to adverse possession.¹¹³ These cases do not endanger the reliability of the land record system, however, because they tend to preserve land record titles in government's name, even though private citizens in the same situation would have to yield the land under adverse possession.

6. *Miscellaneous.*—Under the *nullum tempus* doctrine, government will normally be exempt from any limitations statute that is silent on the issue; hence, the legislature seldom includes explicit exemptions. Nevertheless, certain statutes explicitly exempt government from limitation periods that apply to private parties. Maryland law first provided such an exemption in 1715.¹¹⁴ Current law

108. Six months from date of recordation. MD. REAL PROP. CODE ANN. § 4-109(b) (1981).

109. Thirty years from effective date of instrument creating possibility of reverter or condition. *Id.* at § 6-101(b).

110. Seven years from date of breach of condition or termination of fee-simple determinable estate. *Id.* at § 6-103.

111. Twenty years from last demand for or payment of rent under a lease. *Id.* at § 8-107.

112. Five years from date of delivery set out in deed, or, if no delivery date in deed, from date when final installment of purchase price was to be paid under deed. *Id.* at § 10-401. Another provision of this section states that the disability of either party does not extend the five-year period. The policy of making the land records reliable seems paramount here. Because this would qualify as a suit on a contract, government would probably be bound by limitations. See *infra* notes 61-74 and accompanying text.

113. Hall v. Gittings, 2 H. & J. 112, 114 (Md. 1806); Bond v. Murray, 118 Md. 445, 452-53, 84 A. 655, 658-59 (1912). See also Central Collection Unit v. Atlantic Container Line, Ltd., 277 Md. 626, 629, 356 A.2d 555, 557 (1976). Private parties must file actions for "recovery of possession of a corporeal freehold or leasehold estate in land" or to enter on the land within twenty years from when the cause of action accrues. MD. CTS. & JUD. PROC. CODE ANN. § 5-103(a) (1984). See also *infra* note 132 and accompanying text.

114. 1715 Md. Laws ch. 23, sec. 6:

That no bill, bond, judgment, . . . or other specialty whatsoever, except such as shall be taken in the name or for the use of our sovereign Lord the King, his heirs and successors, shall be good . . . after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years standing . . .

See also Note, *supra* note 28, at 294.

provides exemptions for the state's efforts to acquire abandoned property in federal custody in the state;¹¹⁵ as well as to file actions on specialties¹¹⁶ and public officers' bonds.¹¹⁷

By statute, certain government agencies have a limited time to file civil actions, including suits for any fine, penalty, or forfeiture;¹¹⁸ violations of the Equal Pay Act;¹¹⁹ enforcement of antitrust provisions;¹²⁰ and suits to enforce liens for the value of public defender services.¹²¹

Raising peculiar questions of their own are the statutes limiting enforcement of civil or criminal penalties under the Public Information Act,¹²² the abandonment of condemnation proceedings,¹²³ and the commencement of contempt of court proceedings against a per-

115. MD. COM. LAW CODE ANN. § 17-208 (1983). The normal limitations period is 90 days. *Id.* at § 17-206(a)(2) (1983).

116. MD. CTS. & JUD. PROC. CODE ANN. § 5-102(c) (1984). "Specialties" include promissory notes or other instruments under seal, bonds (except a public officer's bond), judgments, recognizances, contracts under seal, or "any other specialty." The normal limitations period is twelve years. *Id.* at § 5-102(a). *See also infra* text accompanying notes 132-34.

117. MD. CTS. & JUD. PROC. CODE ANN. § 5-104(b) (1984). The normal limitations period is five years. *Id.* at § 5-104(a).

118. One year from date of offense. *Id.* at § 5-107 (1984).

119. Three years from date of offense. MD. ANN. CODE art. 100, § 55D(b) (1985).

120. Four years from date cause of action accrues. MD. COM. LAW CODE ANN. § 11-209(c) (1983).

121. Ten years from filing of lien. MD. ANN. CODE art. 27A, § 7(d) (1983).

122. Two years from the date on which cause of action arises. MD. CTS. & JUD. PROC. CODE ANN. § 5-110 (1984). This statutory limit applies to actions arising under MD. STATE GOV'T CODE ANN. § 10-623 (1984), which permits a governmental unit or private party to file a complaint against another governmental unit if denied the right to inspect documents under the Act. Governmental plaintiffs must obey this limitations period for two reasons: (1) Since only a governmental entity can be a defendant, the limitations clause must have been enacted specifically to protect government-defendants from stale claims; therefore, this particular limitations statute has a special status not possessed by most other statutes, which usually apply to private parties. (2) Since the Act by its terms subjects government to lawsuits, and since there is no question of a fund for judgments, a complete waiver has occurred; under the *Pride Homes* reciprocity principle, therefore, immunity to pleas of limitations also has been waived.

123. One hundred and twenty days from the entry of final judgment or the receipt of an appeals court mandate or abandonment of appeal. MD. REAL PROP. CODE ANN. § 12-109(d)(2)-(3) (1981). MD. R. U4.a. (1986) allows governmental entities and private parties to be plaintiffs in condemnation proceedings; hence, the statute of limitations applies to both types of plaintiff and cannot be said to apply only to government. Under the doctrine of *Pride Homes*, therefore, government may be immune. On the other hand, the legislature surely had in mind when passing the statute that government dominates the field of eminent domain; thus, the statute was probably intended to apply to government. However, waivers of sovereign immunity must be explicit, *Washington Suburban Sanitary Comm'n v. Pride Homes*, 291 Md. 537, 544, 435 A.2d 796, 800-01 (1976), so the courts could refuse to apply the statute to governmental plaintiffs.

son defaulting on payment of periodic child or spousal support.¹²⁴

In causes of action in which sovereign immunity survives for government-defendants, government-plaintiffs need not obey the general three-year limitation on civil actions not covered by specific statutes.¹²⁵ Government is probably also excused from limitations on actions for violations of the fine prints provisions,¹²⁶ submission of proof of claim for proceeds of sale of property sold by state police,¹²⁷ and filing claims against bulk sale transferees.¹²⁸

7. *Local Governments Exercising Proprietary Functions.*—Local governments¹²⁹ exercising “governmental” functions possess sovereign immunity; those exercising “proprietary” functions lack sovereign immunity.¹³⁰ It follows from *nullum tempus* that the former have immunity from limitations,¹³¹ while the latter lack such immunity. Thus, when a statute relieves the state from limitations without exempting local government, such as in cases of adverse possession,¹³² suits on public officers’ bonds,¹³³ and actions on special-

124. Three years from date each installment of support becomes due and remains unpaid. MD. CTS. & JUD. PROC. CODE ANN. § 5-111 (1984). Compare MD. FAM. LAW CODE ANN. § 10-102 (1984), which is virtually identical to this statute. MD. R. P4 (1986) allows contempt proceedings to be brought by the court or by a private party, and under the *Pride Homes* doctrine a governmental plaintiff would not be bound. Yet, just as in the case of eminent domain, government is probably the dominant plaintiff in this field, and thus the legislative intent was likely to place a time limit on government. However, waivers must be explicit.

125. MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984).

126. One year from discovery of violation or three years from sale of fine prints, whichever is longer. MD. COM. LAW CODE ANN. § 14-505(c) (1983).

127. Three years from date of sale. MD. ANN. CODE art. 88B, § 27 (1985).

128. Six months from date transferee takes possession of goods. MD. COM. LAW CODE ANN. § 6-111 (1975).

129. The governmental/proprietary distinction does not apply to the state, only to counties, municipalities, and their agencies. *Austin v. Mayor of Baltimore*, 286 Md. 51, 53, 405 A.2d 255, 256 (1979).

130. It is not the case that sovereign immunity is waived when a proprietary function is undertaken by a local government; rather, in such a case sovereign immunity never existed. Thus, the reciprocity principle of *Pride Homes*, see *supra* notes 48-60 and accompanying text, does not apply, since it was enunciated to cover waivers of immunity. A governmental entity exercising proprietary functions is treated by the courts like any private party. The significance of this point in litigation is that a defendant who pleads limitations against government based on an absence of sovereign immunity can bypass the confusing issues raised by *Pride Homes* in applying *nullum tempus* to partial waivers of immunity. See *supra* notes 64, 77, & 80.

131. See, e.g., *Goldberg v. Howard County Welfare Bd.*, 260 Md. 351, 358, 272 A.2d 397, 400-01 (1971) (quoting 51 AM. JUR. 2D *Limitation of Actions* § 412 (1964)).

132. Land held by a local government in its governmental capacity may not be taken by adverse possession. *Siejack v. Mayor of Baltimore*, 270 Md. 640, 644, 313 A.2d 843, 846 (1974); *Desch v. Knox*, 253 Md. 307, 312, 252 A.2d 815, 818 (1969); *Mayor of Baltimore v. Chesapeake Marine Ry. Co.*, 233 Md. 559, 572, 197 A.2d 821, 827 (1964).

ties,¹³⁴ local governments exercising proprietary functions remain subject to limitations. A statute of limitations will bar a suit to enforce private (*i.e.*, non-“governmental”) rights, even when brought derivatively by a municipality¹³⁵ or by a court-appointed receiver.¹³⁶

It is still necessary, however, for the practitioner to determine when a governmental unit is operating in a proprietary capacity. Maryland jurists have repeatedly criticized the governmental/proprietary distinction.¹³⁷ Its fatal weakness is that no satisfactory definition of the distinction has ever been advanced; consequently, the test is “unsatisfactory and illogical.”¹³⁸

I can think of no reason whatsoever why the operation of a park, swimming pool or camp should be deemed “governmental,” thereby relieving the City of liability for its negligence, whereas the construction and maintenance of public streets, bridges and sewers, or the removal of garbage, or the supplying of water to homes, should all be classified as “proprietary” with governmental liability for negligence There simply is no rational basis for this classification of the operations of local government.¹³⁹

Prior to litigation, it is often difficult to tell whether a particular function is proprietary or governmental, although cases from other jurisdictions may be helpful.¹⁴⁰ Once it becomes clear, however, that an entity lacks sovereign immunity because it engages in a pro-

By contrast, land held by a municipal corporation for private purposes is subject to adverse possession. *Siejack*, 270 Md. at 644, 313 A.2d at 846; 10 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 28.55 (3d ed. 1981); 2 C.J.S. *Adverse Possession* § 20 (1972); 3 AM. JUR. 2D *Adverse Possession* § 106 (1986).

Adverse possession simply means the successful occupation of land by a nonowner beyond the time set by the statute of limitations for owners to bring an action to recover their interest. MD. CTS. & JUD. PROC. CODE ANN. § 5-103 (1984).

133. Five years from date of bond is the normal limitations period, from which the state is explicitly exempted. MD. CTS. & JUD. PROC. CODE ANN. § 5-104 (1984).

134. See *supra* note 116 and accompanying text.

135. *Gloyd v. Talbott*, 221 Md. 179, 186, 156 A.2d 665, 668 (1959).

136. *Kluckhuhn v. Ivy Hill Ass'n*, 55 Md. App. 41, 48-49, 461 A.2d 16, 21 (1983). This is true even when the receiver is an agent not of local but of state government, so long as private rights are being enforced. *Id.*

137. *Tadger v. Montgomery County*, 300 Md. 539, 554-55, 479 A.2d 1321, 1329 (1984) (Eldridge, J., concurring in part and dissenting in part); *Austin v. Mayor of Baltimore*, 286 Md. 51, 67, 405 A.2d 255, 263 (1979) (Eldridge, J., concurring in part and dissenting in part); *id.* at 83-85, 405 A.2d at 272-73 (Cole, J., dissenting).

138. *Austin*, 286 Md. at 72, 405 A.2d at 266 (Eldridge, J., concurring in part and dissenting in part).

139. *Id.*

140. See 2 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 10.01-.05 (3d ed. 1979).

prietary function, it follows from the doctrine of *nullum tempus* that statutes of limitation will bind such an entity when it sues private parties.

IV. IRRELEVANCE OF IMMUNITY

A number of statutes closely resemble statutes of limitation but yet are something different; these non-claim statutes, discussed at *A* below, are pre-conditions of suit, and their time limits apply to government irrespective of sovereign immunity. Sovereign immunity is irrelevant to the application of many other statutes, discussed at *B* below, because government cannot assume the role of plaintiff in suits governed by the statute.

A. Non-Claim Statutes

The time limits set by non-claim statutes bind government. Although resembling statutes of limitation, non-claim statutes differ because they constitute conditions precedent to filing suit. The expiration of the time limit in a non-claim statute extinguishes all of the claimant's rights; when the time limit in a statute of limitations expires, the right to sue remains, although the claimant's remedy—the ability to file suit in a particular court—is lost because of the failure to sue. Courts frequently state that a non-claim statute “extinguishes the right to sue and not merely the remedy.”¹⁴¹

Government apparently must obey the time limits set by the following non-claim statutes: to file a petition for allowance of a claim, or to commence an action against the personal representative of an estate;¹⁴² to file a claim against a decedent's estate;¹⁴³ to file a claim against a decedent's estate based on conduct of or contract with a personal representative;¹⁴⁴ and to bring an action against a personal

141. *Donnally v. Montgomery County Welfare Bd.*, 200 Md. 534, 541, 92 A.2d 354, 357 (1952).

142. Sixty days from the mailing of the notice of disallowance by the personal representative. MD. EST. & TRUSTS CODE ANN. § 8-107(b) (1974).

143. Six months from the first appointment of a personal representative. *Id.* at § 8-103(a). This statute is ineffective, however, when “otherwise expressly provided by statute with respect to claims of the United States and the state.” *Id.* The fifth paragraph of the official comment states that claims of the state “based on other statutes, such as tax statutes” are intended to be excluded from the six-month limitation.

144. Six months from date claim arises. MD. EST. & TRUSTS CODE ANN. § 8-103(c) (1974). If the suit is on a contract, the contract waiver discussed in *Washington Suburban Sanitary Comm'n v. Pride Homes, Inc.*, 291 Md. 537, 435 A.2d 796 (1981), *supra* notes 61-74 and accompanying text, may apply.

representative.¹⁴⁵ The statute limiting the time for a cause of action to arise for contribution or indemnity from an architect, professional engineer, or contractor for damages from the defective and unsafe condition of an improvement to real property¹⁴⁶ also seems to bind government, as does the statute limiting the time for a cause of action to arise for damages from the defective and unsafe condition of an improvement to real property.¹⁴⁷

B. Plaintiff Status Limited to Private Parties

Many limitations statutes apply to actions that can probably be brought only by private parties; in these situations, the question of government's immunity from a limitations defense becomes irrelevant. These actions include suits under the Maryland Torts Claims Act¹⁴⁸ and the Equal Credit Opportunity Act.¹⁴⁹ Also included are suits by owners of private property against railroads for damages from laying of track;¹⁵⁰ for violations of the Consumer Credit Reporting Agencies provisions;¹⁵¹ under the Wrongful Death Act;¹⁵² against a county, town, or city for damages from riots or tumultuous assemblages;¹⁵³ for claims of erroneous tax assessment of property;¹⁵⁴ for a refund of an advance payment of property tax;¹⁵⁵ for claims for property tax, recordation tax, or transfer tax;¹⁵⁶ for re-

145. One year from close of estate. MD. EST. & TRUSTS CODE ANN. § 10-103(a) (1974).

146. Ten years from date the entire improvement first becomes available for its intended use. MD. CTS. & JUD. PROC. CODE ANN. § 5-108(b) (1984).

The interaction of this statute with *nullum tempus* gives rise to an anomaly. Unlike private plaintiffs, the government might not be barred by the accompanying three-year limitation on bringing suits. *Id.* at § 5-108(c). Thus, so long as the government's claim arises within the ten years, it might have literally *forever* to sue on the claim. For example, this reasoning might affect the government's ability to maintain suits against builders and subcontractors for asbestos removal.

147. Twenty years from date entire improvement first becomes available for its intended use. *Id.* at § 5-108(a).

148. One year from denial of claim or three years from date cause of action arises, whichever is later. MD. STATE GOV'T CODE ANN. § 12-106(b)(3) (Supp. 1986).

149. One year from date of violation. MD. COM. LAW CODE ANN. § 12-707(g) (1983).

150. Two years from completion of tracks. MD. ANN. CODE art. 23, § 199 (1981).

151. Two years from discovery of misrepresentation or two years from date on which liability arose, whichever ends later. MD. COM. LAW CODE ANN. § 14-1214 (1983).

152. Three years from death of injured person. MD. CTS. & JUD. PROC. CODE ANN. § 3-904(g) (1984 & Supp. 1986).

153. Three years from "time of accrual." MD. ANN. CODE art. 82, § 2 (1980).

154. One year from date of finality of erroneous assessment. MD. TAX-PROP. CODE ANN. § 14-915(4) (1986 & Supp. 1986).

155. One year from date property tax rate is fixed. *Id.* at § 14-915(5).

156. Three years from date of payment. *Id.* at § 14-915(1)-(3).

fund of mistaken payment of special taxes, fees, and charges;¹⁵⁷ and claims for refund of retail sales taxes.¹⁵⁸

In a significant number of cases, the question whether a governmental entity may sue under the statute is problematic. This is true with regard to the limitations statutes for filing actions for assault, battery, libel, or slander;¹⁵⁹ to claim payment for loss or damage from omission or error in filing, recording, or indexing of a security interest in a motor vehicle;¹⁶⁰ to file claims for compensation for removal of property, dead bodies, markers, or monuments through condemnation actions;¹⁶¹ to file a petition to invalidate a final decree of adoption because of procedural or jurisdictional defect;¹⁶² to file an action for damages against a health care provider for injury arising out of rendering or failing to render professional services;¹⁶³ to give notice of a claim against a county or municipal corporation for unliquidated damages for injury to person or property;¹⁶⁴ to file mechanic's lien proceedings;¹⁶⁵ to file a petition to enforce a mechanic's lien;¹⁶⁶ to commence action under express and implied warranty statutes for newly constructed housing units;¹⁶⁷ to sue for warranty enforcement under the Maryland Condominium Act;¹⁶⁸

157. Three years from date of payment. MD. ANN. CODE art. 81, § 215 (1980).

158. Four years from date of payment. *Id.* at § 348 (Supp. 1986).

159. One year from accrual of cause of action. MD. CTS. & JUD. PROC. CODE ANN. § 5-105 (1984).

160. Three years from date cause of action arose. MD. TRANSP. CODE ANN. § 13-210(a) (1984).

161. Six months from removal of property, dead body, marker, or monument. MD. REAL PROP. CODE ANN. § 12-112(a) (1981). The limitations period is one year for petitioners to claim a pecuniary allowance for such a removal. *Id.* at § 12-112(h).

162. One year from entry of final decree. MD. FAM. LAW CODE ANN. § 5-325 (1984).

163. Five years from time of injury, or three years from date injury is discovered, whichever "is the shorter." MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984). Since three years is always a "shorter" period than five years, the General Assembly probably meant to state, "whichever period ends first."

164. One hundred and eighty days from date of injury. *Id.* at § 5-306(a) (1984 & Supp. 1986).

165. One hundred and eighty days from date work finished or material was furnished. MD. REAL PROP. CODE ANN. § 9-105(a) (1981).

166. One year from date petition to establish the lien was filed. *Id.* at § 9-109 (1981).

167. Two years from date defect was or should have been discovered, or two years from expiration of warranty, whichever comes first. *Id.* at § 10-204 (1981 & Supp. 1986). This statute does not refer to "consumers" but merely to purchasers of newly constructed dwelling units.

168. One year from end of warranty period. *Id.* at § 11-131(d) (1981 & Supp. 1986). If the government sues under § 11-130(c) (1981), which allows the Attorney General to sue to protect consumers from violations of this statute, limitations may apply to government on the premise that private rights are being enforced. *See Goldberg v. Howard County Welfare Bd.*, 260 Md. 351, 357-58, 272 A.2d 397, 400-01 (1971); *Gloyd v. Talbott*, 221 Md. 179, 186, 156 A.2d 665, 668 (1959).

and for a personal representative or special administrator of an estate, or an unsuccessful exceptant, to appeal to circuit court.¹⁶⁹

V. SUGGESTIONS FOR REFORM

The fundamental difficulty with *nullum tempus* is that government's need for protection from lawsuits by private parties bears no logical relationship to defendants' need for fresh evidence.

Sovereign immunity is designed to protect government by preserving public assets and avoiding the impracticalities of suing a sovereign who recognizes no superior authority. The modern trend is to curtail sovereign immunity in order to secure substantial justice for private citizens whenever possible without unduly threatening the larger policies that underlie the doctrine. As a result, private parties may now bring a wide variety of tort, contract, and other claims against government in Maryland courts. It is true that these reforms have increased the possibility that negligence or poor administration will cost the taxpayers money in the form of contract and tort judgments. Mandatory insurance, however, minimizes the potential harm from tort claims, and ordinary care in drafting and entering into contracts ensures that the losses in contract suits will not be extravagant. These considerations, coupled with the strong need for private parties to have redress against government for negligent wrongs and breaches of contract, show the wisdom of the General Assembly's decision to dilute sovereign immunity.

A similar balancing of interests leads to the conclusion that *nullum tempus* should be abandoned.¹⁷⁰ Statutes of limitation should be permitted to fulfill their primary function: protection of defendants from stale claims. To be sure, statutory abolition of *nullum tempus* would increase the chances that some government claims would be barred by limitations. A powerful countervailing factor, however, is that government lawyers exercising ordinary care ought to be able to file suits on time; after all, most of Maryland's statutes of limitations are measured in years, not months. Consider this, too: a web of limitations binds government in tax collection, yet the state's coffers bulge.¹⁷¹ Subjecting government to limitations would promote

169. Thirty days from date probate court announces allowance. MD. EST. & TRUSTS CODE ANN. § 7-601(c) (1974).

170. *Developments in the Law*, *supra* note 25, at 1253 ("In view of the apparent absence of sound policy ground for the sovereign exemption, complete repudiation of the rule would seem desirable.").

171. Admittedly, these statutes give government many more years to act than most other limitations statutes allow. *See supra* notes 94-107 and accompanying text. *But see*

justice by eliminating stale claims, which force the courts to render judgments based on unreliable evidence. Surely, if government can survive responsibility for negligent acts and breaches of contract on the part of its truck drivers, health care workers, and procurement officers, then government can survive responsibility for failures to timely file lawsuits on the part of its litigators.

Because of the peculiar historical role played by the General Assembly with respect to sovereign immunity in Maryland, any reform aimed at modifying *nullum tempus* must stem from the legislature rather than the courts.¹⁷² After the Declaration of Independence, Maryland succeeded to the crown's sovereignty, as did all the states of the new Union.¹⁷³ In most states, sovereign immunity began and has remained as judge-made law, allowing the courts to freely mold the doctrine to fit modern circumstances.¹⁷⁴ In Maryland, however, the legislature entered the picture early, enacting a statute in 1786 that cut back common-law sovereign immunity by granting all Maryland citizens the right to seek money judgments at law against the state.¹⁷⁵ Thirty-four years later, the General Assembly repealed the act, rescinding the privilege it had given.¹⁷⁶ Because of this historical background,¹⁷⁷ Maryland courts now defer to the legislature and refuse to modify sovereign immu-

Developments in the Law, supra note 25, at 1252 (“[T]he argument that the rigors of statutes of limitations should not be applied to overworked government officials is difficult to square with the universal limitations on the government’s taxing and penal functions, areas in which the burden of public law enforcement is particularly heavy.” (footnote omitted)).

172. The Court of Special Appeals has offered an alternative to the rationale set out in the text paragraph. “There is, of course, sound reason why the legislature is the proper division of government to determine whether to abolish sovereign immunity. It is that body that will be called upon, through the imposition of taxes, to pay any judgment rendered against the sovereign.” *Herilla v. Mayor of Baltimore*, 37 Md. App. 481, 486, 378 A.2d 162, 166 (1977).

173. By the United States Constitution, Maryland surrendered part of its sovereignty to the United States. Thus, immunity from limitations accrued to the federal government when exercising its own sovereign powers. *Booth & Rench, Ex’rs of Swearingen v. United States*, 11 G. & J. 373, 377 (Md. 1841). See also *Central Collection Unit v. Atlantic Container Line, Ltd.*, 277 Md. 626, 628, 356 A.2d 555, 556-57 (1976); *Godwin v. County Comm’rs*, 256 Md. 326, 333, 260 A.2d 295, 298 (1970).

174. *Austin v. Mayor of Baltimore*, 286 Md. 51, 67-68, 405 A.2d 255, 264 (1979) (El-bridge, J., concurring in part and dissenting in part).

175. 1786 Md. Laws ch. 53; *Austin*, 286 Md. at 69, 405 A.2d at 264.

176. 1820 Md. Laws ch. 210; *Austin*, 286 Md. at 69, 405 A.2d at 264-65.

177. In addition to the legislature’s historical domination, the Court of Appeals has pointed to the legislature’s superiority over the judicial branch in dealing with the “fiscal considerations, administrative difficulties and other problems in balancing the rights of the State and its agencies with new possible rights of the individual citizens.” *Jekofsky v. State Roads Comm’n*, 264 Md. 471, 474, 287 A.2d 40, 42 (1972).

nity by judicial fiat.¹⁷⁸ Thus, the legislature (perhaps unintentionally) arrogated the field to itself; it has continued to tinker with sovereign immunity to the present day, enacting waivers of contract immunity in 1976¹⁷⁹ and tort immunity in 1984.¹⁸⁰

As a result, Maryland's General Assembly is the only branch of government that can abrogate *nullum tempus* and replace it with a rational, consistent approach to the question of when limitations should bind government. Other state legislatures—South Carolina for one—have successfully discarded *nullum tempus*.¹⁸¹ Maryland's legislators would be wise to adopt language similar to this paraphrased version of the South Carolina statute: "The limitations prescribed in this code shall apply to actions brought in the name of or for the benefit of the state, counties, cities, or agencies thereof, in the same manner as to actions by private parties."

VI. SUMMARY

Faced with a lawsuit filed by a governmental entity, a private practitioner should first determine which statute of limitations governs the action and whether the particular governmental unit is explicitly bound by the language of the statute. If the government is not bound, one should next ask whether the plaintiff is a local government exercising a proprietary function. If so, the practitioner might successfully plead limitations. If not, the inquiry should focus on whether the government-plaintiff is suing on a cause of action from which the legislature has waived immunity for government-defendants. If so, limitations may be successfully asserted through the reciprocity theory.¹⁸²

The distressing number of cases that do not fall within the above-noted exceptions to *nullum tempus* demonstrate the need for legislative reform. No legitimate interests are served by permitting

178. *Austin*, 286 Md. at 70, 405 A.2d at 265 (Eldridge, J., concurring in part and dissenting in part). Compare *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 218-19, 359 P.2d 457, 461-62, 11 Cal. Rptr. 89, 93-94 (1961), in which Justice Traynor authored an opinion abolishing governmental immunity from tort liability over a strong dissent urging that it was a matter for the legislature, *id.* at 221-24, 359 P.2d at 463-64, 11 Cal. Rptr. at 95-96 (Schauer, J., dissenting).

179. 1976 Md. Laws ch. 450.

180. 1984 Md. Laws ch. 284 (enacting the State Government Article of the Maryland Annotated Code).

181. S.C. CODE ANN. § 15-3-620 (Law. Co-op. 1977) ("The limitations prescribed by this article shall apply to actions brought in the name of the State or for its benefit in the same manner as to actions by private parties . . ."). See *State ex rel. State Highway Dept. v. Piedmont & N. Ry. Co.*, 186 S.C. 49, 59, 194 S.E. 631, 635 (1938).

182. Discussed *supra* Section III.

government to flout reasonable statutes of limitation. The *nullum tempus* doctrine should be eradicated by statute, so as to protect private defendants against stale claims and loss of evidence.

When *should* statutes of limitation bind government? Always.

THOMAS A. BOWDEN

APPENDIX

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