PENDING ACTIONS AND RETROSPECTIVE LEGISLATION

IN RE YARRELL, [1956] N.Z.L.R. 739.

The general principles which the Courts apply in interpreting statutes which it is argued should operate retrospectively are reasonably clear. For this we may thank not so much the doctrine of precedent as the discernible belief of successive judges that it is intolerable that Parliament should presume to legislate for the past, that it intended its statutes to affect the rights of citizens only from the date of their commencement, and that they should accordingly be confined to their proper domain. A rationalisation may be formulated thus: the Legislature cannot be presumed to intend to pass an unjust measure; a statute acting retrospectively will operate unjustly; therefore an Act ought to be construed prospectively.

The second premise of this argument is, however, debatable. Could it be seriously contended, for instance, that an Act which retrospectively legitimated children born out of wedlock in the past was contrary to any concept of natural justice? It is not easy to see that a statute which retrospectively alters the rights of the parties in a civil action, to the advantage of one and the corresponding disadvantage of the other, will necessarily work an injustice, (though in specific instances, no doubt, it will). So it is in the field of criminal law that we are usually invited to reflect upon the evil of retrospective legislation. And indeed, that a man should be punished for an act or omission not declared to be an offence at the time of its occurrence is repugnant to the modern mind. But whatever may be the ultimate justice of altering the rights of civil litigants by legislating for the past, it will be agreed by many that such an alteration may well produce a result only one degree less startling than that in the sphere of criminal law.

Broadly, the Courts will not allow statutory interference with vested rights. The problem is to see how far and to what cases this general principle will extend. The following rule has been formulated:

> They [viz. statutes] are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. . . . No statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.(1)

This passage was approved by Scott L.J. in Croxford v. Universal Insurance Company, [1936] 2 K.B. 253, 281.(2)

Long before this decision, however, the Privy Council in Young v. Adams, [1898] A.C. 469 adopted the dictum of Erle C.J. in Midland Railway v. Pye (1861), 10 C.B. (N.S.) 191 that "plain and unambiguous language" was necessary to persuade a Court to recognize that the Legislature intended to allow an exception to the general rule of prospective construction.

Numerous other cases might be cited to the same effect: see Wright J. in Re Athlumney, [1898] 2 Q.B. 547, 552; the English Court of Appeal in Ex parte Singer, [1916] 2 K.B. 249, 257; London Fan Motor Co. v. Silverman, [1942] 1 All E.R. 307, 309; and Langford Property v. Pajzs, [1943] 2 All E.R. 687, 690. Statements of the rule by New Zealand Courts are harder to find. In In re Matawhero B Block (1884), 2 N.Z. L.R. 357, 359 (S.C.), however, Richmond J. said: "In determining whether or not a statute is to be construed as having a retrospective operation, the Courts have been more guided by considerations of substantial justice and convenience than by attention to grammatical form".

The presumption against statutory retroactivity has been held inapplicable where the Act affects purely procedural or administrative provisions as these determine only the method by which substantive rights are enforced. This seems a wise and necessary modification of the rule; as Mellish L.J. said in Costa Rica v. Erlanger (1876), 3 Ch.D. 62, 69: "No suitor has a vested interest in the course of procedure . . . if during the litigation the procedure is changed." This distinction between substantive law and

procedure is clearly drawn in the judgments in the recent New Zealand Court of Appeal decision, Davies v. Public Trustee, [1957] N.Z.L.R. 1021.(3)

Let us, however, centre attention on the distinct but dependent problem: what is the effect of retrospective legislation upon pending actions? A "pending action" may be defined as an action which has been formally commenced, as for example by the issue of a writ of summons or an originating summons, but which awaits hearing. The nature of the problem may be clarified by framing two questions—

(i) In what circumstances will legislation, not ex facie retrospective, be deemed to have retrospective effect?
(ii) If either the Statute to be interpreted is ex facie retrospective, or its retrospective effect has been established as in (i), will it affect pending actions which were commenced before it came into operation?

The answer to the first question will be found by applying the general principles already outlined. The answer to the second may well depend upon the correctness of the answer given by Gresson J. to the preliminary question to which he addressed himself in In re Yarrell, Dickinson v. Yarrell, [1956] N.Z.L.R. 739.

This was a Family Protection case, the applicant being an adopted child. An originating summons under s. 33 of the Family Protection Act 1908 was filed on October 11, 1954. On October 26, 1955, that Statute with its amendments was repealed and replaced by the Family Protection Act 1955. The summons came on for hearing on June 13, 1956. On the date when the 1955 Act came into force, therefore, the action for relief was a pending action. Logically, therefore, the first issue to be decided was whether the application was governed by the Family Protection Act 1955 or by the legislation in existence when the summons was taken out in 1954.

There is a general direction in s. 2 (2) of the Family Protection Act 1955 that the Act is to apply "in all cases whether the deceased person died before or after the commencement of this Act". It is, therefore, ex facie

retrospective and we need be concerned only with the second question formulated above.

The learned Judge discussed the provisions of the Acts Interpretation Act 1924 bearing on the problem, and considered that s. 20 (e) was in point. This provides that the repeal of an enactment shall not affect:

> any right, interest or title already acquired, created or established or any remedy or proceedings in respect thereof.

Gresson J. rejected the contention that the plaintiff's right to apply under the 1908 Act was such a right, citing an extract from the advice of the Judicial Committee of the Privy Council in Abbott v. Minister of Lands, [1895] A.C. 425. In this case an 1861 (Victorian) Statute(4) allowed an existing tenant in fee-simple to make certain additional land purchases, but an 1884 Act(5) took away this right. Although the latter Act saved "all rights accrued", it was held that the right conferred by the 1861 enactment was not such a "right accrued". The Lord Chancellor said (at p. 431):

> It may be . . . that the power to take advantage of an enactment may without impropriety be termed a "right". But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed. Their Lordships . . . think that the mere right . . . existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment. [Emphasis added.]

The distinction made by their Lordships between a "right" and a "right accrued" is vital. But it is at once apparent that the whole significance of the passage depends upon the words emphasized. This being so, what is "any act done . . . ."? The answer to this will, it is submitted, also provide the answer to two specific questions: (i) What is

"any thing whatsoever done" within s. 16 (2) of the Family Protection Act 1955? That subsection provides that (without affecting the Acts' Interpretation Act 1924) ". . . the repeal of any provision by this Act shall not affect any document made or any thing whatsoever done under the provision so repealed". (ii) What will amount to "any right . . . acquired" within the meaning of s. 20 (e) of the Acts Interpretation Act 1924?

One answer was given by Ostler J. in his judgment in Mathieson v. Hall, [1929] N.Z.L.R. 333. The Mortgages Final Extension Act 1924 required that mortgagees give three clear months' notice before exercising their contractual power of sale. The Property Law Amendment Act 1927 repealed this provision. A mortgagor, the plaintiff in the action, contended that he had been given a right under the 1924 Act which subsisted in spite of the repeal by the 1927 Act. Ostler J., relying on Abbott's case (supra), upon Reynolds v. Attorney-General, [1896] A.C. 240, and on Ex parte Raison (1891), 60 L.J.Q.B. 206, held that that right was not an accrued or acquired right but a mere right or privilege to take advantage of an enactment while that enactment was in force. This right or privilege "could have been turned into a right accrued had he commenced proceedings while the Act was in force, which proceedings could not be heard until the Act was repealed" (ibid., p. 337).

It is respectfully submitted that Ostler J.'s remarks as to when a right may "accrue" were based on a correct deduction from the authorities. If this is so, the following proposition can be stated: If a statute gives a mere right to a person and he commences an action while that statute remains operative to enforce or defend that right, the right qualifies as "a right accrued". The commencement of proceedings amounts to "a thing done" upon which a new repealing Act should have no effect unless the Legislature evidences a clear intention to the contrary.

In In re Yarrell (supra), however, Gresson J. treated Ostler J.'s remarks as obiter(6) and relied on two decisions of the English Court of Appeal, Hutchinson v. Jauncey, [1950] 1 K.B. 574 and Jonas v. Rosenberg, [1950] 2 K.B. 52 to show that the issue of proceedings is not "an act done". Do these decisions in fact justify Gresson J.'s refusal to follow the

remarks of Ostler J. in Mathieson v. Hall (supra)? If the issue of a writ or of a summons is not an ". . . act done by an individual towards availing himself of that right . . . ." (in the words of the Lord Chancellor in Abbott's case) (supra) the words "an act done" must bear a very restricted meaning. It is submitted that such a restriction is not justified by authority.

Before turning to those two English decisions some earlier authority may be cited. The proposition that an Act does not affect pending actions except by express words to that effect or by necessary intendment is supported by a line of decided cases. In Hitchcock v. Way (1837), 6 Ad. & E. 943, it was stated by Lord Denman C.J. in the Court of Exchequer Chamber that "the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the legislature express a clear intention to vary the relation of litigant parties to each other" (pp. 951-2). In Wright v. Hale (1860), 30 L.J. (Ex.) 40, the Court of Exchequer reiterated this principle. In the words of Channell B. (p. 42): "Where the Act, supposing it to have a retrospective operation, would enable the defendant by plea to put an end to the maintenance of the action or to come to the Court to stop proceedings, then the Court ought to see clearly that that Act was intended to have that retrospective operation."

Again, in In re Joseph Suche & Co. Ltd. (1875), 1 Ch.D. 48, Jessel. M.R. stated (at p. 50) that ". . . it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."(7)

In Re Snowdown Colliery Co.(1925), 94 L.J.Ch. 305, In re Joseph Suche & Co. was specifically approved by the English Court of Appeal, and the same Court in In re a Debtor, [1936] Ch. 237 applied both In re Joseph Suche & Co. and Abbott's case (supra). In In re a Debtor the validity of an act done by a creditor before the Law Reform (Married Women and Tortfeasors) Act 1935 came into operation was in issue. In the judgment of Lord Wright M.R. (p. 243): ". . . by serving the bankruptcy notice the creditor has done an act towards availing himself of the right given by

the repealed section which was the case put by the Judicial Committee in Abbott v. Minister of Lands . . . ."

The last two cases mentioned, are not, strictly speaking, cases where a pending action was involved, but are valuable both because they show the general trend of authority and because they approve In re Joseph Suche & Co. in which the right to prove for a debt was expressly likened to a right of action before the winding up of a company.

One might have thought that after these cases had been decided, the law on the problem of pending actions and retrospective legislation would be settled. But the English Court of Appeal itself adopted a very different approach in Hutchinson v. Jauncey (supra), one of the authorities relied on by Gresson J. This was a tenancy case. Section 10 of the Landlord and Tenant (Rent Control) Act 1949 (which extended the protection of tenants) applied the Act "whether the letting began before or after the commencement of the Act". A plaint claiming possession was filed a week before the Act came into force. The problem therefore was as Evershed M.R. stated it at p. 579: ". . . since a summons had been issued before the Act came into force, did the landlord acquire rights pursuant to the law as it stood before the Act was passed, and are those rights unaffected either by the express language of or by the necessary implication to be drawn from ss. 9 and 10 of the Act of 1949?" He held (p. 579) that an Act would affect a pending action if that were its "necessary intendment". Such an intendment he discerned in the Act before him, and therefore he concluded that the Act retrospectively applied to protect the tenant. The landlord thus failed to recover possession. As the Master of the Rolls observed (p. 583): ". . . the landlord must go on to say that the cause of action crystallising on the issue of the summons is something done, the full effect of which must in no way be minimized or otherwise affected by the Act"; but he did not consider this a fair or possible construction, and it is submitted that he implied that the issue of the summons was not a thing done. The other members of the Court concurred in the result reached. Cohen L.J., however, stated rather cryptically (p. 584): "The issue of a plaint is no doubt an act done within s. 10; but it is not equivalent to judgment." It therefore seems that there was a divergence of view on this vital question. Asquith L.J. did not resolve

the differences of his brethren. His approach was (p. 584): ". . . assuming that it [sc. the issue of the plaint] is something done . . . what is 'affected' by the 1949 Act is . . . the result of the action, and that is not something done."

The same Court in Jonas v. Rosenberg (supra), following Hutchinson v. Jauncey, extended the principle to the case where judgment had been reserved prior to the date of commencement of the (same) amending Act.

It is submitted, with respect, that there is much room for criticism of these two decisions. First, no reference was made to Abbott's case, no doubt of only persuasive authority had it been cited to the English Court, but of very great weight as a precedent for our own Courts. Neither Re Snowdown Colliery Co., nor In re a Debtor, which lay down a rule the opposite of that deducible from Hutchinson v. Jauncey itself, appear to have been considered by the learned Lord Justices. There is, therefore, support for the view that the decision in Hutchinson v. Jauncey was per incuriam.

Secondly, the members of the Court were clearly not unanimous on the vital question whether the commencement of an action was a "thing done", and their decision is thus of less persuasive value. Was Gresson J. justified therefore in In re Yarrell in placing reliance on it as a conclusive authority to show that the commencement of an action should never be so regarded?

Apart from this direct criticism, it is also suggested that Hutchinson v. Jauncey and Jonas v. Rosenberg (supra) may be authoritative only in cases arising under tenancy legislation. In Hutchinson's case the case of Remon v. City of London Real Property Co. Ltd., [1921] 1 K.B. 49 was applied by the Court as being directly in point. Referring to this case, Evershed M.R. (at p. 579) said: ". . . that case seems to me to have laid down the application of a principle to this class of legislation generally, and I think, therefore, that citations from authorities relating to wholly different subject-matters may not be so pertinent to cases of this character". He also referred (at p. 582) to "the peculiar character of this rent restriction legislation"(8). It would seem, therefore, that the decision may itself be logically

restricted to tenancy cases and not be of authority in other types of litigation.

What is to be the fate of a pending action when new legislation is passed is of considerable practical interest. An amendment to the Tenancy Act 1955 either extending or reducing the protection afforded the tenant by that Act is always a possibility whatever political party is in power. Is it of no importance that a landlord has begun his action before the amendment comes into operation? If Hutchinson v. Jauncey is followed, and if Gresson J.'s view in In re Yarrell rightly states the law, the timing of the action counts for nothing at all. In the writer's opinion it is desirable that a landlord (or indeed any type of plaintiff) should be able to decide whether to issue proceedings, confident that if he does so his action will not be affected by the mere repealing or amending of the legislation on which it was based.

Of course, there may be acts other than the issuing of a writ or the filing of a summons which would qualify as "an act done" and which would convert a mere right into a "right accrued". A party may have to serve a notice or secure a Ministerial consent to the exercise of his right. But where Court proceedings are an essential adjunct to the exercise of a right, as is the issuing of an originating summons to the right to seek further protection under the Family Protection legislation, and the applicant having issued proceedings can do no more (for the time being) in his own cause, this seems the very case where the Court should treat him as the possessor of a "right accrued". If a new statute is passed during the period of his enforced inactivity, it should not, it is submitted, adversely affect his rights if it merely states the general proposition that it is to apply (following the same example) "whether the deceased person died before or after the commencement of the Act". If the Legislature intends to displace this principle (as of course it may do) and make an Act apply to affect even pending actions it should do so either by express words or at least by very clear implication. If this test is adopted, then it is submitted that it is not satisfied by the wording of the relevant statute in Hutchinson's case.

Sometimes the type of problem here discussed seems to have been brushed aside by the Courts. The Court of Appeal in

In re Kallil, Kallil v. Koorey, [1957] N.Z.L.R. 31, also a Family Protection case, recently did this in its endeavour to come to grips with more substantive problems. The issue should, however, be squarely faced. Does s. 16 of the Family Protection Act 1955(9) include the commencement of an action in its reference to "any thing . . . done"? If, following In re Yarrell, it is decided that it does not, it is respectfully submitted that the clear implications of Abbott's case have been disregarded. Further, if In re Yarrell is correct, can we not say that, at least in respect of pending actions, the principle that legislation is not to be construed as taking away vested rights has been decisively undermined?

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(1) Maxwell, The Interpretation of Statutes (10th ed.), p. 213.
(2) The passage approved by Scott L.J. was at p. 186 of the 7th edition. This passage is identical with that appearing in the 10th edition at p. 213.
(3) On this modification to the rule reference may also be made to A.-G. v. Theobald (1890), 24 Q.B.D. 557, 560 and Newton Abbot R.D.C. v. Dyer, [1947] Ch. 67, 88-9 (followed in Fairey v. Southampton B.C., [1956] 2 All E.R. 843).
(4) Crown Lands Alienation Act 1861 (24 Vict. No. 1) s. 25.
(5) Crown Lands Act 1884 (48 Vict. No. 1) s. 42.
(6) It could possibly be argued that the dictum was not obiter but, like the remarks of Gresson J. on this point, essential to the logic of the decision.
(7) Jessel M.R. in In re Joseph Suche & Co. Ltd. would seem to debar an Act affecting pending actions by necessary implication. To this extent, his decision is probably too "precise" as Evershed M.R. said in Hutchinson v. Jauncey (at p. 79).
(8) The Courts have indicated that they are aware of the distinctive social purpose of tenancy legislation and will construe such legislation accordingly. See, e.g., Brown v. Brash and Ambrose, [1948] 2 K.B. 247.
(9) Section 59 (2) of the Tenancy Act 1955 is framed in identical terms to s. 16 of the Family Protection Act 1955 and such a provision is now frequently inserted by the Law Draftsman. Another example is s. 89 (4) of the Trustee Act 1956.