35/82

No. 36 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

BETWEEN:

1. YEW BON TEW ALSO KNOWN AS YONG BOON TIEW

2. GANESAN S/O THAVER (AN INFANT) SUING BY HIS GUARDIAN AND NEXT FRIEND, YEW BON TEW ALSO KNOWN AS YONG BOON TIEW

Appellants
(Plaintiffs)

- and -

KENDERAAN BAS MARA

Respondent
(Defendant)

CASE FOR THE APPELLANT

Record

1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) (Raja Azlan Shah C.J. /Acting President/, Chang Min Tat and Syed Othman, F.JJ.) dated 27th November 1979, allowing with costs an appeal by the Respondents herein from the Judgment and Order of the High Court of Malaya (Azmi J.) dated 13th April 1977 whereby the Respondents' preliminary objection as to limitation was overruled and by consent the Respondents were ordered to pay the Appellants damages. pp. 28-36 pp. 15-24

2. The sole question that falls for consideration in this appeal is whether or not the Appellants' cause of action against the Respondents was barred by effluction of time; i.e. that notwithstanding that at the date the action was commenced the three year limitation period then prescribed under the Public Authorities Protection Ordinance, 1948 (as amended by the Public Authorities Protection /Amendment/ Act, 1974) had not then expired, did the fact that during a period prior to the amendment the action would have been barred preclude the Appellants from making a claim?

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Pp. 1-3

3. The claims made by the Appellants herein endorsed on their Writ of Summons dated 20th March 1975 were as follows:

P.2 Ll.38-47

> "The 1st Plaintiff is claiming for himself and the 2nd Plaintiff is claiming through his guardian and next friend, the 1st named Plaintiff for personal and consequential loss and damage to themselves by reason of the negligent driving of a motor bus registration no. BQ 4205 by the Defendants' agent or servant on the 5th day of April 1972 along the Klang-Banting Road in the State of Selangor."

Pp. 3-6

4. It appears that the Statement of Claim was served together with the Writ; in it allegations were made that the first-named Appellant was riding and the second-named Appellant was a pillion passenger on a motorcycle which was in collision with a motor bus driven by a servant of the Respondents. It was further alleged that the collision was caused by the negligence of the Respondents' said servant and that both Appellants sustained injuries and suffered loss and damage.

Pp. 7-8

5. The Respondents served a Statement of Defence on 19th March 1976; it was therein admitted that there had been a collision at the time and date alleged in the Statement of Claim, namely 5th April 1972, but the negligence alleged therein was denied and negligence was alleged against the first-named Appellant. For the purposes of the instant appeal, the only material averment in the Statement of Defence was:

P. 8 Ll. 6-9

> "4. Further or alternatively the Plaintiffs are time barred from bringing this action by virtue of the Public Authorities Protection Ordinance 1948."

P. 9 Ll. 31-37

P. 17 Ll.14-29

6. It seems from the Record that the Respondents first raised a preliminary objection by a Summons-in-Chambers dated 21st April 1976 which came up for hearing on 3rd June 1976. It appears from the Judgment of the Learned Trial Judge that this application by the Respondents was dismissed with costs. In his Judgment the Learned Trial Judge said :

P. 17 Ll.21-29

> "The Defendants should be estopped from raising the same matter again. Counsel for the Plaintiffs did not raise any objection presumably on the ground that the point of law was not actually adjudicated at the previous hearing and application because the Plaintiffs and their counsel failed to appear at the hearing."

The reference to "Plaintiffs" application and the non-appearance of the "Plaintiffs" would appear, in the respectful submission of the Appellants, to be a mistake;

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it is clear from the context that the word "Defendants" was intended to be used. As it also appears that no point in this regard was pursued before either of the courts below the Appellants do not seek to raise this point in the instant Appeal.

7. The substantive action came on for hearing before the Hon. Mr. Justice Mohd. Azmi on 13th April 1977. Pp. 8-15
It appears from his notes that the Learned Judge was told that, subject to a preliminary legal point on limitation, both the issues of liability and damages had been agreed between the parties. On behalf of the P. 9 Ll.11-12
Appellants herein a concession was made that the Respondents were a Statutory Body entitled to the benefit of the Public Authorities Protection Ordinance, 1948. This concession could not have been refused because of the relevant provisions of the Majlis Amanah Ra'ayat Act (Act No. 20 of 1966). This provides by Section 29:

> "The Public Authorities Protection Ordinance 1948, shall apply to any action, suit, prosecution or proceeding against the Majlis or against the Chairman, any member, officer, servant or agent of the Majlis or of any corporation in respect of any act, neglect or default done or committed by him in such capacity."

8. It is convenient at this stage to tabulate the order and dates of certain events relevant to the consideration of the instant appeal:

19th August 1948	Public Authorities Protection Ordinance, 1948 came into force in the Federation of Malaya.
5th April 1972	The collision between the motorcycle upon which the Appellants were riding and a motor bus driven on behalf of the Respondents occurred which constituted the cause of action.
6th April 1973	Expiration of the 12 months next after the act complained of.
14th June 1974	Public Authorities Protection (Amendment) Act 1974 came into force.
20th March 1975	Issue of the Writ of Summons in the instant case.

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4th April 1975	Expiration of the 36 months next after the act complained of.

9. The relevant ordinance, in its amended form, subsequently became Act 198 of the Laws of Malaysia as the Public Authorities Protection Act, 1948 (Revised - 1978) coming into force in this form on 15th February 1978. As the 1978 revision incorporates the amendments affected by the Act of 1974 it is useful to compare the two provisions in parallel. They read as follows:

1948 Ordinance	1978 Revised Act
Long titles An Ordinance to amend and unify the law relating to the protection of persons acting in execution of statutory and public duties.	An Act relating to protection of persons acting in the execution of statutory and o ther public duties.
Section 1 - short title This Ordinance may be cited as the Public Authorities Ordinance 1948	This Act may be cited as the Public Authorities Protection Act 1948.
Section 2 - protection of persons acting in statutory or other public duty Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceedings is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect - a. the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve m months next after the act, neglect or default complained of or in the	Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or exection or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect - a. the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty six months next after the act, neglect or default complained of or, in the

		Record
case of a continuance of injury or damage, within twelve months next after the ceasing thereof;	case of a continuance of injury or damage, within thirty six months next after the ceasing thereof;	

The substantive wording of the Public Authorities Protection (Amendment) Act, 1974, (which in the Appellants' submission is relevant to show that it was contemplated that the usual rule is applied of construing an amending statute as having retroactive force in relation to matters of procedure) provides, in its entirety, as follows:

> "1. This Act may be cited as the Public Authorities Protection (Amendment) Act, 1974.
>
> "2. The Public Authorities Protection Ordinance, 1948 is hereby amended by deleting the words 'twelve months' wherever appearing in paragraph (a) of section 2 thereof and substituting therefor the words 'thirty six months'."

10. After hearing submissions from counsel for the parties as to whether or not the case was time barred the Learned Trial Judge made an order overruling this preliminary objection. It appears from the notes of the Learned Trial Judge that he gave a brief ruling on that day (13th April, 1977). After considering certain of the cases that had been cited to him the Learned Trial Judge held, it is submitted, correctly: — Pp. 9-14; P.14 L.14; P.15 Ll.30-31; P.14 Ll.16-29

> " .... I hold that in cases of procedure, the test to be applied is, what is the law applicable at the time when suit was instituted. — P.14 Ll.24-29
>
> "Applying these two principles, the preliminary objection overruled."

11. Thereafter the learned Trial Judge made a consent order providing for both Appellants to recover damages with an agreed sum by way of costs. — P.14 L.34, P.15 L.4, P.15 L.33-P.16 L.10

12. By Notice dated 25th April 1977, the Respondents herein gave Notice of Appeal from the Order of the learned Trial Judge on the preliminary objection. — Pp. 25-26

13. Written Grounds of Judgment were delivered by the Learned Trial Judge in amplification of the short judgment on 13th April 1977, referred to in paragraph 10 above, on 13th March 1979. — Pp. 16-24; P. 24

14. The Learned Trial Judge began his Judgment by reciting that the action was a claim for damages for personal injuries and recalling that agreement had been reached as to liability and quantum of damage subject to the preliminary objection as to limitation. The Learned — P.16 L.35 - P.17 L.14

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Judge went on to consider the Respondents' application heard on 3rd June 1976 which is dealt with in paragraph 6 of the Appellant's case.

15. The Learned Trial Judge then summarised the contention of the Respondents herein as being that the extension of the limitation period from twelve months to thirty six months effected by the Public Authorities
P.17 Ll.29-49 Protection (Amendment) Act, 1974 was prospective rather than retrospective in its application. The Learned Judge went on to set out the provisions of the legislation
P.17 L.50 - P.18 L.19 and the effect of the amending Act. The Learned Judge then stated his view in the following words:

P.18 Ll.20-32 "From the authorities cited, it is my considered judgment that whether the prospective or retrospective rule of construction should apply depends on the nature of the new statute or amending statute. If it is purely a procedural statute and does not deal with substantive rights then the retrospective rule of construction should apply. But where the statute deals with substantive rights, or deals with both procedural and substantive rights, then the prospective rule of construction is applicable. In either case, however, it is subject to any express provision to the contrary in the statute in question."

The appellants respectfully submit that the view of the Learned Judge expressed in the passage cited is correct.

16. The Learned Trial Judge went on to consider The Ydun, 1899 P. 236, an authority upon the English Public Authorities Protection Act, 1893 (56 & 67 Vict. c. 61); Section 1 of which is in pari materia with Section 2(a) of the Malaysian Public Authorities Protection legislation. That decision related to the effect of an abridgement of the limitation period by the introduction of such legislation in England and Wales. By the new English legislation which was passed on 5th December 1893 and came into force 1st January 1894, a six month limitation period was introduced in respect of actions brought against authorities covered by that legislation as an exception to the general limitation period of six
P. 19 years. The Learned Trial Judge first mentioned the Judgment of the President (Sir F.H. Jeune) and went on to consider the Judgement of the Court of Appeal (which appears in the report immediately after the Judgment
P.20 at first instance). After citing passages from the Judgments of the President and A. L. Smith L.J., the Learned Trial Judge went on to reach the following conclusions, which it is respectfully submitted are correct;

P.20 L.30-45 "It would also appear that the important factor is

> the law of limitation applicable when the action was commenced and not when the cause of action arose. The latter is only relevant for the purpose of computing when time starts to run. A statute of limitation merely denies remedy to a litigant who fails to comply with its procedure or mode of enforcing right, but it does not confer any right or cause of action. In the light of all these, in the present case, I think it is clear that the Public Authorities Protection (Amendment) Act, 1974 is purely a procedural statute and, therefore, retrospective, and it cannot be said that the Defendants have acquired a vested right before the amendment."

17. After recalling that it had been argued for the Respondents that liability had ceased on 4th April 1973, the Learned Trial Judge pointed out that this argument would only have been valid if the action had been commenced in the period between April 1972 and June 1974. The Learned Judge correctly concluded that because the writ had been issued after the amendment had come into operation the original section had not had the effect of extinguishing the Appellants' remedies but merely suspended the same. In this respect the Learned Trial Judge was, it is respectfully submitted, correct; the effect of limitation legislation is to bar the remedy rather than extinguish the claim. After noticing Rex v. Chandra Dharma 1905 2 K.B. 335 (which is dealt with more fully in paragraph 32 hereafter), the Learned Trial Judge went on to consider Maxwell v. Murphy (1956-57) 96 C.L.R. 261 (which is considered in detail in paragraphs 26-31 hereunder) and reached the conclusion:

P.20 Ll.45-51

P.20 L.50 - P.21 L.4

> "In my view, Maxwell v. Murphy is distinguishable from the present case. The Compensation to Relatives Act of Australia confers right or cause of action and as well provides for procedures for enforcing such right. The right of action under the Act is dependent on compliance with special procedure on limitation."

P.21 Ll.39-45

The Learned Trial Judge went on to observe that there was no question of any right being conferred by the Public Authorities Protection Act. He observed that the Appellants' cause of action was conferred by Section 3 of the Civil Law Ordinance, 1956. This provision provides for the general application of English law. The Learned Judge went on to notice that the limitation period would, apart from consideration of whether or not the Respondent was a public authority, have been six years pursuant to Section 6 of the Limitation Ordinance 1953. That section, in its material part, provides :

P.22 L.11-3

> "1. Save as hereinafter provided the following

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actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -

a. actions founded on a contract or on tort;"

18. In support of his conclusions that the amending Act should take effect retrospectively, the Learned Judge, without finding it necessary as part of his conclusion, held that Section 34 of the Interpretation
P.22 Ll.22-30 Act, 1967 supported his conclusion. In this part of his decision the Appellants will concede that the Learned Trial Judge fell into error. The interpretation Act of 1967 is not, in the Appellants submission, the relevant act to be used as an aid to construction of the Public Authorities Protection legislation. Further submissions in this regard appear at paragraphs 34-37 hereafter. Thereafter the Learned Trial Judge considered further Rex v. Chandra Dharma 1905 2 K.B. 335. He reached a conclusion, it is respectfully submitted
P.23 Ll1-5 correctly, that the law of limitations applicable was that in force when the writ was issued. The Learned Judge then held, it is also submitted correctly, that the decision in J.S. Drinkhall v. Nam Hue Motor Hiring (1955) 21 M.L.J. 119 was consistent with the conclusion he had reached. It is to be observed that the Learned Judge noticed especially a citation in Drinkhall's case from Allah Rakhi v. Mohammed Abdur Rahim, a decision of this Honourable Board. (That case is not only reported in the reference given by the Learned Trial Judge, namely A.I.R. 1934 P.C. 77 but also in the Law Reports at 61 Ind. App. 50.) That case involved the application of the Indian Limitation Act (Act IX of 1908). The Board in that case comprised Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Sir Lancelot Sanderson. The whole paragraph from which
P.23 L.18-12 the quotation is taken that appears in the Record renders the quotation itself more comprehensible. It reads as follows:

> "The suit which is the subject of this appeal, was brought on January 29 1926, and the question whether it was then barred by limitation must depend upon the law of limitation which was applicable to the suit at that time. The provisions, therefore, of the Act of 1929 are not applicable, and the question is whether the unamended s. 10 of the Limitation Act of 1968 is applicable to this suit."

19. The Learned Trial Judge, in holding the
P.24 Ll.7-11 amended Section 2(a) should apply, based himself on the following reason;

P.23 Ll.43-51 "But the writ is issued after amendment when the period of limitation has been increased from

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twelve to thirty six months. The writ is filed within thirty six months from date of accident. The limitation law applicable when the writ was issued on March 20 1975, is the amended Public Authorities Protection Act and since the period of thirty six months has not lapsed from the date of accident, I hold that the claim is not time barred."

This is respectfully adopted as correct.

20. The Respondents herein filed their Memorandum of Appeal in the Federal Court on 31st July 1979. They stated the grounds of appeal relied on in the following terms therein: Pp. 26-27

"1. The Learned Judge erred in law in holding that the Public Authorities Protection (Amendment) Act 1974 (Act A252) is purely procedural and therefore has a retrospective effect; P.27 Ll.14-28

and

"2. In coming to the above decision the Learned Judge failed to consider that by giving a retrospective effect to the Public Authorities Protection (Amendment) Act 1974 (Act A252), the Learned Judge was reviving or revived the Respondents' right of action which was already barred under the Public Authorities Protection Ordinance 1948; and which effect is clearly wrong in law."

21. On 25th September, 1979 the Respondents' appeal to the Federal Court of Malaysia came on for hearing before the acting President, Raja Azlan Shah, and the Honourable Chang Min Tat and the Honourable Sayed Othman, Judges of the Federal Court. This date appears from the Record. At the conclusion of oral argument it was intimated that the order of the Learned Trial Judge would be upheld by the Court. However, on 12th November, 1979, the counsel for the parties as required by the Court returned for further argument. There is no reference to the hearing on this date in the Record. Judgment was then reserved and on 27th November, 1979 the Federal Court ordered that the Appeal of the Respondents herein to the Federal Court be allowed with costs. The Appellants would respectfully accept that as no order was effected on 25th September, 1979 the Federal Court, in the exercise of its inherent jurisdiction, was entitled, having heard the parties as it duly did, to vary the decision it had originally intimated. This concession is made because National Benzole Co. Ltd. v. Gooch 1961, 1 W.L.R. 1489 makes clear that an appeal remains on foot until a judgment is perfected as an order of the court and the same can P.36 Ll.13-14 P.36 Ll.19-27

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accordingly be recalled on the same principles as those applied in In re. Harrison's Share under a Settlement 1955 1 Ch. 260.

Pp.28-35 22. The Judgment of the Federal Court was delivered by the Acting President, Raja Azlan Shah, C.J. Malaya. The Chief Justice commenced his judgment by summarising
P.28 L.33 - P.29 L.5 the effect of the claim. He went on to express the issue before the Federal Court in the following ways:

P.29 Ll.6-10 "The question for decision in this appeal is whether the claim which was commenced after the expiry of the twelve months for bringing the action and therefore barred could be revived by the extended period of thirty six months in the Act."

and

P.29 Ll.28-30 "The pertinent question for determination is the nature of Act A252 - does it affect rights or procedure."

P.29 Ll.15-27 P.23 L.42-51 He stated that the Federal Court was not prepared to subscribe to the view of the Learned Trial Judge quoted in paragraph 19 hereinbefore.

23. The Chief Justice acknowledged on the authority of The Ydun 1899, P. 236 that an act which
P.29 Ll.30-31 makes an alteration in procedure only is retrospective. He went on to comment that the distinction between procedural matters and substantive rights was one often of great fineness.

24. The Chief Justice recalled that The Ydun had been cited in support of the argument that the amending
P.29 Ll.49-50 legislation was procedural. He considered that this case proceeded on the basis it related to procedure
P.30 Ll.1-15 only. After consideration of the legislation relevant to the decision in The Ydun he said:

P.30 Ll.15-20 "In our opinion the Act dealt only with the mode in which a right of action for damages already existing should be asserted against the public authority. That seems to be in accord with the common law presumption that a procedural amendment is prima facie retrospective."

This view is not disputed; it is however submitted that the Learned Chief Justice fell into error when he sought to draw a distinction from the instant case by stating:

P.30 Ll.20-21 "The Act did not affect a vested right adversely."

25. It is respectfully submitted that the Plaintiff

in The Ydun had the right to sue; in the case of The Ydun this right was affected by the abridgement of the limitation period brought about by the English legislation. If "a right" in the legal sense includes the notion that it is a right that the Courts will protect and enforce by some appropriate remedy then that right was lost to the Plaintiff in The Ydun. It is submitted that in this sense the introduction of the English Public Authorities Protection legislation abrogated or impaired Plaintiff's rights in taking away that right of action just as legislation taking away property would. The Chief Justice ought to have held, it is respectfully submitted; firstly, that legislation dealing with limitation relates to questions of procedure and these are sui generis; and secondly, that the general principle that statutes are not to be construed retrospectively is disapplied in such a case. The maxim "omnis nova constitutio futuris formam imponere debet non praeteritis", which he later referred to was presumably the authority he had in mind when he stated the general principle in unqualified terms as being against retrospectivity. Such a principle is of value in its application only provided due regard is paid to well known exceptions to its application. The exception relating to procedural provisions, is, it is respectfully submitted, so notorious that no reliance in the instant case can be placed upon this wide ranging principle.

P.32 Ll.4-5

P.30 Ll.22-23

26. The Chief Justice went on to consider the Australian case of Maxwell v. Murphy (1956-57) 96 C.L.R. 261. The Chief Justice's view, which it is respectfully submitted was erroneous, was that this case formed a close analogy with the instant appeal. It is respectfully submitted that

P.30 L.24-P.31 L.35

(a) this decision does not form a precedent in relation to the matters falling for decision in the instant appeal as the case was decided on its own legislation and is sui generis; and, further or alternatively,

(b) the reasoning of the dissenting judgment of Fullagar J. is to be preferred.

27. Maxwell v. Murphy was a decision of the High Court of Australia on the effect to the principal act of the Compensation to Relatives (Amendment) Act, 1953 of New South Wales. Prior to amendment the relevant section of the principal act read.

> "Not more than one action shall lie for and respect of the same subject matter of complaint, and every such action shall be commenced within twelve months of the death of such deceased person."

The amending legislation substituted "six years" for

"twelve months".

28. So far as it is submitted that Maxwell v. Murphy did not afford a precedent in relation to the instant case it is necessary to examine the three judgments given by the four members of the Court that formed the majority. Kitto J. and Taylor J. delivered a joint judgment. They held that, like the Fatal Accidents Act of the Imperial Parliament, the New South Wales legislation provided a statutory cause of action and accordingly (at page 292 of the report):

> "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 forwhom 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.'"

Because of this, the Learned Judges held, a future cause of action only was affected by the amendment; they said that the second limb to the proviso could hardly have worn less resemblance to a mere limitation of the time for enforcing a cause of action to which it was extraneous and they accordingly held the time limit was an essential qualification of the new action that was being provided for.

29. The reasoning in the judgment of Dixon C. J. was similar. He put it in the following way (at page 268 of the report):

> "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 reimposed a liability on the respondent from which he had been discharged."

30. Williams J., on the other hand, approached the case on a rather wider basis than the other judges whose judgments have been referred to. He concurred (at page 273 of the report) in holding that a new cause of action was created by the legislation. In the submission of the appellants, the passage cited by the Federal Court from the judgment of Williams J. is not borne out by the judgments of the other members of the Court. It is also to be observed that Williams J. cites a passage from an earlier judgment of Dixon C.J. in Kraljevich v. Lake View and Star Ltd. (1945) 70 C.L.R. 647 at page 652 immediately prior to the passage cited in the Record. It is there stated that thereis no reason to presume an alteration in the law relating to the mode in which rights and liabilities are to be enforced is not intended to apply to rights and liabilities already existing. This is respectfully adopted as correct. If Williams C.J. is right in that part of the passage cited in the Record which he states:

P.31 L.1-35

"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."

P.31 Ll.28-35

this would be contrary to precedent if it expressed the law generally. The Appellants respectfully submit that this passage must be taken as stating the law only when a statutory cause of action is being considered. That this was the intention of Williams J. is clear from the immediately preceding sentence:

"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."

P 30 Ll.25-28

The observation cited above was in any event unnecessary to the decision of Williams J.; the ratio of Williams J.'s

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decision is to be found in the following passage (at pages 282 and 283 of the report):

> "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 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 the 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."

31. Fullagar J. (at pages 283-291 of the report) held that the distinction between retrospective operation and prospective operation of an amending statute hinged between statutes which create or modify or abolish substantive rights or liabilities on one hand and statutes which deal with the pursuit of remedies on the other hand. He found that the New South Wales statute was procedural.

32. After consideration of Maxwell v. Murphy, the
P.31 Ll.36-40 Chief Justice stated that the Court was satisfied that the amending legislation in the instant appeal was not truly procedural but affected vested rights; in this respect it is submitted that the Court fell into error. In support a certain observation of Channell J. in
P.31 Ll.48-54 Rex v. Chandra Dharma 1905 2 K.B. 335 was relied on. It is convenient at this stage to notice that the substance of the decision of Lord Alverstone C.J., with whom all the other members of the Court (Lawrence, Kennedy, Channell and Phillimore JJ.), agreed, proceeded on a different basis. In relation to a statutory offence committed on 15th July 1904 the prisoner was charged on 27th December 1904. Under the original legislation a three month time limit was prescribed but by amending legislation that commenced on 1st October 1904 six months was prescribed. In dismissing the appeal against conviction, Lord Alverstone said :

> "The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective (in The Ydun) and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should

not also be held to be retrospective."

The observation of Channell J. cited by the Learned Chief Justice was :

> "if the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and in my view it would not have enabled a prosecution to be maintained even within six months from the offence." P.31 L.148-53

This observation, it is respectfully submitted, is of doubtful authority and ought not to have been relied on by the Chief Justice. It appears from the report itself that it is entirely obiter and no view was expressed on it by other members of the Court. Comment to this effect was made in Maxwell v. Murphy by Fullagar J. at page 288 and Williams J. at page 278. It was similarly criticised by Brightman J. in Re. 14 Grafton Street 1971 1 Ch. 935 at page 946G. and Jordan C.J. in Coleman v. Shell Co. of Australia (1943) 45 S.R. (N.S.W.) 27 at pages 33-34.

33. The Chief Justice stated that regard must be had to the maxim "omnis nova constitutio futuris formam imponere debet non praeteritis". In regarding this maxim as binding him without considering the exception as to procedural statutes the Chief Justice fell into error in the manner submitted in paragraph 25 hereinbefore. P.32 Ll.1-7

34. The Chief Justice then turned to the Interpretation Act, 1967 (Act No. 23 of 1967). He considered, it is respectfully submitted wrongly, Section 30(1)(b) of the Act to be of relevance in the construction of the amending act. It is convenient at this stage to notice the wording of the whole of this subsection; it provides: P.30 Ll.8-16

> "The repeal of a written law in whole or in part shall not -
>
> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
>
> (b) affect any right privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
>
> (d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or

> punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or pub punishment may be imposed, as if the repealing law had not been made."

It should be observed the 1967 Act defined repeal under Section 3 in the following way:

> "'repeal' includes rescind, revoke, cancel and replace;"

Even if the 1967 Act is applicable to consideration of question arising in the instant appeal that Section 30 would not be applicable to the instant appeal is clear. This is respectfully submitted because of Sections 34 and 63 of the Act. These sections respectively provide as follows:

> "34. Where a written law amends another written law, the amending law shall be read and construed as one with the amended law.
>
> "63. (1) The Interpretation and General Clauses Ordinance 1948, is hereby repealed in so far as it is a federal law.
>
> (2) Notwithstanding sub-section (1), the Ordinance thereby repealed shall continue to apply to any written law to which it applied immediately before the commencement of this Act and to subsidiary legislation made after the commencement of this Act under such a written law."

The effect of these provisions is, it is respectfully submitted, to echo the effect in the Imperial Legislation in Section 40 of the Interpretation Act, 1889. That section, it will be recalled, provided:

> "The provisions of this Act respecting the construction of Acts passed after the commencement of this Act shall not effect the construction of any act passed before the commencement of this Act, although it is continued or amended by an Act passed after such commencement."

P.32 Ll.9-16, P.34 Ll.24-26

The Appellants therefore respectfully submit that the Chief Justice fell into error in holding that the amending act was subject to Section 30 of the Interpretation Act, 1967.

35. The Interpretation legislation relevant to the construction of the Public Authorities Protection legislation in West Malaysia is the Interpretation and General Clauses Ordinance, 1948. Although a similar

provision to the 1967 Act is to be found in Section 13 of the 1948 Ordinance, it must be borne in mind that in the definition section of the 1948 Ordinance (Section 2) no definition of 'repeal' is to be found. For this reason and for the reason propounded in paragraph 37 below, the Appellants respectfully submit that that similar section has no application in the construction of the Public Authorities Protection legislation. None the less it is convenient to notice the wording of that Section at this stage. It is as follows:

> "13. Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not -
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any written law so repealed or anything duly done or suffered any written law so repealed; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or
>
> (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

36. If, contrary to the submissions made herein, this section is held to be relevant to construing the Public Authorities Protection legislation, the Appellants would respectfully make the following submission. For the reasons adumbrated in paragraphs 52 and 53 hereinafter, the Appellants say that the period of immunity from suit between 6th April, 1973 and 14th June, 1974 is not within the scope of Section 13 and that section has no application.

37. The Appellants do submit that the section in the 1948 Ordinance that assists with the interpretation of the Public Authorities Protection legislation is the following section. That provides specifically for

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"Construction of amending Ordinance or Enactment" and reads:

> "14. Where an Ordinance or Enactment amends or adds to any Ordinance or Enactment, the amending Ordinane or Enactment shall, so far as is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended Ordinance or Enactment and as part thereof."

The effect of this provision is submitted to be that the amending legislation must be construed as one with the principal Public Authorities Protection legislation. No question of the originating process being out of time could thus arise, the writ having been issued before the expiry of the three year period inserted by the amending Act.

P.32 L.18-P.33 L.49

38. Returning to the Judgment of the Chief Justice, it is to be observed he went on to consider three cases dealing with the preservation of rights under repealed statutory provisions. These are submitted not to be relevant, or alternatively, if relevant do not support the Chief Justice's conclusion that a right accrued in the instant case to Respondents herein within the meaning of the Interpretation legislation.

P.34 Ll.22-27

P.32 Ll.17-39

39. The Chief Justice cited Hamilton Gell v. White 1922 2 K.B. 422 as an example of how an accrued right was determined. It is respectfully submitted that this case bears no analogy with the instant appeal as the facts are quite different. It assists to notice how that case was dealt with by Lord Morris of Borth-Y-Gest in Director of Public Works v. Ho Po Sang 1961 A.C. 901 at page 925. Lord Morris there said:

> "The case of Hamilton Gell v. White furnishes an example of an accrued right and the facts are in contrast with the facts in the present case. In that case the landlord of an agricultural holding gave his tenant notice to quit; he gave it because he wished to sell. The tenant then became entitled to compensation upon the terms and subject to the conditions of Section 11 of the Agricultural Holdings Act 1908. The tenant duly complied with one condition. He duly gave notice of his intention to claim compensation. Another condition was that he should make his claim within three months of quitting. But before the time for him to quit arrived Section 11 was repealed. He did nevertheless make his claim within three months of quitting. It was held that his claim could proceed and that he could recover compensation under Section 11. He had an accrued right which resulted from the fact that the landlord had given a notice to quit in view of a sale. The conditions imposed by Section 11

were conditions not of the acquisition of the right but of its enforcement. As he had an accrued right it was observed by the operation of the Interpretation Act and, further, as he had an accrued right the repeal did not affect the investigation in respect of that right."

The appellants therefore submit that no analogy can be drawn with the case of Hamilton Gell v. White.

40. The Chief Justice then quoted a passage from the speech of Lord Morris in the case of Director of Public Works v. Ho Po Sang; it is respectfully submitted that the passage cited only has relevance if the Respondents' reliance on the unamended Public Authorities Protection Ordinance 1948 was an accrued right. In so far as it may arise the issue in the instant case would rather be whether there was an accrued right than what is the effect of the existence of such a right. The case itself is, in the Appellants' submission, an authority for holding that such an entitlement cannot be an accrued right. Abbott v. Minister of Lands 1895 A.C. 425 was cited in Ho's case with approval by Lord Morris. Giving the judgment of the Board (at page 924 of the report), Lord Morris notices with apparent approval that the Lord Chancellor, Lord Herschell, said therein: P.32 L.45 - P.33 L.6

"It may be, as Windeyer J. observes, 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 not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed'. They think that the mere right (assuming it to be properly so called) 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."

41. The Chief Justice then cited Free Lanka Insurance Co. Ltd v. Ranasinghe 1964 1 A.E.R. 457. It is respectfully submitted that the judgment of the Board in that case does not assist so far as the instant appeal is concerned.

42. The Chief Justice then proceeded to discuss how an 'accrued right' could be acquired. He held, it is respectfully submitted erroneously, that in respect to causes of action already existing before the amending Act came into operation, that both prospective plaintiffs and prospective defendants possessed accrued rights on P.33 L.49 - P.34 L.27

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the happening of the necessary event specified in the old
P.34 Ll.15-19 Act. This interpretation, it is respectfully submitted, is inconsistent with the dicta of Lord Herschell in Abbott v.
P.34 Ll.21-25 Minister of Lands. The conclusion of the Chief Justice that the failure of the Appellants herein to commence an action, gave the respondents herein an accrued right is, it is respectfully submitted, unsustainable.

P.34Ll.30-33 43. The Chief Justice acknowledged that the Learned
P.23 Ll.11-38 Trial Judge was correct in citing J.S. Drinkhall v. Nam Hue Motor Hiring (1955) 21 M.L.J. 119. He stated
P.34 L.33 that the Learned Trial Judge had found difficulty in applying the same. In this respect it is submitted that the Chief Justice was incorrect; as submitted in paragraph 18 above, the approach of the Learned Trial Judge to this case is adopted. The relevance of this case is marginal for, as correctly pointed out by the Learned Trial Judge,
P.23 Ll.30-33 the claim was barred at the institution of the suit and when the trial took place the enlarged period of limitation had expired under the amended law. It therefore appears that had a new action been instituted after the passing of amended legislation as happened in the instant case, the Chief Justice of Singapore who tried that case (Murray-Aynsley C.J.) could have found that the Plaintiff in the new action was within the limitation period. It is pertinent to observe that in the headnote of the report in Drinkhall's case reference is made to Mohamed Yousoff v. Teo Kai Tee & Anor (1953) 19 M.L.J. 188; this case is discussed in paragraphs 52 and 53 below.

44. It appears that in the instant case the Chief Justice cited Drinkhall's case as an authority for the following well known, and undoubtedly correct, proposition:

P.34 Ll.35-38 "Unless the contrary is provided for, the law of limitation applicable to the suit is the law in force at the date when such suit was instituted, in the instant case, Act A252."

However the Appellants respectfully submit the Chief Justices's qualification:

P.34 Ll.38-41 "But this principle is subject to the condition that the rights sought to be enforced have not already been barred under the previous law;"

is only applicable if the rights have specifically been barred rather than prevented from being enforced.

45. The citation from the judgment in Raman Kurup v Chappan Nair (1918) A.I.R. Mad. 86 that:

P.34 Ll.43-46 "a claim barred at the time when the writ is issued is not revived by a subsequent amendment of the law."

is submitted to be not relevant to the instant case and indeed is not disputed as an accurate statement of the applicable law. The decision mentioned of Odayar v. Odayar (1888) L.R. 15 I.A. 167 is likewise not relevant to the instant appeal. Insofar as the judgment therein touches upon the question of limitation, the observations made are in the Appellants' submission obiter and not a correct statement of the principles of law governing the instant appeal.

46. The Chief Justice concluded his Judgment by holding, it is respectfully submitted erroneously, that the time for bringing the plaintiffs' claim was not enlarged by the operation of the amending Act and that Act was not retroactive. The Court accordingly allowed the appeal with costs both in the Federal Court and in the High Court. P.34 L.47 - P.35 L.3

47. On 19th May 1980 the Federal Court granted the Appellants herein final leave to appeal to His Majesty the Yang Dipertuan Agung. Pp.37-38

48. So far as can presently be ascertained a problem akin to that which arises in the instant case does not appear have been considered anywhere in the Commonwealth other than in the cases cited in paragraphs 49-53 below.

49. In Coleman v. The Shell Company Of Australia Ltd. (1943) 45 S.R.(N.S.W.) 27, it was held that, where an amending act extended time for the institution of proceedings and proceedings were instituted within the timesso allowed, no question of limitation could arise. In the appellant's submission the actual reasoning in that case requires consideration with care and, while accepting the conclusion reached, the Appellants are not prepared to fully adopt the judgment of the Court.

50. In Kerley v. Wiley (1931) 3 D.L.R. 68, problem arose that was not quite the issue in the instant case. In this case, both when the cause of action arose and when the writ was issued, the limitation period was six months yet the writ was not issued until eleven months after the cause of action arose. Subsequently the limitation period was extended by fresh legislation and the plaintiff unsuccessfully sought to argue that this legislation validated the writ which had been out of time when it had been issued. The legislation in this case extending the limitation period was, however, not passed until after the limitation period as extended had expired. The Appellant will accordingly submit that this case can be distinguished from the instant appeal.

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51. The problem was prevented from arising in Batting v. London Passenger Transport Board 1941 1 A.E.R. 228 when the period of limitation under the original English Public Authorities Protection Act was extended by legislation in 1939 from six months to twelve months by the wording of the new Act itself. Section 33(a) of the Limitation Act, 1939 provided:

> "Nothing in this Act shall (a) enable any action to be brought which was barred before the commencement of this act by an enactment repealed by this act (except in the case of revival by acknowledgement or part payment)."

No assistance can be obtained as to general principle from this decision because it proceeded upon the basis of the wording quoted. Nonetheless, because no phrase of like effect in the Malaysian legislation extending the limitation period under the Public Authorities Protection legislation is incorporated therein, it ought to be inferred that the legislature had no intention of inhibiting the effect of the amending Act of 1974 in relation to potential pending claims.

52. The most valuable precedent in the submission of the Appellants is to be found in a case decided in Singapore in 1953. As the report of that case is very brief it is convenient to notice first that the Interpretation Ordinance referred to by the Chief Justice therein contained, as Sections 14 and 15 respectively, clauses with wording identical to the wording in Sections 13 and 14 of the Interpretation and General Clauses Ordinance, 1948 in force in Malaysia set out in paragraph 25 above (save that the Malaysian legislation also refers to 'enactments' as well as ordinances'). It is also pertinent to observe that the relevant limitation Ordinance in Singapore set out in a schedule limitation periods for various causes of action. Part I was causes with a one year limitation period and Part III causes with a three year period. The Singapore amending legislation read:

> "1. This Ordinance may be cited as the Limitation (Amendment) Ordinance, 1953.
>
> "2. The Schedule to the Limitation Ordinance is hereby amended as follows:-
>
> (a) by deleting from Part I thereof the whole of item 9; and
>
> (b) by inserting in Part III thereof after 94 the following new item

'94a	For compensation for injury to the person	Ditto	When the injury is committed'"

53. The judgment in the case itself, Noor Mohamed Yousoff v. Teo Kai Tee & Anor (1955) 19 M.L.J. 188, is so short that it justifies quotation in full:

> "Murray - Anynsley, C.J.:- This issue raised a short point of law.
>
> "The cause of action arose on February 9, 1952. Proceedings as against the 2nd defendant were begun on April 10, 1953. Previous to February 22, 1953 the period of limitation for this claim would have been one year. By an amendment to the Limitation Ordinance on the latter date the period of limitation was extended to three years. Therefore, from February 10, 1953 until March 22, 1953 if proceedings had been taken the 2nd defendant could have successfully raised a plea of limitation. The question before me is as to the effect of this amendment to the Limitation Ordinance.
>
> "If this were to be applied literally the relevant period would be governed by the state of the law at the time when proceedings were begun. I do not think that in these days, unless there is ambiguity, it is possible to rely on any supposed presumption against retrospective operation of statutes or on any difference between the effect of legislation on substantive and adjectival law. The prevailing mode is in favour of extremely literal interpretation of statutes. In view of the great care with which statutes are now drafted, which contrasts very much with the way statutes have been drafted in the past, it appears to me that this is the only attitude that Courts can adopt. In view of this I think the plaintiff is entitled to succeed unless the Interpretation Ordinance (No. 4 of 1951) affects the situation. Section 14 was relied on by counsel for the 2nd defendant. It is possible that the words of this section cover the situation. Section 14 was relied on by counsel for the 2nd defendant. It is possible that the words of this section cover the situation of the 2nd defendant after February 9, 1953, but in order to bring the section into operation there must be a repeal. I cannot find a case in which a mere amendment has been treated as a partial repeal - so as to bring into play the corresponding English section.
>
> In the circumstances I must find for the plaintiff on the motion. Plaintiff's costs in any event."

This case is respectfully submitted to be indistinguishable from the instant case and ought to be followed.

54. Certain principles of law are, in the respectful

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submission of the appellants, relevant to the consideration of the instant appeal.

These are

(a) that alterations as to practice and procdure take immediate effect on all pending causes; authority can be found for this in the words of Bowen L.J. in Turnbull v. Forman (1885) 15 Q.B.D. 234 at page 238 where he states

"It is not unreasonable to suppose that, in regard to mere matters of procedure, the legislature does not intend to alter the procedure, even where past transactions come in question; because no person who sues or is sued on a cause of action which existed before the enactment as to procedure has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect, and therefore has altered; and it may, therefore, well be supposed that the legislature intends to apply the new and more perfect procedure universally."

(b) The principle that acts of limitation are to be classified as procedural acts. Scott L.J. considered in National Real Estate & Finance Co. v. Hassan 1939 2 K.B. 61 at page 74:

"As a general rule, when you speak of an act as being a procedural Act, you mean it as an Act relating to proceedings in litigation."

Nield J. in Rodriguez v. R.J. Parker 1967 I Q.B. 117 after consideration of earlier authorities, held (at page 136F) that the Limitation Acts were procedural because they do:

".... not provide that after such period the plaintiff's remedy shall be extinguished or even wholly cease to be enforceable, and indeed the remedy is not extinguished, nor does it wholly cease to be enforceable; ...."

In Malaysia Raja Azlan Shah F.J. (as he then was) held in Public Prosecutor v. Datuk Haji Harun Bin Haji Idris (1977) 1 M.L.J. 14 that:

"An amending statute which is purely procedural is to be construed as retrospective in its operation unless a contrary intention appears ... no person has any vested interest in the course of a procedure if during an investigation that procedure is changed ...."

This accords with the English Authority of D.P.P. v. Lamb 1941 K.B. 89.

(c) Public Authorities Protection Acts are limitation acts and are to be construed as such. In The Ydun 1899 P. 236 at page 245, A.L. Smith L.J. held the Act of 1893 to be dealing with procedure only. Dixon C.J. in Maxwell v. Murphy (1956-57) 96 C.L.R. 261 commenting on The Ydun held that the language of that Act pointed 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. If this is so it is difficult to see why it does not apply equally forcefully to amendments extending rather than those restricting the limitation period under such acts. In reliance on the principle expressed by the dicta in Murray v. The East India Company (1821) 5 B. & Ald 204 of Abbott C.J. at page 215:

"The several statutes of limitation being all in pari materia, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same."

it is submitted that Public Authorities Protection Acts ought to be construed similarly to Limitation Acts styled as such and accordingly treated as procedural only.

55. The Appellants humbly submit that this Appeal should be allowed and that the Judgment and Orders of the Federal Court in Malaysia should be set aside and that the Judgment and Order of the High Court of Malaya should be restored and that the Respondents should be ordered to pay to the Appellants their costs of this appeal and of the proceedings in the Courts below for the following, amongst other

R E A S O N S

1. BECAUSE the Public Authorities Protection legislation does not bar the claim of the Appellants; and

2. BECAUSE the Learned Trial Judge was right; and

3. BECAUSE the judgment of the Federal Court was wrong.

NIGEL MURRAY

No. 36 of 1980

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

1. YEW BON TEW ALSO KNOWN AS YONG BOON TIEW

2. GANESAN S/O THAVER (AN INFANT)
SUING BY HIS GUARDIAN AND NEXT FRIEND,
YEW BON TEW ALSO KNOWN AS YONG BOON TIEW

Appellants
(Plaintiffs)

- and -

3. KENDERAAN BAS MARA

Respondent
(Defendant)

CASE FOR THE APPELLANT

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