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# THE OPERATION IN TIME OF THE STATUTE OF FRAUDS AND OF THE STATUTE OF LIMITATIONS

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Article abstract

This article is concerned with the operation in time of two specific Statutes: *The Statute of Frauds* and *The Statute of Limitations*.

In a first step, the principles applicable to the operation in time of those two Statutes are traced back to their common law origins. At that stage of the paper, it is realized that the principles originally enunciated attached to the Statute in respect of which they had been propounded, without any interconnection.

Then, it is seen that a certain streak of cases has, for all practical purposes, merged the said principles, thereby operating a break in the quasi-absolute separation characterizing the more or less exclusive links that previously existed between the Statute concerned and the principles regulating its operation in time.

In a further step, however, it is concluded, from certain cases, that the merger of the principles under study should probably have never taken place, the Statutes to which they were originally respectively applied being very different the one from the other.

Still further, at the conclusion of that common law analysis, hypotheses are made as to what might have been the effect of the Federal Interpretation Act had the provisions of that Act been applied to some of the cases covered in this article.

Finally, conclusions are drawn from the entire paper and a suggestion is made that the Federal *Interpretation Act* be amended.

# THE OPERATION IN TIME OF THE STATUTE OF FRAUDS AND OF THE STATUTE OF LIMITATIONS

par Louis CÔTÉ*

*Le présent article étudie l'application dans le temps de deux Statuts spécifiques: le* "Statute of Frauds" *et le* "Statute of Limitations".

*En premier lieu, les principes régissant l'application dans le temps de chacun de ces Statuts sont retracés jusqu'aux origines de* "common law" *de ces principes. Aux termes de cette étape, le lecteur réalise que les principes dégagés à l'origine s'identifiaient au Statut à l'égard duquel ils avaient été énoncés, sans possibilité d'interversion.*

*Ensuite, le lecteur apprend qu'un certain courant jurisprudentiel a, à toutes fins pratiques, fusionné les principes en question, rompant par là la quasi-étanchéité caractérisant les liens plus ou moins exclusifs qui existaient auparavant entre le Statut concerné et les principes régissant son application dans le temps.*

*À l'étape suivante, cependant, il est conclu, de certaines décisions judiciaires, que la fusion des principes sous étude n'aurait peut-être jamais dû avoir lieu, les Statuts auxquels ils étaient à l'origine respectivement appliqués étant fort différents l'un de l'autre.*

*Plus loin, aux termes de cette analyse de* "common law", *des hypothèses sont émises quant à l'effet qu'aurait pu avoir la* Loi fédérale d'interprétation *si les dispositions de cette dernière avaient été appliquées aux décisions étudiées tout au long du présent article.*

*Finalement, des conclusions sont tirées de l'ensemble de l'article et il y est suggéré qu'une modification soit apportée à la* Loi fédérale d'interprétation.

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*This article is concerned with the operation in time of two specific Statutes:* The Statute of Frauds *and* The Statute of Limitations.

*In a first step, the principles applicable to the operation in time of those two Statutes are traced back to their common law origins. At that stage of the paper, it is realized that the principles originally enunciated attached to the Statute in respect of which they had been propounded, without any interconnection.*

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*Finally, conclusions are drawn from the entire paper and a suggestion is made that the Federal* Interpretation Act *be amended.*

# SUMMARY

# INTRODUCTION

There is one question which most, if not all, lawyers are asked to answer at least once in their career: is a new enactment applicable to circumstances that are antecedent to the said enactment? Unfortunately those who are faced with the question soon realize that the answer to it is not easily to be found. Indeed, it does not take too long for those concerned to find out that one of the difficulties of the problem is that the solution changes with the situations or with the type of enactment in relation to which the problem is studied, or with both.

The object of the present paper is to suggest an answer or, better, answers to the foregoing question in connection with two different types of statutes: *The Statute of Frauds* and *The Statute of Limitations*.[1] This will be accomplished, hopefully, through an analysis of the latter two statutes in the light of three concepts: retrospectivity, acquired rights and existing rights.

Thus, in a first step, *The Statute of Frauds* will be considered from the standpoint of its nature and operation in time. Then, the same process will be followed with *The Statute of Limitations*.[2]

Also, the lines of cases that have emerged from *The Statute of Frauds* and from *The Statute of Limitations* will be distinguished and brought within the bounds of their own proper perspectives.

And, then, attention will be paid to the application of section 35 and of paragraph 36(d) of the Federal *Interpretation Act*[3] to the operation in time of *The Statute of Frauds* and of *The Statute of Limitations*.

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1. For the purposes of the present paper: *"The Statute of Frauds"* will be used as inclusive of any enactment requiring that a common law contract be in writing if proceedings are validly to be initiated on the basis of the said contract; and, *"The Statute of Limitations"* will be used as inclusive of any enactment passed establishing a time limit within which to initiate certain actions and beyond which the said actions are time-barred.

2. H. D. PITCH, *Limitation Periods and Retroactivity*, (1977-78) 1 Adv. Q. 239; J. WILLIAMS, *Limitation of Actions in Canada*, 2nd Ed., Toronto, Butterworths, 1980; H. JOFFE, S. DITTA and H. CRISP, *Federal Limitation Periods*, Toronto, Butterworths, 1978.

3. *Interpretation Act*, 1970 R.S.C., c. 1-23, s. 35 and par. 36(d).

But, before all that is done, perhaps a brief definition of the concepts of retrospectivity, of acquired rights and of existing rights would, at this point, be of some assistance.[4]

Thus, at least for the immediate purposes of the present paper, retrospectivity is defined as the application of an enactment in a manner such that it would alter, for the past or the future, a fully closed operation of some pre-existing law, statute or common, with equally pre-existing facts. Furthermore, courts usually refuse to apply enactments in that fashion unless there are clear and unambiguous words on the face of those enactments which, directly or by necessary implication, require that the said enactments be so applied.

Then, and for the same purposes, the concept of acquired rights is defined as being a past but unclosed operation of the law, statute or common, with equally past facts, which operation of the law is closed by courts as it would otherwise have been closed had not the law been changed before it could be closed under the old law. In other words, in such circumstances, courts carry the old law to the face of some new and incompatible law so the past operation of the old law is brought to its conclusion as it would have otherwise been had the law remained unchanged. Again, courts usually will not apply a new enactment in frustration of acquired rights unless there are, on the face of that new enactment, clear and unambiguous words requiring, directly or by necessary implication, that it be so applied.

Finally, the concept of existing rights is defined as being, by and large, the mere claim of a right in the permanence of the law as opposed to a claim concerning a specific right owing its existence to the operation of a particular stipulation of the law with corresponding facts; of course, existing rights usually go unprotected.

It is in the light of the foregoing that *The Statute of Frauds* and *The Statute of Limitations* will now be considered.

4. For further comments on those concepts, see: L. CÔTÉ, "Retrospectivity, Acquired Rights, Existing Rights and Section 35 of the Federal Interpretation Act", (1984) 15 *R.D.U.S.* 113.

## A. THE STATUTE OF FRAUDS

Attention will first be paid to the determination of the nature of *The Statute of Frauds* and then, the operation in time of *The Statute* will be considered.

### 1. The Nature of the Statute of Frauds

As was previously said, the applicability of an enactment to situations that are antecedent to the enactment itself may vary with the kind of enactment the application of which is sought.

It is with an issue of that type, inter alia, which the Supreme Court of Canada had to deal with in the case of *Upper Canada College* v. *Smith*.[5] In the circumstances of the case, a real estate agent had, for a commission, agreed to find a buyer for and to negotiate the sale of some of the appellants' land. After the agent had successfully negotiated the sale of some of the land he had undertaken to sell, but before he could sell all of it, difficulties arose which made the sale of the rest of the land impossible. The real estate agent attributed the entire responsibility for the difficulties to the appellants and took action for his full commission. But, after the agreement between the respondent and the appellants had been entered into and before the plaintiff's action was initiated, the Legislature of Ontario passed a new enactment the provisions of which stipulated, among other things, that real estate brokerage agreements that involved the payment of a commission could not, as far as the payment of the commission was concerned, be enforced by courts unless the said agreements were in writing:

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.[6]

The appellants argued that the enactment was procedural and therefore automatically retrospective. The plaintiff, however, thought that it was an enactment concerned with the substantive rights of the parties and that therefore it should operate prospectively only.

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5. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.). See also *Wenger* v. *Le Master*, (1963) 36 D.L.R. (2d) 277 (B.C. Sup. Ct.).

6. *Id.*, 648.

The majority of the Bench agreed with the plaintiff. Duff J., put it in the following words:

> The plaintiff had a contract with the defendants. Under that contract he was entitled, upon the performance of certain conditions, to be paid by them a certain sum of money. He was entitled also to have them refrain from taking steps which would prevent him earning his right to be paid by hindering him in the performance of the conditions. The effect of the statute construed, as we are asked to construe it, on behalf of the defendant, was to enable the defendant to refuse to pay, to refuse to perform their obligations under this contract because the plaintiff could never acquire a right to bring an action upon it unless the defendants consented to sign a memorandum complying with the provisions of the statute. It is quite true that the statute does not in terms declare such a contract to be void but the effect of taking away the right to bring an action is that practically as regards to power of the plaintiff to secure the right which the contract gave him according to the law as it then was, the contract is reduced to an abstraction. The plaintiff's right at the time of the passing of the Act was a valuable right, a right capable of being appraised in money; after the passing of the Act it became, if the defendant's construction is the right one, deprived of all value.[7]

And, further, he went on to add:

> It seems too obvious for argument that a statute declaring contracts enforceable by the usual method (that is to say by action) for the breach of which either party may recover damages, to be no longer enforceable by action so that the parties have no longer any legally enforceable right under such contracts, is a statute which, if our language is to have any relation to the facts of the economic world, abrogates or impairs rights just as a statute taking away property does.[8]

It is clear, from the foregoing statements, that Duff J., viewed *The Statute of Frauds* as an enactment concerned with the substantive rights of the parties; yet he so viewed it, not on the basis of the inherent nature of *The Statute* but, rather, on the basis of *The Statute's* factual effect on the rights of the parties. Indeed, could not *The Statute* have been seen as a mere procedural enactment requiring that certain contracts had to be reduced to a writing before actions could validly be taken with the view of their enforcement?

It was, in any event, approached in that fashion in the case of *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing*

7. *Id.*, Duff J., 650-651.

8. *Id.*, Duff J., 655.

*Company Ltd.*[9] In the instance, a verbal contract for the sale of goods had been entered into at a time when section 4 of *The Sales of Goods Act, 1893*, was still in force. The relevant parts of Section 4 read as follows:

> A contract for the sale of any goods of the value of £.10 or upwards shall not be enforceable by action . . . unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent on that behalf.[10]

Before the case was actually tried but after the action had been initiated and the defence pleaded, section 4 was repealed. Did the repeal apply to the facts of the case? The Court thought it did:

> It is to be borne in mind, I think, that s. 4 does not affect the legal rights of the parties. It does not affect the passing of property under a contract which would be subject to its terms. If a party desires to rely on the section that party has to plead it and plead it with some particularity. It is not a substantive provision of the law in the sense that the court itself will take judicial notice of the fact that the provision of the section has not been complied with, unless the point is raised by one of the parties.[11]

And, further on:

> . . . but I am satisfied that the plaintiffs' argument is right and that s. 4 is a procedural section in the sense that I have indicated.[12]

At face value, thus, the latter two cases certainly respectively speak a different language. Yet, as will be seen hereafter, the consequences of that contradiction may not be overwhelming.[13]

## 2. The Operation in Time of The Statute of Frauds

Let's consider, first, the *Upper Canada College* v. *Smith*[14] case.

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9. *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing Company, Ltd.*, (1954) 3 All E.R. 17 (Q.B.). See also *Leroux* v. *Brown*, (1852) 138 E.R. 1119 (C.P.) where *The Statute of Frauds* was, for the purpose of the determination of the *lex fori*, viewed as a procedural enactment.

10. *Id.*, 18.

11. *Id.*, Pilcher J., 18.

12. *Ibid.*

13. For one thing, *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.) is a Canadian case whereas the *Craxfords (Ramsgate) Ltd.*, case was decided in a British Court.

14. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.).

The fundamental issue of the case, as will be remembered, was whether or not *The Statute of Frauds* applied to agreements entered into before *The Statute* was passed into law. More specifically, it was there thought that the resolution of the issue depended upon which one of the following two propositions applied to the circumstances of the case:

> . . . speaking generally, it would not only be widely inconvenient but a flagrant violation of natural justice to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.[15]

And,

> . . . the statute is a statute relating to procedure and the case therefore falls within the rule thus expressed by Lord Penzance, then Wilde, B., in his judgement in *Wright* v. *Hale*, (1860), 6 H. and N. 227, at p. 232, 158 E.R. 94, at p. 96, "but where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act."[16]

The majority of the Bench opted for the first branch of the alternative; acquired rights, it was thought, would otherwise have been interfered with. Indeed, the parties, in the instance, had previously entered into an agreement the enforcement of which was no longer allowed by the law at the time the action was initiated seeking the enforcement of the said contract; and still, the Court was asked to maintain the action. In other words, it was being asked to close a transaction as that transaction would have been closed had not a new and incompatible enactment been passed before it could actually be closed. And, as there were no clear and unambiguous words on the face of the new enactment which, directly of by necessary implication, required that it be applied in frustration of acquired rights, the Court closed the transaction as it was asked to close it.[17]

Moreover, there are circumstances where the foregoing statements remain true even if *The Statute of Frauds* is viewed as a procedural enactment.

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15. *Id.*, Duff J., 650.

16. *Id.*, Duff J., 651.

17. Comparable decisions were rendered in the 1678 cases of *Ash* v. *Abdy*, (1678) 36 E.R. 1014 (Ch.) and of *Helmore* v. *Shuter*, (1678) 89 E.R. 764 (K.B.).

As will be remembered from *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing Company Ltd.*,[18] the repeal of *The Statute of Frauds*, there viewed as a procedural enactment, allowed the enforcement of rights acquired under an otherwise valid contract. Also, as was suggested in the same case, the repeal of *The Statute* would not have operated so as to deprive the defendants of a vested defence had the said repeal taken place after trial but before a judgement was actually rendered.[19]

Thus, whichever way it is looked at, *The Statute of Frauds* does not often frustrate acquired rights. This should be enough to dispose of the question as to whether or not *The Statute* operates retrospectively. Indeed, if *The Statute* does not, unless properly worded for the purpose, affect acquired rights, *a fortiori* it should not, unless properly worded for the purpose, operate retrospectively.[20]

But as retrospectivity was at issue in neither of the *Upper Canada College* or the *Craxfords (Ramsgate) Ltd.* cases, doubts may remain. Those doubts will be dispelled, hopefully, through the demonstration that *The Statute of Limitations*, a procedural enactment, does not operate retrospectively. Indeed, if *The Statute of Limitations*, a procedural enactment, cannot, unless properly worded for the purpose, operate retrospectively, why should it be any different for *The Statute of Frauds*, whether procedural or not?

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18. *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing Company Ltd.*, (1954) 3 All E.R. 17 (Q.B.). Strictly speaking, the issue at bar in that case was much more the operation in time of the enactment repealing *The Statute of Frauds* than that of *The Statute of Frauds* itself.

19. *Id.*, Pilcher J., 19.

20. *The Statute of Frauds* only bars actions on verbal contracts and usually does not provide for the nullity of those contracts. Thus retrospectivity can more or less never be an issue in a case concerning the applicability of *The Statute* to contracts entered into before the making of *The Statute*; indeed, the question, in those cases, is not the re-opening of the contracts but their enforceability by way of an action initiated after *The Statute* is passed into law. The issue is concerned with the future only and is therefore a pure acquired rights issue. For a case where the enactment under the consideration of the Court both barred actions on a certain type of contracts and stipulated for the nullity of the said contracts, see: *Moon* v. *Durden*, (1848) 154 E.R. 389 (Ex.).

## B. THE STATUTE OF LIMITATIONS

*The Statute of Limitations* will hereafter be considered from two different but somewhat related angles: its nature and its operation in time.

### 1. The Nature of the Statute of Limitations

The nature of *The Statute of Limitations* was discussed in the early case of *Pardo* v. *Bingham.*[21] In the circumstances of the case, debts had been contracted at a time when section 7 of the *Statute* 21 *Jac.* 1, c. 16, provided that some limitation periods did not, with respect to those who were beyond the seas when a cause of action accrued to them, start running until after those concerned had returned to England. Later on, the *Mercantile Law Amendment Act*, 19-20 Vict., c. 97, s. 10, was passed taking away that exception. Did the new enactment apply to causes of action already in existence at the time it was passed into law?

The Court thought that the resolution of the issue more or less depended on the nature of *The Statute*. It did, therefore, discuss that aspect of the issue but, it stopped short of expressly labelling the said enactment anything at all:

> I think there is a considerable difference between this case and a case where the right of action is actually taken away. That is the ground of the decisions in *Moon* v. *Durden* and *Jackson* v. *Wolley*. In each of those cases the person had acquired by positive act *inter partes*, a right of action, in the latter case by a co-contractor having made a promise, which of course, the person had a right to rely upon as the law then stood, as giving him a further period of six years for his remedy. And in *Moon* v. *Durden* (1) the person had actually brought an action before the statute passed, and to hold the statute retrospective would have deprived him of a right which he had actually acquired; whereas in this case the creditor has not acquired by any act on the part of the debtor any new or fresh right, but he stands upon that remedy which, according to his view, would extend to him for fifty years, or more, the right to recover against the debtor a debt which he might have proceeded to recover within the six years.[22]

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21. *Pardo* v. *Bingham*, (1868-69) 4 L.R. Ch. App. 735. The issue had been discussed in the earlier case of *Cornill* v. *Hudson*, (1857) 120 E.R. 160 (K.B.), but nothing very informative about the nature of *The Statute of Limitations* was said in the report of the case.

22. *Pardo* v. *Bingham*, (1868-69) 4 L.R. Ch. App. 735, Hatherley L. C., 740-741.

*The Statute of Limitations*, thus, was not viewed as an enactment directly concerned with the substantive rights of the parties; yet, no particular nature was ascribed to it.

That extra step was made years later in the case of *The Ydun*.[23] Indeed, referring to the *Public Authorities Protection Act, 1893*, (55-57 Vict., c. 61), an Act passed establishing a new limitation period, Smith L. J., said this:

> The Act of 1893 is an Act dealing with procedure only.[24]

Even though the foregoing principle was doubted in the recent cases of *Quinn* v. *Monaghan*,[25] and of *Perrie* v. *Martin*,[26] it is very unlikely that the Supreme Court of Canada would, with respect to the issue, depart from its decisions in *McGrath* v. *Scriven*[27] and *Sommers* v. *The Queen*.[28] In the latter case, Fauteux J., speaking of *The Statute of Limitations*, said:

> The provisions of s. 1140(1) (b) (i), limiting the time within which a prosecution under s. 158(1) (e) may be commenced, being undoubtedly merely procedural, ceased from the date of the coming into force of the new Code, to be afterwards effective with respect to proceedings commenced after that date.[29]

But, there are consequences to the procedural nature of *The Statute of Limitations*. What are they?

### 2. The Operation in Time of The Statute of Limitations

Procedural enactments, most believe, are retrospective by nature. Still, as will be seen hereafter, such is not necessarily the case; at least as far as *The Statute of Limitations* is concerned.[30]

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23. *The Ydun*, 1899 P. 236 (C.A.).
24. *Id.*, Smith L. J., 245.
25. *Quinn* v. *Monaghan*, (1980) 27 Nfld. and P.E.I. Rep. 13 (Nfld. Sup. C.T.D.), see Goodridge J., 28.
26. *Perrie* v. *Martin*, (1983) 42 O.R. (2d) 127 (Ont. C.A.), see Dubin J. A., 130-131.
27. *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.).
28. *Sommers* v. *The Queen*, [1959] S.C.R. 678.
29. *Id.*, Fauteux J., 688.
30. Much could be said for the proposition that procedural enactments, generally, are not retrospective. The demonstration of that proposition, however, is beyond the scope of the present paper. Still, see *Brown* v. *Black*, (1888) 21 N.S.R. 349 (N.S. Sup. C.), and *McLean* v. *Leth*, (1950) 1 W.W.R. 536 (B.C.C.A.). See also para. 36 (d) of the Federal *Interpretation Act*, 1970 R.S.C., c. 1-23.

Rather, the rule is that *The Statute* is, because of its procedural nature, applicable to causes of action that are already in existence at the time it is passed into law.[31]

Of course, there are qualifications to that general rule. For instance, the point in time at which a new limitation period becomes effective, relative to the operation of the pre-existing limitation period being replaced by the new one, is a determinant factor in the decision as to whether *The Statute* passed enacting the new limitation period is applicable to a cause of action already in existence when *The Statute* comes into force. In turn, the foregoing statement suggests at least two sets of circumstances: 1) the enactment of a new limitation period at a time when, with respect to a particular cause of action, an earlier limitation period is still running; 2) or, the enactment of a new limitation period at a time when, with respect to a particular cause of action, an earlier limitation period has already run out.

In the first set of circumstances, one must consider whether *The Statute of Limitations* is passed extending or reducing the earlier limitation period.

Thus, an enactment passed extending an already existing limitation period will be applicable to a cause of action already in existence at the time the enactment is passed into law in all cases where the earlier limitation period is still running at the time the new enactment comes into force.

Such was, in any event, the decision of the Court in *The King* v. *Chandra Dharma*.[32] In the circumstances of that case, an offence was committed when the law in force provided for a limitation period of three months with respect to the offence in question. Before the charge was laid, while the three-month period was still running, a new enactment was passed extending the limitation period to six months. The charge having been laid

31. In *The Ydun*, 1899 P. 236 (C.A.), Smith L. J., is reported to have said that *The Statute of Limitations* was applicable to all actions whether commenced before or after the making of *The Statute* but, that apparently was a mistake. In this respect, see: Riddell J. A., in *Glynn* v. *City of Niagara Falls*, (1914) 31 O.L.R. 1 (Ont. C.A.), 9.

32. *The King* v. *Chandra Dharma*, (1905) 2 K.B. 335 (C.A.). As the authority followed in the instance was *The Ydun*, a case decided in civil matters, there does not seem to be any basic mutual exclusion as between cases arising in civil matters and those taking place in criminal matters. (See, however, *infra*, note 90.)

more than three months (but less than six months) after the commission of the offence, it was argued that the proceedings were time-barred at the time they were initiated. The Court disagreed:

> . . . 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.[33]

And, the same Judge, Alverstone C. J., went on to add:

> It is a mere matter of procedure, and according to all the authorities it is therefore retrospective.[34]

While Channell J., added the following:

> . . . but I wish to say that in my view a statute dealing only with procedure applies to past events as well as to future events, and to hold this is not to make the statute retrospective.[35]

And,

> 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.[36]

The new limitation period, therefore, was applied to a pre-existing offence.

A similar decision was rendered by the Supreme Court of Canada in the case of *Sommers* v. *The Queen*.[37] In the instance, the Court expressly approved the decision of the British Court of Appeal in the *Chandra Dharma* case. This aspect of the question, thus, is most likely conclusively settled.

Such also is the case when, in like circumstances, a new enactment is passed reducing an earlier limitation period. The British Court of Appeal had to resolve the issue in the case of *The Ydun*.[38]

In the circumstances of that case, a barque had, on September 13, 1893, sustained damages within the limits of the Port of Preston, England, and it was only years later, on November

33. *Id.*, Alverstone C. J., 338.

34. *Id.*, Alverstone C. J., 339.

35. *Id.*, Channell J., 339.

36. *Ibid.*

37. *Sommers* v. *The Queen*, [1959] S.C.R. 678.

38. *The Ydun*, 1899 P. 236 (C.A.).

14, 1898, that its owners took action against the Port Authorities for compensation. In the meantime, however, a new enactment had been passed establishing a six-month limitation period in the stead of the pre-existing longer limitation period. The new enactment had come into force on January 1st, 1894, and, obviously, the action was, if the enactment was at all applicable to the case, time-barred. Smith C. J., had this to say about the issue:

> It is, however, secondly said that even if this be so, still the Act has no retrospective operation, and only applies to actions brought after the Act came into force on January 1, 1894; but in that view I cannot agree, and, in my opinion, that point was correctly dealt with by the learned President in the Court below. The rule applicable to cases of this sort is well stated by Wilde B., in *Wright* v. *Hale* (1), namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.[39]

Once more, as the old limitation period was still running when the new one was passed into law, the latter limitation period was applied to the case with the result that an action was barred which would not have been, had not the limitation period in force at the time the cause of action took place been replaced in the circumstances in which it was.

The same principle was applied in Canada years later when the Supreme Court of Canada, in *McGrath* v. *Scriven*,[40] dismissed an appeal from the decision of Harris C. J. N. S. Therefore, it seems that this other aspect of the question is also fully resolved.

Still, there are exceptions to the principles applied in the cases of *Sommers* v. *The Queen*,[41] and of *McGrath* v. *Scriven*.

For example, in *Glynn* v. *City of Niagara Falls*,[42] the limitation period in force at the time the cause of action had taken

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39. *Id.*, Smith L. J., 245. *The Statute of Limitations*, regardless of Smith's L. J., statement, is applicable to pre-existing causes of action and not to actions already begun at the time The Statute is passed into law; see *Glynn* v. *City of Niagara Falls*, (1914) 31 O.L.R. 1 (Ont. C.A.), Riddell J. A., 9.

40. *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.).

41. *Sommers* v. *The Queen*, [1959] S.C.R. 678.

42. *Glynn* v. *The City of Niagara Falls* (1914), 31 O.L.R. 1 (Ont. Sup. C. App. Div.).

place was applied even though it had not already run out when a new limitation period was later passed replacing it. The reason for that, however, is that, in the instance, the action had already been commenced when the new limitation period was enacted.

Indeed, Mulock C. J. O., distinguishing the issue under consideration in the instance from that in *The Ydun* case, put it in the following terms:

> ; but in the present case the writ was issued prior to the coming into force of the Public Utilities Act. At that time the plaintiffs had not only a vested right but had already commenced their action.[43]

Likewise, the B.C. Court of Appeal, in *Dixie* v. *Royal Columbian Hospital*,[44] refused to apply a new limitation period to pre-existing facts on the notion that, as of its coming into force, the new limitation period barred an already existing cause of action. In the instance, both the *Upper Canada College* v. *Smith*[45] and the *McGrath* v. *Scriven*[46] cases were brought to the attention of the Court. Basically the B.C. Court of Appeal was asked to liken the issue at bar to the circumstances under scrutiny in *Upper Canada College* v. *Smith*, a *Statute of Frauds* case, or to the circumstances at issue in *McGrath* v. *Scriven*, a *Statute of Limitations* case.

*Upper Canada College* v. *Smith* was applied. Here is how McDonald J. A., put it:

> In the *McGrath* case, . . . even if the amendment did operate retrospectively, still the plaintiff had more than two months thereafter wherein the bring his action for the seizure, before the statute, literally applied, would bar him. He did not have the full three months given; but still his remedy was not arbitrarily abolished without there being preserved to him any chance to assert it.[47]

Then, referring to the *Upper Canada College* case, he went on to say:

> The *Upper Canada* case, *supra*, dealt with a statutory provision similar to sec. 4 of the *Statute of Frauds* which required any agreement for paying a real estate agent's commission to be in writing. The Supreme Court of Canada held that such enactment ought not to be construed as retros-

43. *Id.*, Mulock C. J. O., 6-7.

44. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.).

45. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.).

46. *McGrath* v. *Scriven* (1921) 1 W.W.R. 1075 (Sup. C.C.).

47. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.), McDonald J. A., 392.

> pective, so as to apply to an agreement made before the statute; for it was pointed out that such a construction would totally deprive the plaintiff of a vested right of action without giving him any chance of complying with the statutory requirement.[48]

Thus, a new limitation period passed into law leaving, with respect to a pre-existing cause of action, no time within which to still initiate the action, will not, according to the *Dixie* case, be applied to that cause of action; and, it will be so even in cases where the new limitation period is passed into law while the earlier limitation period is still running with respect to the right of action in question.

Now, what happens when a new limitation period is passed into force at a time when, with respect to a pre-existing cause of action, an earlier limitation period has already run out?

In such circumstances, cases where a new limitation period is enacted reducing an earlier such period are obviously irrelevant: the action is barred either way.

But, what if, in such circumstances, a new limitation period is passed extending an earlier limitation period? Could it not be argued, then, that regardless of the time-bar effected by the earlier limitation period, an action could still be taken on the basis of the new limitation period, provided, of course, the action is initiated within the new limitation period? No! And *Kearley* v. *Wiley*[49] is one of the authorities that support a negative answer.

> In the present case, the defendant had acquired a statutory defence. The effect of construing the Act of 1930 as retrospective would be to create a cause of action against him, to deprive him of his right to immunity from the plaintiff's claim.[50]

The new limitation period, therefore, was not used to reopen a past and fully closed operation of the past law with equally past facts: in other words, *The Statute of Limitations* was not applied retrospectively. There is support, thus, for the proposition that there is at least one kind of procedural enactment which is not retrospective by nature: *The Statute of Limitations.*

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48. *Id.*, McDonald J. A., 392.

49. *Kearley* v. *Wiley*, [1931] O.R. 167 (Ont. Sup. C. App. Div.); see also *Maxwell* v. *Murphy*, (1956-57) 96 C.L.R. 261 (Aust. H.C.); *Merrill* v. *Fisher*, (1976) 11 O.R. 551 (Ont. C.A.); *Woloszczuk* v. *Onyszcak*, (1977) 14 O.R. 732 (Ont. H.C.); *Yew Bon Tew* v. *Kenderaan Bas Mara*, (1982) 3 W.L.R. 1026 (P.C.); see, however: *Carlino* v. *Zimblarte*, (1926-27) 60 O.L.R. 269 (Ont. H.C.), and *Perrie* v. *Martin*, (1983) 42 O.R. (2d) 127 (Ont. C.A.).

50. Mulock C. J. P., 169.

Of course, the foregoing conclusion will probably be doubted on the basis of the few cases where the procedural nature of *The Statute* was questioned.[51] Yet, there should not be any doubt. Courts are simply reluctant to regard the rule for the inherent retrospectivity of procedural enactments as a non-existent one and, whenever faced with the problem, they just ascribe another nature to *The Statute of Limitations*.[52]

Still, no matter how courts justify their conclusions, the following principles are consistently applied to *The Statute of Limitations*: 1) There are no existing rights in a limitation period;[53] 2) a new limitation period does not bar an already acquired right of action when it is passed into law after an action has already been validly initiated with respect to that right of action;[54] 3) a new limitation period is not applied so as to bar an already acquired right of action in cases where it has such an effect as of the moment of its own coming into force;[55] 4) and, a limitation period is not given retrospective effect.[56]

Then, if *The Statute of Limitations*, a procedural enactment, does not, unless properly worded for the purpose, operate retrospectively, why should it be any different for *The Statute of Frauds*, whether procedural or not? This should certainly reinforce the statement made earlier to the effect that, unless properly worded for the purpose, *The Statute of Frauds* does not operate retrospectively.

Still there are limits to what those two *Statutes* have in common. Attention will next be paid to a case where the limit was clearly exceeded. Then, differences will be drawn between the two *Statutes*.

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51. *Quinn* v. *Monaghan*, (1980) 27 Nfld. and P.E.I. Rep. 13 (Nfld. Sup. C.T.D.), see Goodridge J., 28; and, *Perrie* v. *Martin*, (1983) 42 O.R. (2d) 127 (Ont. C.A.), see Dubin J. A., 130-131.

52. For instance, see *Maxwell* v. *Murphy*, (1956-57) 96 C.L.R. 261 (Aust. H.C.), Williams J., 277-278.

53. *The Ydun*, 1899 P. 236 (C.A.); *The King* v. *Chandra Dharma*, (1905) 2 K.B. 335 (C.A.); *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.); and, *Sommers* v. *The Queen*, [1959] S.C.R. 678.

54. *Glynn* v. *City of Niagara Falls*, (1914) 31 O.L.R. 1 (Ont. Sup. C. App. Div.).

55. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.). More will be said later concerning this case.

56. *Kearly* v. *Wiley*, [1931] O.R. 167 (Ont. Sup. C. App. Div.). See also note 49, *supra*.

## C. THE STATUTE OF FRAUDS AND THE STATUTE OF LIMITATIONS LINES OF CASES: THEIR MERGER AND DIFFERENTIATION

Courts, it was seen, have at times solved cases concerned with *The Statute of Limitations* with the principles enunciated in *Upper Canada College* v. *Smith*,[57] a *Statute of Frauds* case. That should only be done with the highest degree of care; and, there are cases in which the reasons for that are more apparent than in others.

### 1. The Merger of The Two lines of Cases

In *Stephenson* v. *Parkdale Motors*,[58] for example, the principles enunciated in *Upper Canada College* were directly applied to the issue, a *Statute of Limitations* issue. In the instance, the cause of action had taken place on July 11, 1923 and the limitation period then attached to it was one year. The writ was issued on March 11, 1924, but, in the meantime, a new limitation period of six months had come into force on December 31, 1923. Obviously, when the writ was issued, the new limitation period had already run out. Moreover, that new limitation period did not, as of its own coming into force, have the effect of automatically barring the pre-existing right of action. The plaintiff had, as of the coming into force of the new limitation period, 11 days in which to still initiate his action, assuming the new limitation period was applicable to his case.

Clearly, thus, the *Stephenson* case was an instance to which cases such as *The Ydun*[59] and *McGrath* v. *Scriven*[60] should have

57. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.); see, for example, *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.).

58. *Stephenson* v. *Parkdale Motors*, (1924) 4 D.L.R. 1201 (Ont. Sup. C. App. Div.), affg. (1924) 3 D.L.R. 663 (Ont. Sup. C.). It will hereafter be suggested that the *Stephenson* case should not be followed. Yet, it was approved of in several cases the facts of which did not justify the approval: *Carlino* v. *Zimblarte*, (1926-27) 60 O.L.R. 269 (Ont. H.C.) Grant J., 272-273; *Kearley* v. *Wiley*, [1931] O.R. 167 (Ont. S.C. App. Div.) Mulock C.J.O., 168; and *Quinn* v. *Monaghan*, (1980) 27 Nfld. and P.E.I. R. 13 (Nfld. Sup. C. T.D.) Goodridge J., 26. But, in *Beattie* v. *Dorosz*, (1932) 2 W.W.R. 289 (Sask. C.A.), the *Stephenson* case was expressly disregarded; see: Mackenzie J.A., 303.

59. *The Ydun*, 1899 P. 236 (C.A.).

60. *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.).

been applied. Why were such cases not followed? Masten J. A., explained it this way:

> But for the judgement of the Supreme Court of Canada in *Upper Canada College* v. *Smith*, I should have arrived at an opposite conclusion. It may be that the present case is to be distinguished on its facts from *Upper Canada College* v. *Smith*; but, in view of the wide application of the general principle enunciated in that case and the strong general expressions employed by the Court, I find myself unable to draw an effective distinction. If it exists, it can best be drawn by the Supreme Court.[61]

Masten's J. A., wish, however, was to be fulfilled only years later. This will next be discussed.

### 2. The Differentiation of The Two lines of Cases

An annotation to the report of the *Stephenson* v. *Parkdale Motors*[62] case immediately brought some light to Masten's J. A., query:

> There lies the fundamental difference, between the Statute of Frauds and the Statute of Limitations. The former deals with the evidence necessary to enforce a right. The right exists and is enforceable under the law as constituted. Parliament passes an Act requiring certain evidence in order to render the right enforceable. If such an Act were retrospective, a person desiring to enforce such a right could not do so because the time for obtaining the necessary evidence is long past, in fact the vested right would be taken away. On the other hand the Statute of Limitations does not take away a vested right of action it merely deals with the method, i.e., the time within which such "right of action already existing may be asserted".[63]

By and large, according to the foregoing statement, the difference between the two *Statutes* is that one of them automatically bars the right of action it is concerned with, whereas it is not always the case with respect to the other one. Does this mean, then, that in cases such as *Dixie* v. *Royal Columbian Hospital*,[64] the two lines of cases should be merged? There is

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61. *Stephenson* v. *Parkdale Motors*, (1924) 4 D.L.R. 1201 (Ont. Sup. C. App. Div.), Masten J. A., 1202. The case of *Surtees* v. *Ellison*, (1829) 109 E.R. 278 (K.B.) could have been argued to claim that the earlier limitation period was deemed to have never existed and that, therefore, only the new one was applicable to the facts of the case.

62. (1924) 4 D.L.R. 1202 (Annotation to the *Stephenson* v. *Parkdale Motors* case).

63. *Id.*, 1205.

64. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.).

room for doubt. Indeed, in *Beattie* v. *Dorosz*,[65] the two lines of cases were viewed as entirely unrelated to one another. In the circumstances of the case, the cause of action had taken place on November, 11, 1930. The writ was issued on July 2, 1931 but, previously, a new enactment had come into force on May 1, 1931 establishing a six-month limitation period. Did the new limitation period apply to the case? It did and the action was barred.

It was to no avail that *Upper Canada College* v. *Smith*[66] was argued in support of the action. Turgeon J. A., differentiated *The Statute of Frauds* line of cases from *The Statute of Limitations* line of cases in the following words:

> In *Smith* v. *Upper Canada College*, *supra*, the statute to be interpreted was not a statute creating a time limit for the bringing of actions, as is the case here and as was the case in *McGrath* v. *Scriven and McLeod.* It was a statute of the province of Ontario making unenforceable certain oral contracts which had previously been valid and enforceable. The question to be determined was whether such a statute affected contracts already entered into.[67]

And, further on, the same Judge said:

> It is of interest to note that no mention was made in any of the judgements delivered in *Smith* v. *Upper Canada College*, *supra*, to what had been decided and what had been said, only a few weeks previously, in *McGrath* v. *Scriven and McLeod*, *supra*. This may mean that the Court saw no relationship between the two cases. In my opinion they are, indeed, very different.[68]

Years later in *Sommers* v. *The Queen*,[69] the Supreme Court of Canada finally fulfilled Masten's J. A., wish and it did so by agreeing with Turgeon J.A.:

> The law, as stated in that case, has been followed by this Court in *McGrath* v. *Scriven and McLeod*, affirming the judgement of the Supreme Court of Nova Scotia. The decision of this Court in *Upper Canada College* v. *Smith*, quoted by counsel for the appelants, has no application

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65. *Beattie* v. *Dorosz*, (1932) 2 W.W.R. 289 (Sask. C.A.).

66. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.).

67. *Beattie* v. *Dorosz*, (1932) 2 W.W.R. 289 (Sask. C.A.), Turgeon J. A., 293.

68. *Id.*, Turgeon J. A., 294. Turgeon J. A., was referring to the fact that the decisions of the Supreme Court of Canada in the *Upper Canada College* and the *McGrath* cases were rendered only weeks apart from one another.

69. *Sommers* v. *The Queen*, [1959] S.C.R. 678.

> in the matter. As stated by Turgeon J. A., in *Beattie* v. *Dorosz and Dorosz*, the statute considered was not a statute creating a time limit for the bringing of actions, it was a statute making unenforceable certain oral contracts which has previously been valid and enforceable. The question considered was whether such a statute affected contracts already entered into.[70]

If, then, the *Beattie* and the *Sommers* cases mean, as it is suggested here they do, that *The Statute of Frauds* and *The Statute of Limitations* lines of cases have very little in common, *Stephenson* v. *Parkdale Motors*[71] and *Dixie* v. *Royal Columbian Hospital*[72] open up to serious questions.

Indeed, is not the *Stephenson* case in contradiction with the strongest line of authorities? Authorities such as: *The Ydun*,[73] *The King* v. *Chandra Dharma*,[74] *McGrath* v. *Scriven*,[75] and *Sommers* v. *The Queen*.[76] Then, does not the same case stand against the proposition that there are no existing rights in a limitation period?

And, in turn, should not the *Dixie* case have been decided on the basis of *The Ydun* case? What difference is there between a new enactment passed leaving no time within which to still initiate an action and such an enactment passed leaving only one day within which to take one's action? Obviously the difference is, in most cases, enough time to still take action. But, should that factual difference take the *Dixie* case out of *The Ydun* line of cases?[77]

The answer is simple: courts are very reluctant to bar an action on the basis of a limitation period passed into law only after the cause of action has taken place. Indeed, they are as reluctant to do that as they are to bar an otherwise valid right of action based on a verbal contract on the ground only that, after the making of the contract, an enactment is passed prohib-

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70. *Id.*, Fauteux J., 690.

71. *Stephenson* v. *Parkdale Motors*, (1924) 4 D.L.R. 1201 (Ont. Sup. App. Div.).

72. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.).

73. *The Ydun*, 1899 P. 236 (C.A.).

74. *The King* v. *Chandra Dharma*, (1905) 2 K.B. 335 (C.A.).

75. *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.).

76. *Sommers* v. *The Queen*, [1959] S.C.R. 678.

77. More will be said later regarding this point.

iting actions on such contracts. And, in trying to avoid those two results, courts have devised a relatively intricate set of rules; most often without any reference to the provisions of the particular interpretation act that may have been applicable in the instances concerned.

Attention, therefore, will next be paid to what might have happened in relation both to *The Statute of Frauds* and to *The Statute of Limitations*, had some of the cases previously considered been decided on the basis of the pertinent provisions of the Federal *Interpretation Act*.[78] Basically, speculations will be made as to what might have been, in the circumstances, the effect of section 35 and paragraph 36(d) of that Act.

Hopefully, from that exercise, some clarification of the uncertainties which the common law leaves unresolved will emerge.

## D. THE STATUTE OF FRAUDS AND THE STATUTE OF LIMITATIONS: THEIR OPERATION IN TIME AND THE FEDERAL INTERPRETATION ACT

Fundamentally, section 35 of the Federal *Interpretation Act* provides against retrospectivity and preserves rights acquired under an enactment. Paragraph 36(d), however, stipulates that where an enactment is passed repealing and replacing another enactment, the procedure established under the replacing enactment is applicable, if adaptable, to things having taken place prior to the repeal and replacement. Section 35 and paragraph 36(d) read as follows:

> 35. Where an enactment is repealed in whole or in part, the repeal does not
> (a) revive any enactment or anything not in force or existing at the time when the repeal takes effect;
> (b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;
> (c) affect any right, privilege, obligation, or liability acquired, accrued, accruing or incurred under the enactment so repealed;

78. *Interpretation Act*, 1970 R.S.C., c. I-23. As the transitional law stipulations existing in the various provincial *Interpretation Acts* in force in Canada have a lot in common with their Federal counterpart, helpful generalizations will be possible on the basis of the conclusions arrived at this stage of the present paper.

(d) affect any offence committed against or a violation of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred under the enactment so repealed; or
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefore,
(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal;[79]

Fundamentally, paragraph 35 provides that past and closed operations of an enactment are not affected by the later repeal of that enactment. To that extent, it is a codification of part of the rule propounded in the case of *Surtees* v. *Ellison*.[80] Indeed, the *Surtees* case was the common law authority for the proposition that only past and closed operations of an enactment were protected from the effects of the repeal of the said enactment. The corollary of that rule, of course, was that unclosed transactions were frustrated by the repeal of the enactment under which they were taking place. Section 35, however, has done away with the corollary; rights acquired under an enactment are now protected from the interference of a repealing enactment.

Still, as regards enactments which have not been brought into operation prior to their repeal, the situation is exactly the same as it was before the enactment of section 35: they are, after the repeal, deemed to have never existed.[81]

Paragraph 36(d), in turn, is somewhat contrary to section 35; it provides for the application of the new law. Indeed, para-

79. *Id.*, s. 35 and par. 36(d).

80. *Surtees* v. *Ellison*, (1829) 109 E.R. 278 (K.B.); *Kay* v. *Goodwin*, (1830) 130 E.R. 1403 (C.P.); *The Queen* v. *The Inhabitants of Denton*, (1852) 118 E.R. 287 (Q.B.); and *MacMillan* v. *Dent*, (1907) 1 Ch. 107 (C.A.).

81. For the proposition that section 35 protects only operations of the past law as opposed to the previous law itself, see *Hamilton Gell* v. *White*, (1922) 2 K.B. 422 (C.A.), Atkin L. J., 431.

graph 36(d) stipulates that where an enactment is passed repealing and replacing another enactment, the procedure established by the repealing and replacing enactment is applicable to circumstances having taken place prior to the repeal and replacement unless that procedure cannot be adapted to those circumstances.[82]

Let's now consider how the provisions of section 35 and of paragraph 36(d) could apply to the operation in time of *The Statute of Frauds*.

### 1. The Statute of Frauds

Only two kinds of circumstances will here be considered: the simple repeal of *The Statute of Frauds* and the repeal-replacement of *The Statute of Frauds*.

The issue, in the *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing Company Ltd.*[83] case, was, it will be remembered, primarily focused on the effects of a simple repeal of *The Statute*. That case, it will also be remembered, was a British case. Still, there does not seem to be anything in section 35 or in paragraph 36(d) of the Federal *Interpretation Act* which would, were a comparable case to come up for decision in Federal matters, be likely to attract a decision that would differ from that which was redered by the Court in the actual case.

To begin with, paragraph 36(d), would, in such circumstances, be of no avail: it does not apply to simple repeals.[84]

Then, as far as section 35 is concerned, only paratraph 35(a) would seem to have any connection with the case at all. Indeed, is it not possible to argue that the simple repeal of *The Statute of Frauds* operates the revival of something (a contract) that was not in force (enforceable) prior to the repeal? In any event, as there was, in the British *Interpretation Act*,[85] a provision com-

82. Note that paragraph 36(d) provides that the new procedure is applicable in respect of rights etc., accruing under the "former enactment" and that therefore, strictly speaking, that paragraph should apply only in cases where the rights concerned were accruing under the enactment that is repealed and replaced, which should not be the case.

83. *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing Company Ltd.*, (1954) 3 All E.R. 17 (Q.B.).

84. *R* v. *Allan* (1979) 45 C.C.C. (2d) 524 (Ont. C.A.), Lacourciere J.A., 530.

85. *Interpretation Act, 1889*, 52-53 Vict., c. 63, par. 38(2) (a): "(a) revive anything not in force or existing at the time at which the repeal takes effect; or"; *Interpretation Act, 1978*, 1978, c. 30, par. 16(1) (a).

parable to paragraph 35(a) of the Canadian Act when the *Craxfords* case was heard, Canadian courts would be all the more likely to follow the decision rendered in the *Craxfords* case were a similar issue put to them for decision in Federal matters.

Now, let's consider a repeal and simultaneous replacement of *The Statute of Frauds*. Suppose, for instance, *The Statute* exists and covers only certain types of contracts. Suppose, also, that *The Statute* is repealed and replaced by a new one that covers additional types of contracts. Would contracts then already in existence be affected on the basis of their new inclusion within the purview of *The Statute*? Could it not be argued that paragraph 36(d) of the Federal *Interpretation Act* operates to cause the application of the new law to those contracts?

Indeed, the *Upper Canada College* v. *Smith*[86] case might be viewed as technically inapplicable in the circumstances. As will be remembered, the issue at bar in that case had come into being as a result of the primary enactment of *The Statute of Frauds*; not as a result of its repeal and replacement. Thus, there was not and could not be, in that case, any resort to provisions such as those of paragraph 36(d) of the Federal *Interpretation Act*.[87] Then, could it not also be argued, on the authority of the *Craxfords* case, that *The Statute*, being a purely procedural enactment, is subject to the provisions of paragraph 36(d) and therefore applicable to things having taken place prior to the repeal-replacement?

In all likelihood, however, courts would probably resolve the difficulty by resorting to the adaptability test provided for in paragraph 36(d) and refuse to apply the new enactment.[88]

All in all, thus, the provisions of section 35 and of paragraph 36(d) of the Federal *Interpretation Act* would probably not, as far as the operation in time of *The Statute of Frauds* is concerned, affect the outcome of the common law cases previously

86. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.).

87. At the time the *Upper Canada College* case was decided, the Ontario *Interpretation Act*, 1914 R.S.O., c. 1 contained a provision similar to par. 36(d) of the Federal *Interpretation Act*, 1970 R.S.C., c. I-23. Indeed, see par. 15(c) of the Ontario Act.

88. Note that the test is one of adaptability and not retrospectivity. That test will be discussed later. See also *Wenger* v. *Le Master*, (1963) 36 D.L.R. (2d) 277 (B.C. Sup. Ct.).

dealt with regarding that question. What would be, now, the effect of the same provisions on *The Statute of Limitations*? This will next be discussed.

### 2. The Statute of Limitations

In their resolution of issues owing their existence to the operation in time of *The Statute of Limitations*, Canadian courts very seldom resort to the rules of transitional law that are found in the various interpretation acts in force in Canada.[89] And thus, again, only approximations will be possible.

Still, the Supreme Court of Canada was, in the 1959 case of *Sommers* v. *The Queen*,[90] expressly asked to consider the potential effects of paragraph 19(1) (c), now paragraph 35(c), of the Federal *Interpretation Act* with respect to a limitation period.[91] More precisely, the Court was asked whether paragraph 19(1) (c) had the effect of continuing a limitation period beyond its own repeal, the repeal having taken place when the limitation period was still running. In the circumstances of the case, the proceedings were, if such was the effect of paragraph 19(1) (c), time-barred. Fauteux did not think that paragraph 19(1) (c) could operate in that fashion:

> The provisions of s. 19(1) (c) of the *Interpretation Act* deal with substantive rights which, subject to the qualifications of the opening words of the section, they aim to protect against the consequences of the repeal of the Act under which their existence is claimed. Had the time limit under the former Code expired before the new Code came into force, the question, then being entirely different from the one here considered, would call for other considerations. In the circumstances of this case, the right claimed

89. This phenomenon can probably be explained by the fact that Canadian courts have based their decisions on early British precedents that did not refer to the British *Interpretation Act*. Moreover, there was nothing comparable to par. 36(d) of the Federal *Interpretation Act* in the British *Interpretation Act, 1889*, 52-53 Vict., c. 63, at the time those early British cases were decided; there still is no such provision in the British *Interpretation Act, 1978*, 1978, c. 30. Some degree of care, therefore, should be had in applying British precedents to instances involving the operation of *The Statute of Limitations* in Canadian jurisdictions.

90. *Sommers* v. *The Queen*, [1959] S.C.R. 678. Fauteux, J., however, implied, at p. 688, that the absence of a statutory limitation period might give application to the common law principle *"nullum tempus occurrit regi"*. To this extent, at least, there may be a difference between cases concerned with civil matters and those concerned with criminal matters.

91. *Interpretation Act*, 1952 R.S.C., c. 158, par. 19(1) (c).

> on behalf of appellants never came into existence. The two facts conditioning the coming into play of the statutory limitation, i.e., the expiration of the time limit and the failure to have, within the same, commenced the proceedings, never came and never could possibly come into being, because of the change in the adjective law.[92]

Paragraph 19(1) (c), thus, could not be used to continue a limitation period for the sole sake of that limitation period. Still, it is apparent from Fauteux's J., statement that paragraph 35(c), then 19(1) (c), of the Federal *Interpretation Act* would operate to effect the same results as those arrived at in *Kearley* v. *Wiley*.[93]

In other words, paragraph 35(c), then 19(1) (c), would be available to protect a vested defence resulting from a spent limitation period against a new limitation period passed into law after the expiry of the earlier one and otherwise allowing an action regarding the right of action in respect of which the earlier limitation period has lapsed.[94]

The *Interpretation Act*, therefore, would leave *Kearley* v. *Wiley* unaffected. What about the cases of *Stephenson* v. *Parkdale Motors*,[95] *McGrath* v. *Scriven*,[96] *Dixie* v. *Royal Columbian Hospital*[97] and of *Glynn* v. *City of Niagara Falls*?[98]

First, *Parkdale Motors*: Paragraph 36(d) of the Federal *Interpretation Act* would apply to the circumstances of a like case in Federal matters and would require results different than those which were arrived at in the actual instance, just as the common

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92. *Sommers* v. *The Queen*, [1959] S.C.R. 678, Fauteux J., 689.

93. *Kearly* v. *Wiley*, [1931] O.R. 167 (Ont. Sup. C. App. Div.). At the time the *Kearley* case was decided, par. 13(c) of the Ontario *Interpretation Act*, 1927 R.S.O., c. 1, was more or less the counterpart to what is now par. 35(c) of the Federal *Interpretation Act*, 1970 R.S.C., c. I-23.

94. In *Yew Bon Tew* v. *Kenderaan Bas Mara*, (1982) 3 W.L.R. 1026 (P.C.) the Judicial Committee of the Privy Council applied par. 30(1) (b) of the Malaysia *Interpretation Act*, 1967, for exactly that purpose. Paragraph 30(1) (b) of the Malaysia *Interpretation Act* somewhat corresponds to par. 35(c) of the Federal *Interpretation Act*.

95. *Stephenson* v. *Parkdale Motors*, (1924) 4 D.L.R. 1201 (Ont. Sup. C. App. Div.).

96. *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.).

97. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.).

98. *Glynn* v. *City of Niagara Falls*, (1914) 31 O.L.R. 1 (Ont. Sup. C. App. Div.).

law would also require according to the cases of *The Ydun*[99] and *The King* v. *Chandra Dharma.*[100] Indeed, paragraph 36(d) provides that where an enactment is repealed and a new one is substituted for the old one, the procedure established by the new enactment is applicable in relation to matters having taken place before the repeal, unless that procedure cannot be adapted to the circumstances in respect of which its application is sought.[101]

That adaptability test came up for consideration before the Supreme Court of Canada in *R.* v. *Ali.*[102] In the instance, the majority of the Bench thought that paragraph 36(d) could not be applied so as to prevent the prosecution from using the results of a breath sample test validly taken at the time the proceedings were initiated even if, later on and pending proceedings, a new enactment was passed requiring that two such tests be taken less than fifteen minutes apart before their results could be used to constitute *prima facie* evidence against an accused. The new evidence requirements were not adaptable to the proceedings because, at the time they were passed into law, it was no longer physically possible to comply with them. Referring to paragraph 36(d), Pratte J., said:

> It prescribes that the retrospective operation of procedural enactments shall not be absolute, but will take place only to the extent that the new rules of procedure may be adapted to the proceedings taken in respect of the matter that has occurred before the new rules came into effect; this clearly means that the new procedure shall not apply retrospectively if or to the extent that it cannot be adapted. Here the new s. 237 requires two samples of breath while the old s. 237 allowed for only one. Clearly the new procedure cannot be adapted: therefore it does not apply to a sample of breath taken pursuant to the old s. 235.[103]

Should, therefore, a case such as the *Stephenson* case come up for judicial consideration in Federal matters, paragraph 36(d) would be applicable to require results different than those actually

99. *The Ydun*, 1899 P. 236 (C.A.). At the time that case was decided, there was nothing comparable to par. 36(d) of the Federal *Interpretation Act* in the British *Interpretation Act*, 1889.

100. *The King* v. *Chandra Dharma*, (1905) 2 K.B. 335 (C.A.).

101. In *Stephenson* v. *Parkdale Motors*, (1924) 4 D.L.R. 1201 (Ont. Sup. C. App. Div.), the Court had a provision comparable to what is now par. 36(d) of the Federal *Interpretation Act* to resort to: see par. 15(c) of the Ontario *Interpretation Act*, 1914 R.S.O., c. 1.

102. *R.* v. *Ali*, (1979) 27 N.R. 243 (Sup. C.C.).

103. *Id.*, Pratte J., 255. See also Pratte J., 254.

arrived at in that case. Indeed, there are, in cases such as the *Stephenson* case, no adaptability problems that would seem to rule out the main object of paragraph 36(d). In the instance, it was not physically impossible to comply with the new limitation period; there would have still been some time left in which to initiate an action even if that limitation period had been applied to the circumstances of the case. In such circumstances, paragraph 36(d) would command the application of the new procedure.

Likewise, that paragraph would be applicable to cases such as the *McGrath* v. *Scriven*[104] case. But, here, paragraph 36(d) would attract the same results as those actually arrived at in that case; the application of the new law.[105]

Now, the *Dixie* case: As will be remembered, the B.C. Court of Appeal refused, in that instance, to apply a new limitation period to a pre-existing cause of action because the new limitation period left, as of its own coming into force, no time within which to still initiate the action. Moreover, it will also be remembered that, on the basis of the common law cases of *The Ydun*,[106] *The King* v. *Chandra Dharma*,[107] and of *McGrath* v. *Scriven*,[108] the soundness of the same case was put to question.

Paragraph 36(d) will provide an answer. Were not the circumstances of the *Dixie* case such that it was physically impossible to comply with the new limitation period there at issue as of the very coming into force of that limitation period? Then, is not the *R.* v. *Ali*[109] case directly applicable? It should be. Thus, a new limitation period, though merely procedural, would not, in Federal matters, apply to bar an action in circumstances such as those at issue in the *Dixie* case. Indeed, such a new limitation period would not meet the adaptability test applied by the Supreme Court of Canada in the *Ali* case. In other words, paragraph 36(d) would, in Federal matters, support a decision such

104. *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.).

105. See s. 15 of the N.S. *Interpretation Act*, 1900 R.S.N.S., c. 1.

106. *The Ydun*, 1899 P. 236 (C.A.).

107. *The King* v. *Chandra Dharma*, (1905) 2 K.B. 335 (C.A.).

108. *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.).

109. *R.* v. *Ali*, (1979) 27 N.R. 243 (Sup. C.C.).

as that which was rendered by the B.C. Court of Appeal in *Dixie* v. *Royal Columbian Hospital.*[110]

Then, the following question automatically springs up: what is the limitation period applicable in such circumstances? It certainly is not the new one. But, it would seem that the earlier one is equally inapplicable. Indeed, the case of *Surtees* v. *Ellison*[111] is fully pertinent in such circumstances and, according to that decision, the earlier limitation period is, after its repeal, deemed to have never existed. The consequence that seems to follow, therefore, is that, in the absence of an otherwise applicable catch-all limitation period, there is no limitation period applicable to causes of action such as that which was under the scrutiny of the Court in the *Dixie* case. This, of course, may not be the ideal situation. However, legislative action as suggested further in this paper would cure this defect.

Finally, *Glynn* v. *City of Niagara Falls.*[112] The reasoning suggested with respect to the *Dixie* case is applicable here.[113] Again, therefore, paragraph 36(d) would support a decision such as that which was handed down in that case were a comparable issue submitted to a Court in Federal matters. In the circumstances of such a case, as an action is assumed to have been validly initiated before the enactment of the new limitation period, there is no need to determine which limitation period is applicable.

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110. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.). See subs. 13(3) of the B.C. *Interpretation Act*, 1936 R.S.B.C.S., c. 1. Subs. 13(3) differs somewhat from today's par. 36(d) of the Federal *Interpretation Act*. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. Ct. C.) has established a common law adaptability test but the enactment there at issue was *The Statute of Frauds*, an enactment which the Court thought was concerned with the substantive rights of the parties, not a procedural enactment such as *The Statute of Limitations*. Technically, therefore, the *Upper Canada College* case could have been viewed as inapplicable to *Statute of Limitations* cases such as the *Dixie* case. In this respect, *The Interpretation Act* resolves any subsisting doubt.

111. *Surtees* v. *Ellison*, (1829) 109 E.R. 278 (K.B.) See note 80 above.

112. *Glynn* v. *City of Niagara Falls*, (1914) 31 O.L.R. 1 (Ont. Sup. C. App. Div.). Paragraph 35(b) of the Federal *Interpretation Act* could also be invoked to justify the application of the earlier limitation period.

113. In the *Glynn* case, not only was an action already validly taken at the time the new limitation period was passed into law, but the said new limitation period left, as of its own coming into force, no time within which to still initiate an action. See also the slightly related case of *Martinoff* v. *Gossen*, (1979) 1 F.C. 652 (T.D.), Collier J., at pp. 658-659.

Section 35 and paragraph 36(d) of the Federal *Interpretation Act*, it seems, would, as far as *The Statute of Limitations* is concerned, affect only the *Stephenson* case.[114]

It is unlikely, therefore, that greater reliance by courts on the transitional law stipulations of the Federal *Interpretation Act* would operate any significant change to the common law rules thus far dealt with; and, this is true with respect to both *The Statute of Frauds* and *The Statute of Limitations*.

But, what were those rules? Lets now sum them up.

## CONCLUSION

1. *The Statute of Frauds*: *The Statute of Frauds* is a *Statute* the nature of which is uncertain. For example, it was held to be a procedural *Statute* for the purpose of the determination of the *"lex fori"*.[115] But, in relation to the effects of its primary enactment on pre-existing contracts, it was considered to be a *Statute* concerned with the substantive rights of the parties to such contracts.[116] Yet, it was viewed as a procedural enactment for the purpose of determining the effects of its repeal on actions initiated before the repeal but not actually heard prior to the said repeal.[117]

2. *The Statute of Frauds* does not affect contracts entered into prior to its own enactment. In this respect, it does not matter whether the cause of action, for example a breach of contract, has taken place before or after the enactment of *The Statute*.[118]

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114. It would probably also prevent *Dixie* v. *Royal Columbian Hospital*, from being reversed on the basis of cases such as *The Ydun*, *The King* v. *Chandra Dharma* and *McGrath* v. *Scriven*.

115. *Leroux* v. *Brown*. (1852) 138 E.R. 1119 (C.P.).

116. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.).

117. *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing Company Ltd.*, (1954) 3 All E.R. 17 (Q.B.).

118. *Upper Canada College* v. *Smith*, (1921) 57 D.L.R. 648 (Sup. C.C.), Duff J., at p. 651.

In this sense, *The Statute* does not affect acquired rights and pre-existing contracts are, even after the enactment of *The Statute*, enforced as they would have been had it not been for the enactment of *The Statute*. Of course, sufficiently worded for the purpose, *The Statute* would affect acquired rights.

As the pertinent provisions of the Federal *Interpretation Act*[119] are not applicable in the case of the primary enactment of *The Statute*, the latter rules are strictly common law rules.

3. The repeal of *The Statute of Frauds* clears the way to proceedings on the basis of contracts that would not, but for the repeal, be enforceable. This remains true even in cases where the repeal takes place pending proceedings, provided the case is not actually heard at the time of the repeal. However, if the repeal should take place only after the case is actually heard, the action would in all likelihood be dismissed because, then, a vested defence would have accrued to the defendant prior to the repeal.[120]

Finally, it is doubtful that the transitional law stipulations of the Federal *Interpretation Act*[121] would affect the foregoing common law rules were the repeal to take place in Federal matters.[122]

4. *The Statute of Limitations*: *The Statute of Limitations* is a procedural enactment.[123]

5. A new limitation period is, at common law, applicable to a pre-existing cause of action in all cases where the new limitation period is passed into law at a time when an earlier limita-

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119. *The Interpretation Act*, 1970 R.S.C., c. I-23, s. 35. Section 35 is not applicable to effect the protection of rights acquired under the common law.

120. *Craxfords (Ramsgate) Ltd.* v. *Williams and Steer Manufacturing Company Ltd.*, (1954) 3 All E.R. 17 (Q.B.).

121. *The Interpretation Act*, 1970 R.S.C., c. I-23, par. 36(d).

122. Canadian courts would probably follow British precedents.

123. *The Ydun*, 1899 P. 236 (C.A.); *The King* v. *Chandra Dharma*, (1905) 2 K.B. 335 (C.A.); *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.); *Sommers* v. *The Queen*, [1959] S.C.R. 678; see however, *Yew Bon Tew* v. *Kenderaan Bas Mara*, (1982) 3 W.L.R. 1026 (P.C.); *Quinn* v. *Monaghan*, (1980) 27 Nfld. and P.E.I. Rep. 13 (Nfld. Sup. C.T.D.); *Perrie* v. *Martin*, (1983) 42 O.R. (2d) 127 (Ont. C.A.).

tion period is still running with respect to that right of action.[124] Thus, existing rights in a limitation period are not protected.[125]

In this respect, paragraph 36(d) of the Federal *Interpretation Act*[126] would, in Federal matters, be applicable to effect the same results.

6. A new limitation period is not, at common law, applicable to a pre-existing cause of action in cases where an action has already been validly initiated with respect to that right of action before the enactment of the new limitation period.[127]

In Federal matters, either paragraph 35(b) or 36(d) of *The Interpretation Act* would, in such a case, apply to effect the same results.[128]

7. A new limitation period is not, at common law, applicable to a pre-existing cause of action in cases where, as of the time of its own enactment, the new limitation period leaves no time within which to still initiate the action.[129]

In Federal matters, paragraph 36(d) of *The Interpretation Act*[130] would operate to effect the same results.

8. A new limitation period does not, at common law, revive a right of action in respect of which an earlier limitation period has already lapsed at the time the new one is passed into law.[131]

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124. *The Ydun*, 1899 P. 236 (C.A.); *The King* v. *Chandra Dharma*, (1905) 2 K.B. 335 (C.A.); *McGrath* v. *Scriven*, (1921) 1 W.W.R. 1075 (Sup. C.C.); *Sommers* v. *The Queen*, [1959] S.C.R. 678. This is also true when a new limitation period is passed into law where none existed previously.

125. In other words no one has a right to the permanence of the law. See *Gustavson Drilling (1964) Ltd.* v. *M.N.R.*, (1977) 1 S.C.R. 271, Dickson J., at p. 282.

126. *The Interpretation Act*, 1970 R.S.C., c. I-23.

127. *Glynn* v. *City of Niagara Falls*, (1914) 31 O.L.R. 1 (Ont. Sup. C. App. Div.).

128. Par. 36(d) would effect that result on the basis of the interpretation given to it by the majority in *R.* v. *Ali*, (1979) 27 N.R. 243 (Sup. C.C.).

129. *Dixie* v. *Royal Columbian Hospital*, (1941) 1 W.W.R. 389 (B.C.C.A.).

130. See note 128, *supra*.

131. *Kearley* v. *Wiley*, [1931] O.R. 167 (Ont. Sup. C. App. Div.). See also notes 49 and 93, *supra*.

Paragraph 35(b) of the Federal *Interpretation Act*[132] would operate to effect the same result.

9. As the rules governing the operation in time of *The Statute of Limitations* leave it uncertain, in many cases, which limitation period is applicable in any particular instance, section 36 of the Federal *Interpretation Act* should be amended to provide that where a new limitation period is enacted replacing an earlier limitation period, the earlier limitation period is applicable to all causes of action having taken place prior to the enactment of the new one.

Quebec, for example, has legislated on that specific point but, has opted for the applicability of the later limitation period.[133]

Legislation as suggested above would, of course, dissipate a fair deal of the uncertainty that characterizes the area of the law to which the present paper was addressed. But, until then, it is hoped that the foregoing comments will serve the same purpose; at least in part.

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132. In *Sommers* v. *The Queen*, [1959] S.C.R. 678, Fauteux J., suggested that par. 35(c) would also effect the purpose. See *Yew Bon Tew* v. *Kenderaan Bas Mara*, (1982) 3 W.L.R. 1026 (P.C.).

133. *Interpretation Act*, 1977 R.S.Q., c. I-16, s. 13. Section 13 is based on the adaptability test and thus retains a relative degree of uncertainty. Providing for the application of the limitation period in force at the time the pertinent cause of action takes place has the advantage of completely removing uncertainty.