

## Tolling Provision Held Applicable Even Though Prisoner Had Legal Capacity to Sue

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cases which deem ineffective, contractual waiver of the right to notice and a hearing prior to seizure of certain types of property.

Additionally, the practitioner is urged to familiarize himself with *In re Frutiger*, a Court of Appeals decision which apparently injects fresh thought into an area of law generally understood to be well settled. Therein, the Court upheld the withdrawal, prior to probate decree, of a waiver of citation and consent to probate, despite the absence of any showing of fraud, duress, misrepresentation or other basis for vitiating the waiver, where the status quo remained unchanged, *i.e.*, no interested party's rights were prejudiced.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, *viz.*, to key the practitioner to significant developments in the procedural law of New York.

The Table of Contents is designed to direct the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

#### ARTICLE 2 — LIMITATIONS OF TIME

*CPLR 208: Tolling provision held applicable even though prisoner had legal capacity to sue.*

Under CPLR 208, the statute of limitations is tolled during a disability due to imprisonment on a criminal charge or conviction for a term less than for life.<sup>1</sup> In *Ortiz v. LaVallee*,<sup>2</sup> a recent Second Circuit decision, the court was confronted with the question of whether the tolling provision was intended to apply even where a prisoner had the legal capacity to bring an action while incarcerated. Plaintiff had instituted this action under the Federal Civil Rights Act of 1871.<sup>3</sup>

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<sup>1</sup> The pertinent language of CPLR 208 provides:

If a person entitled to commence an action is, at the time the cause of action accrues . . . imprisoned on a criminal charge or conviction for a term less than for life, and the time otherwise limited for commencing the action is three years or more . . . the time within which the action must be commenced shall be extended to three years after the disability ceases. . . . The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues. . . .

<sup>2</sup> 422 F.2d 912 (2d Cir. 1971).

<sup>3</sup> 42 U.S.C. § 1983 (1964). Plaintiff, in his complaint, alleged that in July of 1965 he was assaulted and mistreated by prison officials while incarcerated in Auburn State Prison.

The cause of action had arisen in July, 1965, but the complaint was not filed until August, 1969.

The timeliness of an action commenced under the Civil Rights Act is governed by the statute of limitations which the state courts would apply in a similar state action.<sup>4</sup> It was determined that the plaintiff's suit would be subject to the three-year limitation period embodied in CPLR 214(2).<sup>5</sup> It is therefore evident, that since the complaint was not filed within three years from the date the cause of action arose, the suit would be barred unless the tolling provision of CPLR 208 were invoked.

It was the contention of the state, that the applicability of CPLR 208 is limited to those situations where New York law would preclude an imprisoned felon from initiating a suit,<sup>6</sup> and that the New York "civil death" statute does not debar a state prisoner from suing under the Federal Civil Rights Act. Thus, since plaintiff had the legal capacity to bring the action while incarcerated, the toll should not be available.

Rather than adopt the seemingly tenable position of the state, the court concluded that practical considerations mandated a literal application of the tolling provision. The decision relied upon the legislative intent as evidenced by an advisory committee report pertaining to the adoption of CPLR 208.<sup>7</sup> The report alluded to the impeditive difficulties which a prisoner would be confronted with upon attempting to bring an action during incarceration.<sup>8</sup>

Literal interpretation of CPLR 208 is certainly warranted in view of the pragmatic considerations.

### ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

#### *CPLR 302: Dual jurisdictional aspects of matrimonial action upheld.*

Matrimonial actions have a dual function: (1) determination of the parties' marital status and (2) provision of support for the plaintiff. In rem jurisdiction empowers a court to grant the first form of

<sup>4</sup> See *Swan v. Board of Higher Educ.*, 319 F.2d 56 (2d Cir. 1963).

<sup>5</sup> CPLR 214(2) provides that "an action to recover upon a liability, penalty or forfeiture created or imposed by statute . . ." must be commenced within three years.

<sup>6</sup> See N.Y. CIV. RIGHTS LAW § 79 (McKinney Supp. 1970).

<sup>7</sup> SECOND REP. 58.

<sup>8</sup> The provisions for extension because of the existence of the stated disabilities present controversial policy questions but the committee concluded that no change should presently be made in the grounds for extension. . . . As to a person imprisoned, legal capacity to sue, if it exists, is only a theoretical right. Litigants have difficulty enough, though they be at large, tracking down their obligors and determining the nature of the liability and where, when and whether to sue.