[HIGH COURT OF AUSTRALIA.]

MAXWELL . . . APPELLANT;

PLAINTIFF,

AND

MURPHY . . . RESPONDENT.

DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1956, SYDNEY, *Aug.* 8, 9;

1957, MELBOURNE, *Feb.* 18.

Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ.

Compensation to Relatives—Statute—Retrospective operation—Action—Time for commencement—Compensation to Relatives Act 1897-1946 (*N.S.W.*), *s.* 5—*Compensation to Relatives* (*Amendment*) *Act* 1953 (*N.S.W.*), *s.* 2 (*a*).

The *Compensation to Relatives Act* 1897-1946 (N.S.W.) provided that every action under the Act should be commenced within twelve months of the death of the deceased person. Section 2 (a) of the *Compensation to Relatives* (*Amendment*) *Act* 1953 (N.S.W.) amended the principal Act as from 16th December 1953 by providing that the words twelve months be omitted and the words six years inserted. On 30th November 1954 the plaintiff brought an action in respect of the death of her husband on 19th March 1951.

Held, by *Dixon* C.J., *Williams*, *Kitto* and *Taylor* JJ., *Fullagar* J. dissenting, that the amendment did not operate to revive the plaintiff's right to maintain an action which had been barred from 19th March 1952.

Principles relating to the retrospective operation of statutes, discussed.

R. v. *Chandra Dharma* (1905) 2 K.B. 335, distinguished.

Decision of the Supreme Court of New South Wales (Full Court) *Maxwell* v. *Murphy* (1956) S.R. (N.S.W.) 175; 73 W.N. 141, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Kitty Blanche Maxwell on behalf of herself and the two children of her marriage with Stuart Edward Maxwell, in which she claimed damages in the sum of £10,000 from the defendant, Lionel William Murphy, the allegation being that the defendant so negligently, unskilfully and carelessly drove a certain motor car on a public highway along which her husband was then lawfully passing that her

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husband was knocked down and injured and died on 19th March 1951 within six years prior to bringing of this action. The writ issued on 30th November 1954, and the declaration was dated 22nd December 1954.

The defendant demurred to the declaration on the grounds: (1) that the suit was barred by the *Compensation to Relatives Act* 1897-1946 (N.S.W.) not having been instituted within twelve months from the date of the death of Stuart Edward Maxwell; and (2) that the amendment of the *Compensation to Relatives Act* by s. 2 (a) of Act No. 33 of 1953 was not retrospective in its operation.

At the date of the death of Stuart Edward Maxwell, which occurred prior to the amendment, s. 5 of the *Compensation to Relatives Act* 1897-1946 provided that not more than one action shall lie for and in respect of the same subject matter of complaint and every action shall be commenced within twelve months after the date of the death of such deceased person. In December 1953 the *Compensation to Relatives (Amendment) Act* 1953 (No. 33 of 1953), was passed, and by s. 2 (a) provided that the words "twelve months" were omitted from s. 5 of the principal Act and the words "six years" were inserted.

The Full Court of the Supreme Court (*Street* C.J., *Roper* C.J. in Eq. and *Herron* J.) ordered that judgment be for the defendant on the demurrer: *Maxwell* v. *Murphy* (1).

From that decision the plaintiff appealed to the High Court.

Sir *Garfield Barwick* Q.C. (with him *P. J. Kenny*), for the appellant. The question that has arisen is whether some qualification must be imposed upon the words in s. 2 of the *Compensation to Relatives (Amendment) Act* 1953 so as to make the amendment affective only as to certain cases, or whether the amendment is to be read as enacted and applicable to all cases which otherwise fall within the Act. There should be called in aid the prima-facie rule of construction that a procedural statute may enure for the benefit of one whose rights have accrued before the date of the change in procedure. The capacity or the ability to resort to an Act of Parliament is not an accrued right in the sense that it has got to come down to particularity by way of action or judgment or the like. The mere fact that the law was something one could avail oneself of had it remained unchanged is not an accrued right (*Abbott* v. *Minister for Lands* (2)). In a criminal case the fact that the prosecution is out of time is not a matter of defence. *R.* v. *Chandra Dharma* (3) is

(1) (1956) S.R. (N.S.W.) 175; 73 W.N. 141.

(2) (1895) A.C. 425.

(3) (1905) 2 K.B. 335.

distinguishable from this case on the facts. In *Coleman* v. *Shell Co. of Australia Ltd.* (1); *R.* v. *Chandra Dharma* (2); *Kraljevich* v. *Lake View & Star Ltd.* (3); and *Re Ovens & King Traders Pty. Ltd.* (4), at the time when the amending Act was passed the right of the claimant had not come to an end.

[DIXON C.J. referred to *Craies* on *Statute Law*, 5th ed. (1951), p. 372; and *R.* v. *Chandra Dharma* (2).]

That case is distinguishable from this case on the facts. The defendant had not an "accrued defence" in this action. The question is whether or not s. 5 as amended is subject to some unexpressed qualification as to the date of the death of the deceased person whose death is taken as the commencing point. The relevant canons of construction are set out in *Kraljevich* v. *Lake View & Star Ltd.* (5). All the judgments excluded statutes which altered procedure. In *The Ydun* (6) not only was the rule about statutes relating to procedure expressed, but it was applied. It was agreed that the Act was retrospective.

[TAYLOR J. referred to sub-s. (2) of s. 6 (E) of the *Compensation to Relatives Act* 1897-1946.]

In this case the amended section applies prospectively to actions commenced after the Act, and the reference to the death is only to fix the point of the commencement of the time; to allow that point of time to be before the commencement of the Act is not to give retroactive or retrospective effect to the Act (*Reg.* v. *Inhabitants of St. Mary, Whitechapel* (7); *Reg.* v. *Inhabitants of Christchurch* (8). *George Hudson Ltd.* v. *Australian Timber Workers' Union* (9). Section 5 on those authorities is not truly retrospective in any right sense of the word.

[DIXON C.J. referred to *Lubovsky* v. *Snelling* (10).].

Observations made in *Coleman* v. *Shell Co. of Australia Ltd.* (11) are not in accordance with the effect of the Privy Council's decision in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (12). The Privy Council said no matter what the rule may be about procedure this man had a particular right, a right of appeal—the proceedings had to be started. The appeal proceedings were not merely procedural.

(1) (1943) 45 S.R. (N.S.W.) 27; 62 W.N. 21.
(2) (1905) 2 K.B. 335.
(3) (1945) 70 C.L.R. 647.
(4) (1949) V.L.R. 16.
(5) (1945) 70 C.L.R., at pp. 650-652.
(6) (1899) P. 236, at pp. 241, 245, 246.
(7) (1848) 12 Q.B. 120, at p. 127 [116 E.R. 811, at p. 814].
(8) (1848) 12 Q.B. 149, at pp. 152, 156 [116 E.R. 823, at pp. 824, 825].
(9) (1923) 32 C.L.R. 413, at p. 446.
(10) (1944) K.B. 44, at p. 47.
(11) (1943) 45 S.R. (N.S.W.), at pp. 30 et seq.; 62 W.N., at pp. 23 et seq.
(12) (1905) A.C. 369.

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The bringing of the action within time is an ingredient of the cause of action. In the original *Lord Campbell's Act*, s. 3 was like a proviso: *Bullen & Leake's Precedents of Pleading*, 3rd ed. (1868), p. 327.

N. A. Jenkyn Q.C. (with him *C. Begg*), for the respondent. The most that can be said of s. 5 is that it merely touches the remedy and has nothing to do with the right. Upon an examination s. 3 shows that " whensoever " means only in any case where the death of a person is caused by a wrongful act then an action for damages shall arise. Section 4 must be read in with s. 3 to make s. 3, in the first place, intelligible. The meaning of the combined effect is essential in order to give s. 3 its full implication. The action for damages which is to be at the suit of a particular person or persons, and for the benefit of a particular person or persons, lies only for a period of twelve months. Each of those sections must be taken in order to determine what the cause of action is; what the action is which is defined by the Act itself. That is only another way of saying that the cause of action which is contemplated, and which was a new cause of action unknown to common law, was one which the legislature intended to remain in existence for a period of twelve months and then to expire. It was said in *R.* v. *Chandra Dharma* (1) and in *The Ydun* (2) that the time factor in the Act constitutes part of the cause of action. The submission being correct, it would follow that in framing a declaration it would be essential to include the allegation as to time in the declaration otherwise it would be demurrerable. The statement by *Goddard* L.J. in *Lubovsky* v. *Snelling* (3) was an *obiter dictum* only and in so far as it would cut across this argument should not be accepted. There is a real distinction to be drawn between the type of case where there is a common law right and obligation which is barred in the ordinary sense in which the description is used by a Statute of Limitations and a case where an entirely new and novel cause of action arises unrelated to any breach of duty by the defendant to the plaintiff, but in which the legislature says, in certain circumstances you shall be called upon to pay a sum of money to somebody else. Such a cause of action is created by the legislature which itself composes the terms and conditions which constitute the essential ingredients of the cause of action. A compliance with each one of those is basic to the cause of action.

(1) (1905) 2 K.B., 335.
(2) (1899) P. 236.
(3) (1944) K.B., at p. 47.

[KITTO J. referred to *Partridge* v. *Chick* (1); *Seward* v. "*Vera Cruz*" (2); *Pym* v. *Great Northern Railway Co.* (3) and *Blake* v. *Midland Railway Co.* (4).]

If the appellant be correct then the Act in fact will provide causes of action, the special creation of the statute, years after they were believed by both parties to be dead, and years after they had in fact ceased to be actionable. The appellant would have to assert that there is no such thing as vested or accrued rights of immunity from action: see *Abbott* v. *Minister for Lands* (5). While it is true for many purposes that such a provision is said to be procedural the Privy Council, in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (6), made it clear that the alteration of the existing law which provided as part of its machinery for an appeal in its procedure, the taking away of that by another Act of Parliament, could have an effect, if applied to past or existing transactions, which was not merely procedural (7). It is taking an unrealistic approach to say that the 1953 Act, if read in relation to previous rights and obligations, is an Act which brings once more into existence a cause of action which was dead for years before the amending Act was passed, and could not, in any real sense, be said to be an Act having a merely procedural effect upon that transaction. The proper interpretation of an amending Act is that it would have no real effect upon the nature of the right or obligation, but merely govern the method by which existing rights were in future to be enforced: see *Reg.* v. *Ipswich Union* (8) and *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Federated Clerks Union of Australia, N.S.W. Branch* (9).

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

Feb. 18, 1957

The following written judgments were delivered:—

DIXON C.J. The question for decision in this appeal is whether an action under the *Compensation to Relatives Act* of New South Wales may be maintained in respect of a death which occurred more than twelve months before the time when the period within which such an action must be brought was enlarged by Act No. 33 of 1953 from twelve months to six years after the date of death.

(1) (1951) 84 C.L.R. 611, at p. 618.
(2) (1884) 10 App. Cas. 59.
(3) (1862) 2 B. & S. 759 [121 E.R. 1254]; (1863) 4 B. & S. 396 [122 E.R. 508].
(4) (1852) 18 Q.B.D. 93, at p. 110 [118 E.R. 35, at p. 41].
(5) (1895) A.C. 425.
(6) (1905) A.C. 369.
(7) (1905) A.C., at p. 372.
(8) (1877) 2 Q.B.D. 269, at p. 270.
(9) (1950) 81 C.L.R. 229, at p. 245.

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Section 5 of the Act 1897-1946 provided that not more than one action should lie for and in respect of the same subject matter of complaint, and every such action should be commenced within twelve months after the death of such deceased person. Section 2 (a) of Act No. 33 of 1953 provided simply that in this provision the words "twelve months" should be omitted and the words "six years" inserted instead. The latter Act came into operation when it was assented to on 16th December 1953. On 30th November 1954 the appellant brought her action in respect of the death of her husband which had taken place on 19th March 1951. The Supreme Court has held that her action does not lie because it ceased to be maintainable by reason of s. 5 twelve months after the death of her husband and because her right to maintain the action was not revived by the subsequent amendment of s. 5 substituting six years for twelve months.

The question is whether the amendment did or did not operate to revive her right to maintain the action.

In a sense the matter is governed by the interpretation of the amending statute. But the interpretation can hardly be accomplished by attempting to extract from the terms of that enactment an actual meaning or intention with reference to such a question. For it is unfortunately only too plain from the brief words substituting one period of time for the other that there was never any advertence to the effect the amendment would or might have in relation to deaths that had already occurred. The interpretation must depend upon presumption or rules of construction.

It may perhaps be noted that in strictness it is the operation of the amendment as a repeal of the limitation of twelve months that gives the appellant room for the contention that no longer is her action barred. It is perhaps possible that the distinction between the repeal of the words "twelve months" and the insertion of the words "six years" might possess an importance if the *Interpretation Act* of 1897 of New South Wales contained the provision that a repeal shall not revive anything not in force or existing at the time at which the repeal takes effect: cf. s. 38 (2) (*a*) of the *Interpretation Act* 1889 of the United Kingdom. But that provision does not form part of the law in that State. Section 8 of the New South Wales statute is in different terms and it was not argued that it affected the question.

If the *Interpretation Act* does not apply, the rule of the common law on the subject must receive effect. In the first place it must be borne in mind that at common law the repeal of a statute or statutory provision means that the law must be applied as if the

provision had never existed. This is subject to an exception, variously expressed, as to past matters. Lord *Tenterden* C.J. used the expression " transactions past and closed ": *Surtees* v. *Ellison* (1). Lord *Campbell* C.J. said : " . . . all matters that have taken place under it before its repeal are valid and cannot be called in question " : *Reg.* v. *Inhabitants of Denton* (2). The phrase of *Blackburn* J. was " transactions already completed under it "— *Butcher* v. *Henderson* (3).

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by *Mellish* L.J. in *Republic of Costa Rica* v. *Erlanger* (4). " No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done " (5).

The distinction is clear enough in principle and its foundation in justice is apparent. But difficulties have always attended its application. In some cases they have been due to the discovery in the nature or context of the legislation or in its subject matter of indications, whether faint and conjectural or strong and persuasive, of a desire to cover situations already existing. In other cases the difficulty has been traceable to the inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance. Again, enactments in truth conferring or denying rights are not seldom expressed in terms of remedy. There is a tacit recognition of this in the manner in which Lord *Penzance* (then

(1) (1829) 9 B. & C. 750, at p. 752 [109 E.R. 278, at p. 279].
(2) (1852) Dears. 3, at p. 8 [169 E.R. 612, at p. 614].
(3) (1868) L.R. 3 Q.B. 335, at p. 338.
(4) (1876) 3 Ch. D. 62.
(5) (1876) 3 Ch. D., at p. 69.

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Wilde B.) stated the rule in a passage that has been much quoted—"The rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act"—*Wright* v. *Hale* (1).

The rule or rules governing the presumption against the operation of new laws upon rights that have already accrued or immunities that have already been established or acquired must be reconciled or accommodated with the rule that the repeal of a provision makes it as if it had never been enacted. It is to this that the exceptions, already described, of the former rule are directed. In the case cited above, *Butcher* v. *Henderson* (2), this is clearly put by *Blackburn* J. as follows: "The maxim alike of law and justice is, '*Nova constitutio futuris formam imponere debet, non praeteritis*,' and therefore, though when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect" (3).

When the *Compensation to Relatives Act* gives rights to those of the deceased man's family to whom injury results from his death it does so in terms of remedy. The wrongdoer is to "be liable in an action of damages": s. 3 (1). "Every such action shall be for the benefit of the wife, parent and child"—s. 4. The effect of these provisions, combined with s. 5 as it stood, was, in the conditions defined, to confer a right of action which is to endure for twelve months from the death. The statement that every such action shall be commenced within twelve months meant, of course, "and not otherwise". When the time expired the right of action was terminated or defeated.

That being so, it appears to me that the situation is one falling within the application of the presumptive rule of construction. The appellant had lost her right of action before Act No. 33 of 1953 was passed and was without remedy. In terms a remedy had been conferred and in terms a bar had been imposed upon the remedy as such. If the passing of Act No. 33 of 1953 revived her remedy that means that it revived a right which had ceased to exist and re-imposed a liability on the respondent from which he had been discharged.

To say that notionally the right to damages continued to exist and only the manner of enforcing the right had been destroyed

(1) (1860) 6 H. & N. 227, at p. 232 [158 E.R. 94, at p. 96].
(2) (1868) L.R. 3 Q.B. 335.
(3) (1868) L.R. 3 Q.B., at p. 338.

appears to me to ignore the fact that the right to damages could not be separated from the right to recover them. There are rights in English law which have an existence and a purpose although the remedy be suspended or wanting. But the right here in question is not one of them. If the amending statute received the operation for which the appellant contends, it would impose anew a liability that had ceased to exist. The presumptive interpretation is against such an operation.

The case is a much stronger one than that dealt with in *Jackson* v. *Woolley* (1) by the Exchequer Chamber, which related to the operation of 19 & 20 Vict. c. 97, s. 14, abolishing the rule that payment by one joint debtor amounted to an acknowledgment setting time running against both. In the absence of some clear indication of intention that the Act should apply to payments made before the date of the Act it was held incapable of so operating because such an operation would deprive the creditor of a right of action which at the date of the Act was maintainable. *Williams* J. said: "Before the passing of the statute this plaintiff, by reason of a payment by one of the defendant's co-contractors, which payment was by the law considered to be made by him as an agent of the other co-contractor, had acquired a vested right of action against that defendant. It would require words of no ordinary strength in the statute to induce us to say that it takes away such a vested right." (2). In *Pardo* v. *Bingham* (3), s. 20 of the same Act was construed differently, but it was acknowledged that the operation given to that section was in truth retrospective and affected vested rights. In *Kearley* v. *Wiley* (4), in a situation not unlike the present, the defendant was described by the Appellate Division of the Supreme Court of Ontario as having acquired a statutory defence. To construe the statute as "retrospective" would, the court said, "be to create a cause of action against him, to deprive him of his right to immunity from the plaintiff's claim" (5). In that case a statute providing that no action should be brought for the recovery of damages occasioned by a motor vehicle after the expiration of six months was amended by substituting a period of twelve months. This amendment was held not to apply to a cause of action arising more than six months before the passing of the amending Act. There was, however, an element which seems to have been regarded as providing an additional consideration; the writ had been issued before the amendment and so at a time when the action stood

(1) (1858) 8 El. & B. 784 [120 E.R. 292].
(2) (1858) 8 El. & B., at p. 787 [120 E.R., at p. 293].
(3) (1869) L.R. 4 Ch. 735.
(4) (1931) 3 D.L.R. 68.
(5) (1931) 3 D.L.R., at p. 69.

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barred and on the other hand the amendment did not extend the period of limitation sufficiently to enable the plaintiff to bring another action after the amendment. It may not be formally accurate to speak of " creating a cause of action " against the defendant but he is clearly deprived of an immunity or defence. Perhaps there could be no more practical summary of the principle, which, as was said, emerges from the English and Canadian cases, than the following,—" unless the language used plainly manifests in express terms or by clear implication a contrary intention—(a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective."—*Dixie* v. *Royal Columbian Hospital* (1), per *Sloan* J.A.

R. v. *Chandra Dharma* (2) cannot be regarded as an authority to the contrary. In the case of all the prisoners the prosecution had been commenced before the first time bar had expired. This appears as the ground of his decision in the judgment of *Channell* J., and in *Craies* on *Statutes*, 5th ed. (1951), p. 372, it is emphasised as explaining the case in a note which says that if the period had expired before the commencement of the Act it would not have destroyed a prescription already acquired. The terms are perhaps worthy of remark in which *Phillimore* L.J. spoke, though not by way of criticism, of this case and of *The Ydun* (3). His Lordship said: " Two stronger cases than these could hardly be imagined."—*Welby* v. *Parker* (4). The observation meant that they were strong as illustrations of the possibility of construing retrospectively a statute in fact affecting rights. But they are cases which cannot be pushed any further than the statutes on which they were decided. Of *The Ydun* (3) it is enough to refer to what *Duff* J. said of the case in his judgment in *Upper Canada College* v. *Smith* (5), a judgment well repaying study. The passage is lengthy but it seems better to set it out in full. *Duff* J. said: " The last of the revelant authorities dealing with statutes on this subject is *The Ydun* (3) in which it was held that the *Public Authorities Protection Act* 1893, (prescribing a time limit of six months for actions against public authorities and imposing a liability to costs as between solicitor and client upon the unsuccessful plaintiff in any such action) was an answer to an action commenced after the passing of the Act and after the expiration of the period of six months limited by the

(1) (1941) 2 D.L.R. 138, at pp. 139, 140.
(2) (1905) 2 K.B. 335.
(3) (1899) P. 236.
(4) (1916) 2 Ch. 1, at p. 6.
(5) (1920) 61 Can. S.C.R. 413.

statute. The trial judge, *Jeune* P., seemed to think the language of the Act too clear to admit of the application of any rule of construction but proceeded to say that it was a case of a statute relating to procedure and that, at all events, there was no hardship because of the fact that some weeks had elapsed between the passing of the Act and the date on which it was to come into force. In the Court of Appeal *A. L. Smith* L.J. and *Vaughan Williams* L.J., treated the Act as an act dealing with procedure only and therefore retrospective. *Romer* L.J. expressed the opinion that the Act was retrospective but gave no reasons for his opinion. With great deference, it is questionable, I think, whether the judgments in this case are of such a character as to afford any real guide for the interpretation of another statute in so far as they profess to lay it down that an Act attaching a time limit to the assertion of rights of action is within the rule an enactment relating to procedure only. Such a proposition is difficult to reconcile with *Jackson* v. *Woolley* (1), and it was not competent to the Court of Appeal in 1899 to overrule a decision of the Court of Exchequer Chamber in 1858. I am not suggesting that the decision in 1899 was an erroneous decision or that the Court of Exchequer Chamber would have decided that case otherwise. I am inclined to think that the language of the *Public Authorities Protection Act* points very clearly to an intention that the Act should apply to existing causes of action as well as to causes of action arising after the passing of the Act. But the judgment in the later case cannot, in face of *Jackson* v. *Woolley* (1), be regarded as satisfactorily establishing the general proposition that such statutes are to be regarded as statutes dealing with procedure only and therefore prima facie retrospective" (2).

In my opinion the appeal should be dismissed.

WILLIAMS J. This is an appeal by the plaintiff from a judgment for the defendant on demurrer given by the Full Supreme Court of New South Wales in an action brought in that Court under the provisions of the *Compensation to Relatives Act* 1897-1953 (N.S.W.). The question that arises on the demurrer relates to the amendment of s. 5 of the *Compensation to Relatives Act* 1897-1946 (N.S.W.) inserted by s. 2 (a) of the *Compensation to Relatives (Amendment) Act* No. 33 of 1953 which came into force on 16th December 1953. Prior to that amendment the section read: "Not more than one action shall lie for and in respect of the same subject-matter of complaint, and every such action shall be commenced within

(1) (1858) 8 El. & B. 784 [120 E.R. 292].

(2) (1920) 61 Can. S.C.R. 413, at pp. 427, 428.

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twelve months after the death of such deceased person". The amendment provided that the *Compensation to Relatives Act of* 1897 as amended by subsequent Acts should be amended by omitting from s. 5 the words "twelve months" and by inserting in lieu thereof the words "six years". The plaintiff sued in accordance with s. 6B (1) of the Act as the widow of the deceased there being no executor or administrator of his estate. Her husband died on 19th March 1951 so that prior to the amendment any cause of action that arose under the Act in consequence of his death would have been out of time because it should have been commenced not later than 18th March 1952. The present action was not commenced until 30th November 1954, that is two and a half years later. But it was commenced within the extended period of six years allowed by the Act of 1953.

The declaration alleged that the defendant was driving a certain motor vehicle along a public highway across which the husband of the plaintiff Stuart Edward Maxwell was then lawfully passing, that as a result of the defendant's negligence the motor vehicle came into collision with him whereby he was knocked down and injured, that he subsequently died on 19th March 1951 and within six years prior to the bringing of the action, that there was no executor or administrator of Stuart Edward Maxwell and that the plaintiff brought the action for and on behalf of herself and of his two children in accordance with the statute in that case made and provided. The declaration was demurred to, the points of law for argument being that the action was barred by the *Compensation to Relatives Act* 1897-1946 not having been instituted within twelve months from the date of the death of Stuart Edward Maxwell, and that the amendment to the *Compensation to Relatives Act* 1897-1946 made by s. 2 (a) of the Act of 1953 was not retrospective in its operation. The demurrer was argued before *Street* C.J., *Roper* C.J. in Eq. and *Herron* J. *Street* C.J. and *Roper* C.J. in Eq. were of opinion that the requirement that the action should be commenced within twelve months after the death of the deceased person limited the life of the cause of action so that the plaintiff's cause of action had expired before the Act of 1953 came into force and that this Act should not be given a retrospective operation so as to apply to causes of action when the period of twelve months since the death had expired prior to 16th December 1953. This was all that it was really necessary to decide but *Herron* J. went further and held that the Act did not apply in the case of any deaths which occurred prior to 16th December 1953 whether the period of twelve months since the death had then expired or not (1).

(1) (1956) S.R. (N.S.W.) 175; 73 W.N. 141.

The question whether the Act applies to cases where the death occurred prior to 16th December 1953 but the period of twelve months was still current can be reserved until such a question arises, but it is necessary to consider whether the amendment does or does not apply to cases where the death had occurred and the twelve months had expired prior to that date. The *Compensation to Relatives Act*, as has been frequently pointed out, created an entirely novel cause of action, new in its species, new in its quality and new in its principle and one which can only be brought if there is any person answering the description of the widow, parent, child &c. who under the circumstances mentioned in the Act suffers pecuniary loss by the death: *Partridge* v. *Chick* (1). The Act creates the novel right for the benefit of a very limited class of persons who might broadly be described as the family of the deceased, and it prescribes in certain important respects the procedure by which it is to be enforced. The original Act was *The Fatal Accidents Act* 1846 (*Lord Campbell's Act*) which was intituled "An Act for compensating the Families of Persons killed by Accidents". Its effect was materially to alter the application of the rule of the common law that *actio personalis moritur cum persona*. That Act was the progenitor of numerous other Acts to the same effect passed in various parts of the British Commonwealth and elsewhere. It was first enacted in New South Wales by the *Fatal Accidents Act* 1847. In the English Act of 1846 the contents of s. 5 of the present New South Wales Act were introduced by the words "Provided always" and in the New South Wales Act of 1847 the same provisions were introduced by the words "Provided always and be it enacted". These words do not appear in s. 5 but there is no reason to suppose that any different effect should be given to the section because of their absence. The circumstances which give rise to the cause of action are set out in s. 3. They are that the death shall have been caused by the wrongful act, neglect or default of the defendant and that the default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. The section then provides that the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death has been caused under such circumstances as amount in law to felony. This section does not contain a complete description of the new cause of action. By itself it does no more than alter the rule of the common law that *actio personalis moritur cum persona* to a certain extent by

(1) (1951) 84 C.L.R. 611, at p. 618.

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providing that in certain circumstances persons can be sued for damages although the injured party has died. To obtain a complete description of the new cause of action it is necessary to go to ss. 4, 5 and 6 which define the persons for whose benefit it is created, the nature of the damages that can be recovered, and the manner in which the cause of action can be enforced. It is apparent that the new cause of action falls into the third class of cases in which a liability may be established founded upon a statute defined by *Willes* J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1), that is, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. Referring to the *Fatal Accidents Act* 1846 itself *Mellor* J. in *Leggott* v. *Great Northern Railway Co.* (2) said: " the action . . . was an action of a very special and limited description. It was an action given expressly by the statute, and must be confined within the limits of the statute. . . . the executor being the mere machine, and this being the form of machinery provided, by which an action can be maintained, the interest of the executor is in maintaining an action strictly within the limits of Lord Campbell's Act " (3). Section 5 contains two important requirements relating to its enforcement by or on behalf of the persons for whose benefit the new right of action is created. The first is that not more than one action shall lie for and in respect of the same subject matter of complaint and the other is that every such action shall be commenced within twelve months (now six years) after the death of such deceased person. These two provisions are in a sense procedural but they are not part of any procedure by which rights of action generally may be enforced. They impose limitations upon such general procedure. If compliance with these requisites is essential to the enforcement of the cause of action then the requirement that the action must be commenced within twelve months from the death places a time limit upon its life. After the expiry of that time the cause of action is not merely statute barred, it is extinguished. This is, it would appear, the true effect of the section. The cause of action is only enforceable to use the words of the original Act " Provided always " that the action is commenced within the twelve months. The extent to which the new cause of action is derived from the personal cause of action which the deceased had immediately prior to his death is indicated by the fact that the new cause of action arises only if the deceased at that moment, but for his death could have sued the wrongdoer for damages himself. If an action

(1) (1859) 6 C.B. (N.S.) 336, at p. 356 [141 E.R. 486, at p. 495].

(2) (1876) 1 Q.B.D. 599.

(3) (1876) 1 Q.B.D., at pp. 604, 605.

is brought under the Act any defences that would have been available against the deceased person if he had lived, such as that of the contributory negligence of the deceased, are available against the plaintiff. The condition that only one action shall lie for and in respect of the same subject matter of complaint would seem to be attributable to this derivation. If the deceased had lived he could only have brought one such action. The time for the enforcement of the personal cause of action is in effect prolonged for a period beyond the death of the deceased. It is not allowed to die with him, it is kept alive for twelve months. At the end of that period it dies. This must have been the view taken by the learned authors of *Bullen and Leake's Precedents of Pleadings* for the form of declaration under *Lord Campbell's Act* which they provide contains an allegation that the death occurred within twelve months next before the suit. Authority as to whether the requirement that the action shall be commenced within twelve months from the death is an ingredient in the cause of action so that, unless the action is so commenced, there is no cause of action at all, or is a mere statute of limitations of a procedural character which, if pleaded, does not extinguish the cause of action but merely bars the remedy, is strangely lacking. But as the purpose of the *Fatal Accidents Act* was to prolong the personal action that the deceased would have had against the wrongdoer but for his death beyond its normal span for the benefit of his family the requirement that the action should be commenced within twelve months, that being the time for which it was prolonged, would appear to be clearly of its essence. The original Act only provided for the action being brought by the executor or administrator of the deceased person, and this also gives effect to the notion that the action instead of dying with the deceased person should survive in his personal representatives for a limited period. The alternative action now provided for by s. 6B (1) of the *Compensation to Relatives Act* is of later origin. It was first introduced in England by the *Fatal Accidents Act* 1846, as the Act states, to meet the case where by reason of the inability or default of any person to obtain probate of the will or letters of administration of the personal estate and effects of the person deceased or by reason of the unwillingness or neglect of the executor or administrator of the person deceased to bring such action the person or persons entitled to the benefit of the Act may be deprived thereof. But even this alternative action had to be commenced within twelve months of the death. Such authorities as there are appear to support this view. Lord *Dunedin* delivering the judgment of the Privy Council in *British Electric*

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Railway Co. Ltd. v. *Gentile* (1) said, " the deceased man had at the moment of his death in no way forfeited or parted with the right of action competent to him for the injury done him. His death took place and the action on the part of the respondent sprang into being. It was raised within twelve months after the death *and is therefore competent* " (2). (The italics are mine.) His Lordship's use of the word " competent " seems to indicate that he thought that the requirement that the action should be commenced within twelve months was essential to its enforcement. The effect of the requirement under discussion has been touched upon in cases where an application has been made to amend a writ issued before the period of twelve months has expired so as to make it a proper writ for an action under *Lord Campbell's Act* after that period has expired and the courts have uniformly applied the principle that such an amendment should not be allowed where it would enable a cause of action to be litigated which was out of time when the application was made. In *Hilton* v. *Sutton Steam Laundry* (3), Lord *Greene* M.R. said : " Further, if the action is incompetent the plaintiff can do nothing, because the time for launching *a new competent* action has elapsed . . . . In this case it seems to me that, to allow this amendment would be to deprive the defendants of the benefit of the statute by setting the action on its feet again " (4). In *Finnegan* v. *Cementation Co. Ltd.* (5) *Jenkins* L.J. said : " It must be borne in mind that in enacting the *Fatal Accidents Act* 1846, the legislature thought fit to impose a limitation period of 12 months. That means that a defendant in such a case is entitled to go scot-free, however negligent he may have been, unless a claim by a competent plaintiff is made in properly constituted proceedings within the prescribed period of 12 months. . . . her writ was a mere nullity and her claim must fail, because she omitted to pursue it in properly constituted proceedings within the prescribed period ; and, the period having run, the court will not take any step to validate proceedings which were *ab initio* defective " (6). A competent action must be an action which the plaintiff is competent to bring and in these passages their Lordships appear to have thought like Lord *Dunedin* that an action under *Lord Campbell's Act* must be commenced within time to be a cause of action at all. In *Bowler* v. *John Mowlem & Co. Ltd.* (7) *Hodson* L.J. said, referring to these two cases : " a wrong capacity cannot be cured by amendment so as to

(1) (1914) A.C. 1034.
(2) (1914) A.C., at pp. 1042, 1043.
(3) (1946) K.B. 65.
(4) (1946) K.B., at pp. 72, 73.
(5) (1953) 1 Q.B. 688.
(6) (1953) 1 Q.B., at pp. 700, 701.
(7) (1954) 3 All E.R. 556 ; (1954) 1 W.L.R. 1445.

destroy the defendants' right to rely on the Statute of Limitations " (1). But his Lordship was probably there referring rather to the general principle governing amendments than to the particular requirement of *Lord Campbell's Act*.

Assuming, contrary to the opinion already expressed, that the requirement that the action must be commenced within twelve months is not an ingredient in the cause of action but merely bars the remedy if pleaded, the appellant would not be in any better position. Where the question arises whether a statute has a retrospective operation, it is usual to divide statutes into two classes, the one where the new statute affects existing substantive rights and the other where it affects only the existing practice and procedure of the courts for enforcing such rights. The distinction between the two kinds of statutes was explained by *Dixon* J. (as he then was) in *Kraljevich* v. *Lake View & Star Ltd.* (2). His Honour said : " The presumptive rule of construction is against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words, liabilities that are fixed, or rights that have been obtained, by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends, appears with reasonable certainty. But, when the alteration in the law relates to the mode in which rights and liabilities are to be enforced or realized, there is no reason to presume that it was not intended to apply to rights and liabilities already existing and its application in reference to them will depend rather upon its particular character and the substantial effect that such an operation would produce " (3). Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the

(1) (1954) 3 All E.R., at p. 558 ; (1954) 1 W.L.R., at p. 1448.
(2) (1945) 70 C.L.R. 647.
(3) (1945) 70 C.L.R., at p. 652.

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action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights. The two cases to which we were specially referred, *R.* v. *Chandra Dharma* (1) and *The Ydun* (2) were cases where the statutes in question were passed whilst in the former case the prosecution and in the latter case the action could still be brought under the existing law. In *R.* v. *Chandra Dharma* (1) a prosecution was commenced for an offence which at the time of its commission had to be commenced within three months. Before the three months had elapsed the time for commencing the prosecution was extended to six months. The prosecution was commenced more than three months but less than six months after the commission of the offence. The accused was convicted of the offence and it was held that the conviction must be upheld because the Act extending the time for launching the prosecution related to procedure only and was therefore retrospective. *Channell* J., one of the judges, said that if the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and it would not have enabled a prosecution to be maintained even within six months from the offence. It may be that the other judges, *Lawrance* J., *Kennedy* J. and *Phillimore* J. did not accept this view. They all agreed with the judgment of Lord *Alverstone* C.J. who said : " when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective " (3). But it would be difficult to say that the amending statute would not have taken away any defence which was formerly open to the prisoner if it had not been passed until after the period of three months had expired. It would appear that this passage from Lord *Alverstone* should be read, like all judicial utterances, in the light

(1) (1905) 2 K.B. 335.
(2) (1899) P. 236.
(3) (1905) 2 K.B., at pp. 338, 339.

of the particular facts and that his Lordship may not have intended his remarks to apply to such an event. The case of *The Ydun* (1) is the opposite case. There the plaintiffs had a cause of action for damages against a public authority which occurred on 13th September 1893. The *Public Authorities Protection Act* 1893, which was passed on 5th December 1893, and came into force on 1st January 1894, provided that actions against public authorities for any alleged neglect or default must be commenced within six months next after the act, neglect or default complained of. The plaintiffs did not commence their action until 14th November 1898 and it was held that the *Public Authorities Protection Act* was retrospective as it dealt with procedure and the plaintiff's action was barred six months after 13th September 1893. Accordingly it applied to all causes of action brought after its commencement whether they arose before or after 1st January 1894. In that case the statute shortened the time within which the plaintiffs could bring their cause of action but still left them with sufficient time within which to institute it after the statute came into force. The case of *Coleman* v. *Shell Co. of Australia* (2) was a similar case in principle to *R.* v. *Chandra Dharma* (3) and *The Ydun* (1). The statute extending the time within which certain proceedings might be taken was held to apply to a cause of action arising before it was passed. But the cause of action could still have been brought under the existing law because, although the plaintiff was out of time as of right, the Court had power for a limited period which had not expired to extend the time. The present case is distinguishable from these three cases because the period within which the plaintiff could commence the action under the existing law had expired before s. 2 (a) of the *Compensation to Relatives (Amendment) Act* 1953 was enacted. It could be said of the statutes under consideration in these three cases, to use the words of the President (Sir *F. H. Jeune*) in *The Ydun* (1), " that the interference with vested rights suggested in this instance is hardly appreciable " (4). But when an existing cause of action is barred by lapse of time under the existing law it could not be said that the effect upon existing legal relationships of a statute extending the time within which the cause of action might be brought would be " hardly appreciable ". The right to enforce a cause of action (sometimes called an accrued claim) is an existing substantive right : *Gillmore* v. *Executor of Shooter* (5) ; *Henshall* v. *Porter* (6) ; *Brueton* v. *Woodward* (7). It is of the same

(1) (1899) P. 236.
(2) (1943) 45 S.R. (N.S.W.) 27 ; 62 W.N. 21.
(3) (1905) 2 K.B. 335.
(4) (1899) P., at p. 241.
(5) (1677) 2 Mod. 310 [86 E.R. 1091].
(6) (1923) 2 K.B. 193.
(7) (1941) 1 K.B. 680.

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character as the right to prosecute an appeal which was held by the Privy Council in *Colonial Sugar Refining Co.* v. *Irving* (1) to be in this category. There can be no distinction in principle between a right given by law to commence an action and a defence given by law which bars an action. A law which has the effect of taking away such a right or immunity could not be classed as merely procedural. Procedural statutes are statutes which regulate the procedure and practice of the courts: *Wright* v. *Hale* (2). The *Statute of Frauds* and *Lord Tenterden's Act* are examples of statutes which relate to procedure but they have been held to affect substantive rights and therefore to be prima-facie statutes which should not be construed as having a retrospective operation. In *Gillmore* v. *Executor of Shooter* (3) decided in 1677, it was held that the Statute of Frauds did not apply to actions brought after to enforce agreements made before it became law. In 1678, one year later, Lord *Nottingham* in *Ash* v. *Abdy* (4) was firmly of the same opinion. In *Towler* v. *Chatterton* (5) *Lord Tenterden's Act* was construed by *Park* J. as having a retrospective effect but only because the operation of the Act was postponed for about eight months so that creditors who were affected by it would have an opportunity of enforcing their claims in the interval under the law as it stood before the passing of the Act. In *Doe d. Evans* v. *Page* (6) it was held that s. 7 of the *Limitation Act* 3 & 4 Wm. IV c. 27, was not retrospective and did not apply to tenancies at will which had determined before the passing of the Act. Lord *Denman* said: "A different construction, even if the words permitted it, would cause the greatest hardship: for a person, who, as the law stood before the passing of the Act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would by the operation of the statute be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons, who would be otherwise affected by it, to assert their rights" (7). See also *Doe* v. *Angell* (8); *Doe* v. *Bold* (9). *Williams* v. *Mersey Docks and Harbour Board* (10) is an example of how a statute of limitations can affect proceedings under *Lord Campbell's Act*. It

(1) (1905) A.C. 369.
(2) (1860) 6 H. & N. 227 [158 E.R. 94].
(3) (1677) 2 Mod. 310 [86 E.R. 1091].
(4) (1678) 3 Sw. 664 [36 E.R. 1014].
(5) (1829) 6 Bing. 258 [130 E.R. 1280].
(6) (1844) 5 Q.B. 767 [114 E.R. 1439].
(7) (1844) 5 Q.B., at p. 772 [114 E.R., at p. 1441].
(8) (1846) 9 Q.B. 328, at p. 359 [115 E.R. 1299, at p. 1311].
(9) (1847) 11 Q.B. 127 [116 E.R. 423].
(10) (1905) 1 K.B. 804.

was held that the injured person, the deceased husband of the plaintiff, would have been barred by the *Public Authorities Protection Act* 1893 if he had sued the defendant when alive and the widow who sued under *Lord Campbell's Act* was also barred. *Cozens-Hardy* L.J. said: "In the present case the deceased could not at the date of his death, or at any time after the lapse of six months from his injury, have maintained an action in respect of that injury against the defendants; and therefore his representative cannot maintain this action" (1). An instance in this Court of a statute relating to procedure which was held to affect a substantive right and for that reason not to have a retrospective operation will be found in *Newell* v. *The King* (2). It is presumably because the right to plead a statute of limitations as a bar to an action is considered to be a matter of substance and not a mere matter of practice or procedure that the courts have adopted the principle already mentioned that no amendment should be made to a writ which will enable an action to be maintained which at the date of the application was out of time. This is borne out by many judicial statements of which it will suffice to cite a few. In *Doyle* v. *Kaufman* (3), (affirmed) (4) *Cockburn* C.J., with whom *Lush* J. concurred, said that a writ should not be renewed "when by virtue of a statute the cause of action is gone" (5). In *Battersby* v. *Anglo-American Oil Co. Ltd.* (6) Lord *Goddard*, delivering the judgment of the Court of Appeal, said of this statement "Perhaps it might have been more accurate to say 'when the remedy is barred,' but the effect is the same" (7). In *Smalpage* v. *Tonge* (8) *Cotton* L.J. referring to *Doyle* v. *Kaufman* (3) said "There the right of action was gone". In *Hewett* v. *Barr* (9) Lord *Esher* M.R. said that amendments "ought not to be granted where they would have the effect of altering the existing rights of the parties" (10). In *Mabro* v. *Eagle, Star & British Dominions Insurance Co. Ltd.* (11) *Scrutton* L.J. said: "The Court has never treated it as just to deprive a defendant of a legal defence" (12) and *Greer* L.J. said: "It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not to be allowed" (13).

An illustration of the extent to which Acts like the *Statute of Frauds* and *Statutes of Limitations*, despite their procedural attributes, can modify substantive rights is afforded by the old rule of

(1) (1905) 1 K.B., at p. 809.
(2) (1936) 55 C.L.R. 707.
(3) (1877) 3 Q.B.D. 7.
(4) (1877) 3 Q.B.D. 340.
(5) (1877) 3 Q.B.D., at p. 8.
(6) (1945) 1 K.B. 23.
(7) (1945) 1 K.B., at p. 29.
(8) (1886) 17 Q.B.D. 644, at p. 648.
(9) (1891) 1 Q.B. 98.
(10) (1891) 1 Q.B., at p. 99.
(11) (1932) 1 K.B. 485.
(12) (1932) 1 K.B., at p. 487.
(13) (1932) 1 K.B., at p. 489.

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equity that bills which did not allege the necessary writing or that the proceedings were commenced within time in suits affected by these statutes were demurrable. The rule is referred to by *Farwell* L.J. in *Humphries* v. *Humphries* (1). The cases are collected in *Daniell's Chancery Practice*, 5th ed. (1871), vol. 1, p. 306. The rule and its basis were explained by *Kindersley* V.C. in *Barkworth* v. *Young* (2). He said: "The function of a demurrer is to insist summarily and simply that, on the assumption of the truth of the facts alleged by the bill, the Plaintiff is not, according to law, entitled to the relief prayed. It is an appeal to the law of which every Judge is bound to take notice, and I never could see what difference it could make in this respect whether the law to which the appeal is made is that which is founded on general principles of law and equity, or that which rests on the authority of a particular statute, or whether the statute on which it rests is one which destroys the right, or only precludes the remedy.

But it is unnecessary to consider the matter on principle, because it has been now quite settled by decision. In *Foster* v. *Hodgson* (3) Lord *Eldon* expressed a clear opinion that a Defendant may avail himself by demurrer of the defence afforded him by the *Statute of Limitations*; and in *Wood* v. *Midgley* (4) Lord Justice *Turner* decided the same point with respect to the Statute of Frauds, Lord Justice *Knight Bruce* concurring" (5).

In *Gregory* v. *Torquay Corporation* (6) (affirmed) (7) *Pickford* J. (as he then was) said: "I do not think it right to hold that every statute which imposes a limitation upon a right of action is necessarily a statute of limitations. If a statute conferred a new right of action and also prescribed a limited time within which that right of action might be enforced, it may be that it could not be properly called a statute of limitations. It is not, however, necessary to consider that point, for the Public Authorities Protection Act does not confer any new rights of action. It seems to me that prima facie any statute which imposes a limitation of time upon an existing right of action is properly called a statute of limitations. It is necessary, therefore, in each case to look at the particular statute and see what its effect is" (8).

In the present case it would not be right for the reasons already given to class the second limb of s. 5 of the *Compensation to Relatives Act* 1897 as a statute of limitations. It is a limitation

(1) (1910) 2 K.B. 531, at p. 535.
(2) (1856) 4 Dr. 1 [62 E.R. 1].
(3) (1812) 19 Ves. 180 [34 E.R. 485].
(4) (1854) 5 De G. Mac. & G. 41 [43 E.R. 784].
(5) (1854) 4 Dr., at p. 9 [62 E.R., at p. 4].
(6) (1911) 2 K.B. 556.
(7) (1912) 1 K.B. 442.
(8) (1911) 2 K.B., at p. 559.

imposed upon a new and not upon an existing cause of action. The limited time within which the new right of action may be enforced is of its essence. It goes to its very survival. In any event the amendment introduced by the Act of 1953 is not merely procedural. Where the cause of action under the principal Act was out of time when it came into force and a consequential immunity had accrued to an alleged wrongdoer, the removal of that bar would necessarily affect his substantive rights. He would find himself exposed to an action to which he had previously a complete defence. The *Compensation to Relatives (Amendment) Act* 1953 is not therefore an Act to which a retrospective operation should be given unless it appears by clear words that such was the intention of the legislature. But there are no such words. The amending Act simply substitutes one period of time for another and does so in a section both limbs of which are couched in the language of futurity. Since the amendment, s. 5 reads: "Not more than one action shall lie etc., and every such action shall be commenced etc." Thus as a matter of ordinary language the section speaks prospectively and could not be used, without doing violence to this language, to subject a person to a liability from which he had become "scot-free".

For these reasons the appeal fails and should be dismissed.

FULLAGAR J. On 19th March 1951 Stuart Edward Maxwell died as the result of injuries inflicted by a motor car driven by Lionel William Murphy. On 30th November 1954 his widow, Kitty Blanche Maxwell, commenced in the Supreme Court of New South Wales an action against Murphy in respect of her husband's death. The action was brought under the *Compensation to Relatives Act* of New South Wales, which is the equivalent in that State of the English *Fatal Accidents Act* 1846 (*Lord Campbell's Act*). At the date of Maxwell's death s. 5 of the Act provided: "Not more than one action shall lie for and in respect of the same subject matter of complaint and every such action shall be commenced within twelve months after the death of such deceased person". The period of twelve months had expired more than two years before the commencement of the action, but on 16th December 1953 the *Compensation to Relatives (Amendment) Act* 1953, had come into force. That Act was entitled "An Act to enlarge the period within which actions may be brought under the *Compensation to Relatives Act* 1897-1946, for this purpose to amend that Act, and for purposes connected therewith." Section 2, so far as material, provided: "The *Compensation to Relatives Act* of 1897, as amended by subsequent Acts, is amended by omitting from s. 5 the words

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'twelve months' and by inserting in lieu thereof the words 'six years'." The Full Court of New South Wales has decided that the amending Act does not apply to this case, and that the plaintiff's claim is barred by s. 5 as it stood before the amendment. From that decision the plaintiff appeals to this Court.

The question in the case, as I see it, is whether the amending Act of 1953 applies to an action brought in respect of a death which took place before it became law. That question is, in the last resort, a question of the interpretation of a particular statute. The particular statute under consideration, however, contains no decisive indication of the intention of the legislature in the material respect. The only indication of any kind, I think, is contained in the long title which I have quoted above—" An Act to enlarge the period within which actions may be brought ". The generality of this language does suggest to my mind that the new " period " is simply to be substituted for the old " period " whenever the cause of action may have arisen. But this, though it should be borne in mind, is by no means a strong indication, and the section itself which actually effects the change in the law contains literally nothing to guide us. The case is, therefore, one in which we are bound to look for a relevant rule of construction, and, if we can find one, to act upon it.

Before considering whether there is any rule of construction which is applicable, I must say that I am, with respect, quite unable to agree with the general approach which appears to have been made in the Full Court. The matter is approached from the point of view that a tortfeasor will, at the expiration of the old statutory period of twelve months, have acquired an " immunity "—what the defendant in *Craxfords (Ramsgate) Ltd.* v. *Williams & Steer Manufacturing Co. Ltd.* (1) called a " vested defence "—and that a statute ought prima facie to be construed as not interfering with such an " acquired immunity " or " vested defence ". I cannot think that this is right. It appears to me to look at the whole matter from the wrong end. I am not able to see any inherent probability that the legislature would, if it had thought about the matter, have been zealous to avoid disappointment to a wrongdoer who might have thought himself safe, or to his insurance company. I should rather have thought that the legislature, being concerned to enlarge the remedy of the relatives of deceased persons, would have seen nothing fundamentally unjust in extending the enlarged remedy to persons who had—whether through ignorance or inadvertence or the mistake of a legal adviser—allowed the old abnormally

(1) (1954) 3 All E.R. 17, at p. 18; 1 W.L.R. 1130, at pp. 1131, 1132.

short period to elapse without commencing proceedings against the wrongdoer. As is well said in *Maxwell* on *Interpretation of Statutes*, 10th ed., (1953), p. 225, "a defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective, remedy". I would reject the idea of a "vested defence", with its corollary that the amending Act should be construed as applying to cases where the old statutory period was still current at the date of commencement of that Act, but as not applying to cases where the old statutory period had expired before the commencement of the Act. It is, in my opinion, impossible to give such a meaning to the Act. The question, to my mind, is whether it applies to cases where the cause of action arose before the commencement of the Act, or only to cases where the cause of action arose after its commencement.

I had occasion (although the case was actually decided on the construction of a particular saving clause) to consider the rules revelant in cases of this type in *Re Ovens and King Traders Pty. Ltd.* (1). The general rule on which the respondent relies is perhaps as well established as anything in English law. It is that a statute is prima facie to be construed as not having a retrospective operation. Two typically succinct statements of the rule may be cited. In *Moon* v. *Durden* (2) *Alderson* B. said that in construing statutes the general rule is that "They are not to be supposed to apply to a past, but to a future, state of circumstances" (3). In *Gardner* v. *Lucas* (4), Lord *Blackburn* said:—"Prima facie, any new law that is made affects future transactions, not past ones" (5). It is worthy of note that the word "retrospective" does not occur in either of these statements, but it has been used in many statements of the general rule. It may, of course, be said with some force that to construe the statute of 1953 in the present case as extending to all actions commenced after it came into force is not really to give it a retrospective operation. But this is simply a matter of terminology. I think that the word "retrospective" has acquired an extended meaning in this connexion. It is not synonymous with "*ex post facto*", but is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before it became law. See *Kraljevich* v. *Lake View & Star Ltd.* (6), per *Dixon* J.

The established rule, however, is subject to an established exception. It is said not to apply to "statutes dealing with procedure"—"statutes of a procedural character". The exception

(1) (1949) V.L.R. 16.
(2) (1848) 2 Ex. 22 [154 E.R. 389].
(3) (1848) 2 Ex., at p. 40 [154 E.R., at p. 397].
(4) (1878) 3 App. Cas. 582.
(5) (1878) 3 App. Cas., at p. 603.
(6) (1945) 70 C.L.R. 647, at p. 652.

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like the rule, has been stated in various forms. In *Wright* v. *Hale* (1) *Channell* B. said :—" In dealing with Acts of Parliament which have the effect of taking away rights of action, we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature ; but the case is different where the Act merely regulates practice and procedure " (2) : cf. *Gardner* v. *Lucas* (3), per Lord *Blackburn*. A consideration of the cases generally cited in this connexion has led me to think that the distinction is probably best stated by saying that it is between statutes which create or modify or abolish substantive rights or liabilities on the one hand and statutes which deal with the pursuit of remedies on the other hand. In the former class of case there is a presumption against retrospective operation in the sense explained above. In the latter class of case there is no such presumption : on the contrary, the presumption is that the enactment applies in all proceedings commenced after it became law, and it may be right to construe it as applying even in proceedings commenced before it became law. What was said by *Wilde* B. in *Wright* v. *Hale* (4) must be read in the light of what is said by *Pollock* B. in *Attorney-General* v. *Theobald* (5).

The distinction itself has not unnaturally been criticised on the ground that it does not represent a logical dichotomy, e.g. by Dr. *Cheshire, Private International Law*, 3rd ed. (1947), pp. 826 et seq.), who cites the well-known saying of Maine to the effect that, if one traces any substantive right back far enough, it will be found " secreted in the interstices of procedure ". But it has been accepted and applied again and again. One or two examples may be selected : see *Cox* v. *Thomason* (6) ; (new rule as to taxation of costs), *Pinhorn* v. *Souster* (7) ; (new rule as to pleading), *Watton* v. *Watton* (8) ; (time within which decree nisi may be made absolute), *Re Joseph Suche & Co. Ltd.* (9), (priorities in bankruptcy).

There are two classes of statute which might have been regarded as dealing with matters of substantive right, but which the common law has traditionally regarded as " procedural " in character—concerned with remedies as distinct from rights. The first class consists of statutes, such as the *Statute of Frauds*, which require certain transactions to be evidenced by writing. The second class consists of statutes, commonly called statutes of limitation, which

(1) (1860) 6 H. & N. 227 [158 E.R. 94].
(2) (1860) 6 H. & N., at pp. 231, 232 [158 E.R., at p. 95].
(3) (1878) 3 App. Cas. 582, at p. 603.
(4) (1860) 6 H. & N. 227, at p. 232 [158 E.R. 94, at p. 96].
(5) (1890) 24 Q.B.D. 557, at p. 560.
(6) (1832) 2 Cr. & J. 498 [149 E.R. 211].
(7) (1852) 8 Ex. 138, at p. 143 [155 E.R. 1292, at p. 1294].
(8) (1866) L.R. 1 P. & D. 227.
(9) (1875) 1 Ch. D. 48.

impose a time limit on the commencement of proceedings to enforce rights. The classification of such statutes as procedural has important consequences in two respects. In the first place, the matters with which they deal are, for purposes of private international law, treated as governed by the *lex fori*. In the second place, the presumption against retrospective operation is not applied to them.

The " character " of the *Statute of Frauds* was finally settled in *Leroux* v. *Brown* (1). With regard to the earlier cases I merely refer to what I said in *Re Ovens and King Traders Pty. Ltd.* (2). It is to be noted that in *Leroux* v. *Brown* (1) *Maule* J. said that the words of the 4th section of the *Statute of Frauds* " prohibit the courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract " (3). The position is well illustrated by comparing *Towler* v. *Chatterton* (4) with *Moon* v. *Durden* (5). In the former case the Court was concerned with s. 10 of *Lord Tenterden's Act*, which provided that an oral acknowledgement should not be sufficient to take a case outside a statute of limitation. The section was held to apply in an action commenced after it came into force to an oral acknowledgement given before it came into force. In the latter case the Court was concerned with s. 18 of Act 8 & 9 Vict. c. 109, which provided that all contracts by way of gaming and wagering should be null and void. It was held that the section did not apply to contracts made before the Act came into force. *Rolfe* B. criticised the decision in *Towler* v. *Chatterton* (4), but the distinction between the two cases seems clear enough, and it is to be remembered that *Moon* v. *Durden* (5) was decided four years before *Leroux* v. *Brown* (1).

The " character " of statutes of limitation is, I think, generally regarded as having been finally settled by *British Linen Co.* v. *Drummond* (6). In his preface to vol. 34 of the Revised Reports, p. vi, Sir *Frederick Pollock* says that this case " is perhaps the best illustration of the rule that statutes of limitation belong to the law of procedure". The position is well illustrated by comparing *Reg.* v. *Griffiths* (7) with *R.* v. *Chandra Dhama* (8). In the former case the Act in question, although a time element was

(1) (1852) 12 C.B. 801 [138 E.R. 1119].
(2) (1949) V.L.R., at p. 20.
(3) (1852) 12 C.B., at p. 827 [138 E.R., at p. 1130].
(4) (1829) 6 Bing. 258 [130 E.R. 1280].
(5) (1848) 2 Ex. 22 [154 E.R. 389].
(6) (1830) 10 B. & C. 903 [109 E.R. 683].
(7) (1891) 2 Q.B. 145.
(8) (1905) 2 K.B. 335.

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involved, created a new substantive offence, and was held not to apply to acts done before it came into force. In the latter case the Act in question merely enlarged the time within which prosecutions might be commenced, and it was held applicable to a prosecution launched after it came into force in respect of acts done before it came into force. In this case the old period was still current when the new Act became law, and *Channell* J. said that, if the old period had expired before the new Act became law, he would have decided the case otherwise. As I have said, I do not think that such a view is sound. Lord *Alverstone* C.J. decided the case on the ground that " when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed " (1). Referring to the particular statute, he said :—" It is a mere matter of procedure, and according to all the authorities it is therefore retrospective " (2). And *Lawrance*, *Kennedy* and *Phillimore* JJ. agreed with the Lord Chief Justice.

In *R.* v. *Chandra Dharma* (3) an existing time limit of three months was extended to six months. In *The Ydun* (4) an existing time limit of six years under the statute of James I was abridged, in the case of public authorities, to six months by the *Public Authorities Protection Act* 1893, which came into force on 1st January 1894. In November 1898 an action was commenced in respect of damage to a ship which had occurred in September 1893. It was held by the Court of Appeal that the Act applied, and that the action was barred six months after the cause of action arose. The Act was regarded as an Act dealing with a matter of procedure. I think that some words such as " in respect of causes of action arising " have been omitted in the report of the judgment of *A. L. Smith* L.J. (5) after the words " action brought ". It is clear that the action was brought long after the Act became law.

The case of *R.* v. *Chandra Dharma* (3) was applied by the Full Court of New South Wales in *Coleman* v. *Shell Co. of Australia Ltd.* (6). The legislation in question in that case, and the decisions interpreting it, were of considerable complexity, but for present purposes the position may be stated quite shortly. The *Workers' Compensation Act* 1926-1938 (N.S.W.) provided that proceedings independently of the Act for an injury must, if any payment or payments by way of compensation under the Act had been received, be commenced by the worker within six months of the receipt of the

(1) (1905) 2 K.B., at p. 338.
(2) (1905) 2 K.B., at p. 339.
(3) (1905) 2 K.B. 335.
(4) (1899) P. 236.
(5) (1899) P., at p. 245.
(6) (1943) 45 S.R. (N.S.W.) 27; 62 W.N. 21.

first such payment. By an amending Act, which came into force on 24th June 1942, the period of six months was extended to twelve months. The plaintiff worker sustained injury on 26th September 1941, and received certain payments by way of compensation under the Act. He commenced his action after the amending Act had come into force, and more than six months, but less than twelve months, after receipt of the first payment of compensation. It was held that the amending Act applied to the case, and that the action was not barred. *Jordan* C.J., in whose judgment *Davidson* J. and *Halse Rogers* J. concurred, felt difficulty in regarding the material Act as " procedural " in character, but considered that he was bound so to regard it, and that, so regarded, it must be held to apply in all actions commenced after it became law. The decision was, in my opinion, correct, though (as I have indicated) I think it wrong and misleading to use in this connexion such expressions as " acquired immunity " or " vested defence ". Reference may be made in this connexion to the latest relevant case that I have seen—*Craxfords (Ramsgate) Ltd.* v. *Williams & Steer Manufacturing Co. Ltd.* (1)—a case which arose out of the repeal in England of the Statute of Frauds, and in which *Pilcher* J. refused to give any countenance to the idea of a " vested defence ".

There are two notable cases in which certain provisions of the *Mercantile Law Amendment Act* 1856 affecting the operation of 21 Jac. I, c. 16, were considered, and in which no reference was made to any rule that statutes dealing with a time limit on actions are to be classed as " procedural " and therefore prima facie to be construed as applicable in all actions commenced after they come into force. In the latter case, indeed, such statutes seem to be regarded as subject to the general rule that statutes are prima facie to be construed as having no retrospective operation. The first case is *Cornill* v. *Hudson* (2). This case was concerned with s. 10 of the Act of 1856, which enacted (to put it summarily) that no person should be entitled to any time for commencing an action beyond the time fixed by the statute of James I by reason only of his being beyond the seas or imprisoned at the time when his cause of action accrued. This section was held to be applicable in an action commenced after it came into force, with the result that the plaintiff was barred by the statute of James, although, if he had been able to deduct a period of imprisonment, he would not have been so barred. Lord *Campbell* did not regard this view as giving a " retrospective " operation to the Act of 1856. He said " There is

(1) (1954) 3 All E.R. 16; (1954) 1 W.L.R. 1130.

(2) (1857) 8 E. & B. 429 [120 E.R. 160].

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no retrospective operation on actions already commenced." The second case is *Jackson* v. *Woolley* (1), in which the decision of the Queen's Bench, following a decision of *Kindersley* V.-C., in *Thompson* v. *Waithman* (2) was reversed in the Exchequer Chamber. The enactment in question was the very curiously worded s. 14 of the *Mercantile Law Amendment Act* 1856. That section provided that no debtor " shall lose the benefit " of the statute of James " so as to be chargeable in respect or by reason only of any payment " made by a co-debtor. In an action brought after the commencement of the Act it was held that s. 14 did not affect the rights of a creditor who had, before the Act came into force, received a payment from a co-debtor of the defendant. The case seems an extremely clear case: one would not have thought it needed any aid from any prima-facie rule of construction. The defendant had " lost the benefit " of the statute of James before the Act became law, and the Act plainly said no more than that no debtor should in the future " lose the benefit " of that statute by reason of any payment by a co-debtor.

I do not think that *Jackson* v. *Woolley* (1) should be regarded as casting any doubt on the very definite line of authority which indicates that statutes imposing or altering a time limit on actions are to be classed as " procedural " statutes, and therefore, for purposes of private international law, to be applied as part of the *lex fori*, and, for purposes of interpretation, to be treated as prima facie applicable in all proceedings commenced after their coming into force. Such a view may be open to criticism, but there is a good deal to be said for it. Such statutes do deal with remedies as such, and not with rights as such, and the distinction involved is not meaningless or unreal. The difference between avoiding an antecedent obligation and making it unenforceable is no mere matter of words. The use of the word " retrospective " in this connexion is apt to be badly misleading. If the legislature is, so to speak, thinking in terms of rights, it is natural to regard it prima facie as thinking of all rights to accrue in the future. If it is thinking in terms of remedies, it is natural to regard it prima facie as thinking of all future seekings of remedies. In any case, I think that the authority is strong for saying that statutes of limitation are statutes of a class to which a special rule of construction applies.

The material part of the *Compensation to Relatives Act* 1897-1946 (N.S.W.) appears to me to be a typical statute of limitation. It imposes, in language exactly parallel to that of 21 Jac. I c. 16 itself,

(1) (1858) 8 E. & B. 778 [120 E.R. 289].

(2) (1856) 3 Dr. 628 [61 E.R. 1043].

a time limit within which actions of a particular class may be commenced. The position is not affected by the fact that the plaintiff in this case has by her declaration alleged that her husband died "within six years prior to the bringing of this action", with the result that the present proceedings came before the Supreme Court on demurrer to the declaration. It is the practice in New South Wales, as it apparently was in England before the *Judicature Act*, to allege in the declaration that the action is brought in due time. But this cannot affect the substance of the matter. That the action is statute-barred is matter of defence. If any question of fact is involved, the burden of proof lies on the defendant. In other States, as in England today, a defendant cannot rely on a statute of limitation, unless he pleads the statute in his defence. See, e.g., *Rules of the Supreme Court of Victoria*, Order XIX, r. 15.

The rule is, of course, like all rules of construction, only a prima-facie rule. It must yield to any sufficient indication of a contrary intention. But the present case is, in my opinion, eminently a case for the application of the rule. I think, as I have said, that the amending Act of 1953 does contain, in the long title, a slight indication that it is intended to apply to all actions brought after its commencement, but, if the appropriate presumption of law were the reverse of what I think it is, I do not think that I would regard the long title as strong enough to overcome it. As things are, however, it appears to me that the appropriate presumption and the long title both point in the same direction.

In my opinion, the plaintiff's action is not statute-barred, and this appeal should succeed.

KITTO AND TAYLOR JJ. This appeal depends upon a very special problem of statutory construction, for the solution of which, as it seems to us, there is little help to be had from decided cases, or from any general rule except that which bids us gather the intention of Parliament as best we may from a study of the language it has employed.

The Imperial Parliament enacted the *Fatal Accidents Act* (9 and 10 Vict. c. 93) in 1846, and the Parliament of New South Wales followed its example by passing the Act 11 Vict. No. 32 in the next year. The Acts were addressed to the mischief which was considered to exist because the common law did not visit with any civil consequences wrongful conduct causing death. To make the wrongdoer liable in damages where he would have been liable if death had not ensued was the purpose to which the Parliaments

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applied themselves. " Whereas no action at law is now maintainable ", the Acts recited, " against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him ". The Acts provided that, in the cases to which they applied, the wrongdoer should be liable to an action for damages notwithstanding the death of the person injured. A new right to recover damages was thus brought into existence by the device of providing for a new liability to an action; and, as consistency in drafting demanded, the nature and extent of the right were defined by means of provisions which, though in one sense procedural, set limitations to the character and incidents of the action. It was to be an action for the benefit of persons within certain descriptions only; it could be brought by and in the name of described persons only; the measure of damages to be applied by the jury was limited by reference to the injury resulting from the death to the parties for whom and for whose benefit the action was brought; and the last-mentioned parties alone were to be entitled to have the amount recovered divided amongst them, their shares being fixed by the verdict of the jury. A proviso added two more limitations: " that no more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person ". That the first limb of this proviso went to the substance of the new right to damages is clear, for its effect was to exclude from the right any persons for whose benefit the liability to an action was imposed who might not be parties for whom and for whose benefit the action was in fact brought. It meant that " the persons who stand out stand out for ever ": *Avery* v. *London & North Eastern Railway Co.* (1). The second limb carried the process of limiting the right a step further, for it meant that the liability was confined to being sued, not only in a single action, but in an action commenced within twelve months after the death. This second limb could hardly have worn less resemblance to a mere limitation of the time for enforcing a cause of action to which it was extraneous. It appeared in the Acts as one of the provisions by which the area of the new liability was being plotted—as an essential qualification indeed, of the new action that was being provided for.

The proviso has always remained as a proviso in England. In New South Wales the Act was re-enacted in 1897, and the words

(1) (1938) A.C. 606, at pp. 613, 618, 619.

" Provided always " and " calendar " were then omitted. But the nature of the provision remains indubitably the same. Then, in 1953, some amendments of no significance for present purposes having been made in the meantime, the words " twelve months " were altered to " six years " ; and it is the operation of that amendment that we have here to determine.

It seems to us that no more can fairly be extracted from the amendment than that a wrongful act, neglect or default causing death in the future, if it would have entailed a liability for damages had death not ensued, is to give rise to a liability to be sued for damages, subject to the provisions of the Act, in an action commenced within six years. The Act applies " whensoever the death of a person is caused " (in certain circumstances), and there is nothing in the amendment to suggest that more was intended than that the Act, in its application in respect of conduct causing future deaths, shall impose a liability of longer duration than it imposed in respect of conduct which caused deaths in the past.

One could not, we think, construe the amendment as applying in cases where the period of twelve months fixed by the principal Act had commenced to run and was still current when the amending Act was passed, unless one were prepared to hold that it applies also in cases in which the twelve months had then expired but the period of six years from the death had not. The distinction was plainly not adverted to at all. But to hold that the amendment applies in the latter class of cases would be to attribute to Parliament an intention of so unusual a kind, and one so clearly demanding a deliberate judgment as to its fairness, that it could hardly have been formed without finding expression in clear words ; and there is not even a hint of it to be found.

In our opinion the learned judges of the Supreme Court came to the correct conclusion, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *David Price.*
Solicitors for the respondent, *John Corcoran & Co.*

J. B.