As both parties were on this view engaged in the same business, the covenant restraining the defendant would be in protection of the plaintiff's interest in its business. The question then became whether this interest of the plaitiff was entitled to legal protection. If the practice of medicine by the company was unlawful, then any agreement made in furtherance of that object would be unlawful and void. The court considered the relevant provisions of the Medical Act,[11] s. 49 of which provides that no person not registered should practise medicine for hire, and that any person who so practised for hire should be guilty of an offence. It held that the effect of the cases[12] relied on by the plaintiff for the proposition that the word "person" referred to a natural person and not a corporation, was limited to prosecutions under the Act, and that a "contract may be illegal although it be not in contravention of the specific directions of the statute provided it be opposed to the general policy and intent thereof."[13] Control of the company was in the hands of the shareholders, who may be all doctors, or as in the present case of unqualified persons, not having the ideals of the medical profession at heart. The practice of medicine by a corporation was, therefore, illegal as being contrary to the policy of the statute, notwithstanding the absence of a specific prohibition in the Act. The agreement between the plaintiff company and the defendant, being connected with the illegal act of practising medicine, was therefore illegal.

Counsel for the plaintiff was in a dilemma. If he argued only from the point of view of the legitimate objects of the company as set out in its Letters Patent, the veil of corporate personality remained undisturbed, but the company would then have no interest to protect in restraining the defendant from the practice of medicine, its authorised business being different from that of the defendant and the covenant was unenforceable. If, however, he invited the court to consider what the company was actually doing, i.e. to look behind the veil, then the business of the company would be disclosed as being opposed to the policy of the Medical Act and therefore the entire agreement, being connected with and in furtherance of this illegal business, would be illegal and void.[14] The court's decision was the same, whether the rule in *Saloman's Case* was applied or not; and the injunction was refused.

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RETROSPECTIVE OPERATION OF STATUTORY AMENDMENTS

MAXWELL v. *MURPHY*

The decision of the High Court in *Maxwell* v. *Murphy*[1] is of particular interest to the student of statutory interpretation in that it clarifies the principles to be adopted in determining the retrospective effect to be given to a statute when no clear indication of intention appears from the language of the statute itself.

The facts of the case were relatively simple. Under s. 5 of the Compensation to Relatives Act, 1897-1946 (N.S.W.) it was provided that every action brought under the Act should be commenced within twelve months of the death of the

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[11] Medical Act for Upper Canada, 1865, c. 34.

[12] *Giffels & Vallet of Can. Ltd.* v. *The King ex. rel Miller* (1952) 1 D.L.R. 620, *Pharmaceutical Society* v. *London & Provincial Supply Association* (1880) 5 A.C. 857 and *Law Society* v. *United Service Bureau* (1934) 1 K.B. 343.

[13] *Chitty on Contracts* (21 ed.) 520.

[14] Having found that the business of the plaintiff was the same as that of the defendant and therefore grounding in the plaintiff an interest in the restraint imposed on the defendant, the court could have reached the same conclusion on the basis that the plaintiff's interest being the practice of medicine was not a legitimate interest and would not support the covenant in restraint of trade.

[1] (1957) 96 C.L.R. 261.

deceased. This section was amended in 1953[2] by extending the period for commencing an action from twelve months to six years. The plaintiff, Mrs. Maxwell, brought an action against the defendant Murphy in the Supreme Court of New South Wales[3] in 1954 in respect of the death of her husband in 1951. Under s. 5 of the Act her right to bring such an action had been determined in 1952 and prior to the amendment in 1953. Accordingly, the defendant demurred successfully on the grounds that the plaintiff's action was barred by s. 5; and that the 1953 amendment was not retrospective in its operation. On appeal the High Court held (Fullagar, J. dissenting) that the 1953 amendment did not operate to revive the plaintiff's right to maintain the action which had been barred at the expiration of one year from her husband's death.

The apparent simplicity of the decision tends to cause one to overlook the very difficult principles of law involved and discussed by Williams, J. and Fullagar, J. On the one hand, there were some apparently well-established statements of law which Fullagar, J. sought to rely upon in support of the retroactive operation of such an amendment, whilst Williams, J. attempted to modify such statements of law to conform to the ultimate decision which was given.

The general principles to be applied in determining the retrospective effect of a statute which does not expressly indicate in the language itself the effect to be given to it, are clearly set out in *Dixie* v. *Royal Columbian Hospital*.[4] They are that (1) a statute divesting a person of vested rights is to be construed as prospective only; (2) a statute which is merely procedural is, however, to be construed retrospectively; and (3) a statute which, whilst procedural in its character nevertheless affects vested rights adversely, is to be construed as prospective only. Similar enunciations have appeared in *Kraljevich* v. *Lake View and Star Ltd.*[5] and *Fairey* v. *Southampton Corporation*.[6] Moreover, the particular statute will always be closely construed to see whether any indication of intention is given in the language of the statute itself. Sufficient indication of prospectiveness may be shown by using a word in its present tense and not in its past tense as in *Allman* v. *Country Roads Board*.[7] If any ambiguity occurs in construing such intention, the ambiguity will be resolved against a retrospective operation.[8]

In the present case their Honours were in complete agreement that no indication of intention was to be found by construction of the language of the amending section.[9] Dixon, C.J. concluded that the plaintiff had had a right of action but had lost it before the amending section came into operation. A remedy had been conferred on the plaintiff which had subsequently become barred and the right to damages could not be separated from the right to recover them.[10] Kitto and Taylor, JJ.[11] in a joint judgment were of opinion that the amendment, though in one sense procedural, set limitations to the character of the action and that the amendment must therefore be treated as being of a substantive nature and having a prospective effect only. Fullagar, J., however, argued that the amendment must be regarded as procedural, and must therefore be given a retrospective effect enabling the plaintiff to succeed. He was influenced in this decision by two factors.

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[2] Compensation to Relatives (Amendment) Act, 1953 (N.S.W.) s. 2(a) (No. 33 of 1953).

[3] (1956) S.R. (N.S.W.) 175; (1956) 73 W.N. (N.S.W.) 141.

[4] (1941) 2 D.L.R. 138, 139. This case is cited with approval by Dixon, C.J. in *Maxwell* v. *Murphy*.

[5] (1945) 70 C.L.R. 647, 652.

[6] (1956) 3 W.L.R. 361.

[7] (1957) V.L.R. 581.

[8] *Colonial Sugar Co. Ltd.* v. *Irving* (1905) A.C. 369.

[9] (1957) 96 C.L.R. 261, 266, 284, 293.

[10] *Id.* at 268.

[11] *Id.* at 292.

First, his Honour felt that the statute was to be looked at from the plaintiff's point of view and ought to be construed in his favour. The legislature was concerned with enlarging the remedy of relatives of deceased persons and therefore the remedy should be extended and construed to apply to relatives who had allowed the time for the bringing of an action to expire.[12] This view was not entertained either by the Full Supreme Court or the majority of the High Court, who took into consideration the fact that the defendant had acquired a vested defence at the expiration of the twelve months period. It is submitted this view was the correct one. A court must look to the rights and interests of all the parties before it and justice would surely fail if this were not the case. Whilst it might be unfortunate for a person to lose a right to damages because of failure to commence an action within a prescribed time, no prejudice should be occasioned the defendant because he acquires a defence to any action commenced subsequent thereto. On this principle the courts have consistently held that no amendment may be made to a writ of summons to enable an action to be maintained which at the date of the application for amendment was out of time.[13]

The present case, however, was distinguishable from cases such as *The Ydun*[14] and *R.* v. *Chandra Dharma.*[15] In the latter case a right to prosecute the accused had not expired before the introduction of an amendment to the relevant Act. It was held that in such a case the amendment was procedural only and enabled the prosecution to be commenced after the time allowed by the old Act. It is apparent therefore that had the amendment been introduced during the currency of the plaintiff's right to sue under the old section, she would surely have succeeded. But to deny the defendant the benefit of the immunity he in fact obtained by reason of the plaintiff's failure to commence her action in time, would be to contravene the common law rules of interpretation as they have been interpreted in this type of situation.

The second argument put forward by his Honour was that certain statutes were regarded by the common law as procedural and not substantive even though they might be regarded as affecting substantive rights.[16] He cited as examples the Statute of Frauds and Statutes of Limitation. As to the former, he thought it had been firmly established that the Statute of Frauds is procedural only, even though it might be regarded as affecting substantive rights, in that it does not affect the contract, but only the evidence of it. This view accords with the principles in *Leroux* v. *Brown*[17] and even as early as 1650 in *Case* v. *Barber.*[18] The view expressed in *Chater* v. *Beckett*[19] that non-compliance with the Statute avoided the contract has been decisively rejected in *Maddison* v. *Alderson*[20] and *Bristol Cardiff and Swansea Aerated Bread Co.* v. *Maggs.*[21] However, whilst this principle is firmly established, it has been held that the Statute of Frauds nonetheless affects substantive rights and therefore should not be construed as having a retrospective operation.[22] It is here submitted, therefore, that even though a contract is unenforceable only and not void the Statute or any amendment thereto could only be given a prospective effect.

Fullagar, J. relied on *British Linen Co.* v. *Drummond*[23] as authority for settling the character of Statutes of Limitation as procedural. Provided that an amendment merely enlarged the time for the doing of an act or the commencement of a prosecution, its operation should be both retrospective and

[12] *Id.* at 284.

[13] *Finnegan* v. *Cementation Co. Ltd.* (1953) 1 Q.B. 689. See also *Hewett* v. *Barr* (1891) 1 Q.B. 98; *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.* (1932) 1 K.B. 485.

[14] (1899) P. 236.

[15] (1905) 2 K.B.. 335.

[16] (1957) 96 C.L.R. 261, 286.

[17] (1852) 12 C.B. 801.

[18] 83 E.R. 235, 236.

[19] (1797) 7 T.R. 201, 204.

[20] (1883) 8 A.C. 467, 475.

[21] (1890) 44 Ch. 616, 622.

[22] See *Gillmore* v. *Executor of Shooter* (1677) 2 Mod. 310; *Ash* v. *Adby* (1678) 3 S.W. 664.

[23] (1830) 10 B. & C. 903.

prospective. In support of this view, his Honour cited *R.* v. *Chandra Dharma,* though he denied the validity of a statement by Channell, J. therein[24] that if the old period expired before the new Act became law, then such a rule could not apply. The basis of this argument would appear to flow quite naturally from the first point, namely, that the legislature by the amendment was seeking to benefit the plaintiff and that the amendment must be construed in the plaintiff's favour. The legislature was concerned with remedies not rights. The amendment was to apply to all persons who sought a remedy within the time prescribed by the amendment. Fullagar, J. had no doubt that the language of the statute was typical of a Statute of Limitation. Dixon, C.J., however, saw the danger of giving the amendment such a *prima facie* interpretation principally because of the rights which were interwoven with the amendment.[26] Such an amendment could not be regarded as procedural only since it would impair a right which a defendant had acquired by virtue of the plaintiff being out of time. The mere fact that a statute seeks to impose a limitation upon a right of action does not necessarily of itself automatically make such a statute procedural. Where such a position arises, the effect must be looked at in each particular statute.[27]

This last view was taken by Williams, J. Relying on *Wright* v. *Hale,*[28] he limited procedural statutes to those which regulate the practice and procedure of the courts, *ergo* the Statute of Frauds would not be truly procedural. He distinguished between a cause of action which cannot be enforced and a cause of action the remedy for which is barred by lapse of time.[29] Any statute enabling a lapsed cause of action to be revived could not be called procedural *simpliciter.* He cited[30] an abundance of authority including *Henshall* v. *Porter*[31] and *Brueton* v. *Woodward*[32] for the principle that the right to enforce a cause of action is an existing subsisting right. Therefore any statute tending to affect such a right could not be classed as merely procedural. It is submitted therefore that the rule that Statutes of Limitation belong to the law of procedure must be limited to those statutes where no substantive rights acquired by virtue of the existing law will be affected. This reconciles such cases as *R.* v. *Chandra Dharma* and *Watton* v. *Watton.*[33]

It is further submitted that the crucial time for consideration of the plaintiff's position is not the time when the action is brought but the time when the amendment is introduced. If the plaintiff has a right to enforce a cause of action at the time of amendment, then any extension of time will allow him to commence the action within the period allowed by the extension. In this sense the statute may be called "procedural". If, however, the plaintiff's right to enforce a cause of action has expired at the time of the amendment then any extension of the time cannot be availed of by the plaintiff. If the plaintiff has a right to enforce a cause of action and during the period allowed for commencing such action the time is abridged, the amendment will be construed prospectively only.

The confidence with which one can state these rules is a tribute to the consistency with which the courts have pursued a settled policy in this particular area of the law. Working with general conceptions such as substance and procedure, the vagueness if not the meaninglessness of which has been repeatedly emphasised,[34] the courts have arrived at a precise interpretation which enables the result of future litigation in this particular field to be predicted with reasonable safety.

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[24] (1905) 2 K.B. 335, 338.
[25] (1957) 96 C.L.R. 261, 290. [26] *Id.* at 267.
[27] *Gregory* v. *Torquay Corporation* (1911) 2 K.B. 556, 559.
[28] (1860) 6 H. & N. 227. [29] (1957) 96 C.L.R. 261, 278. [30] *Id.* at 279.
[31] (1923) 2 K.B. 193. [32] (1941) 1 K.B. 680. [33] (1866) L.R. 1 P. & D. 227.
[34] See J. Stone, *The Province and Function of Law* (2 ed. 1950) 177, 413, citing T. W. Arnold, "The Role of Substantive Law and Procedure in the Legal Process" (1932) 45