

CPLR 210(b): Held To Be a Tolling Provision

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process under appropriate statutory provisions, such as Sections 253 and 254 of the Vehicle and Traffic Law.²⁰

In *Ellis v. Riley*,²¹ a case decided recently, but governed by the CPA, the supreme court, Kings County, ruled that if the driver of an automobile owned by a non-resident gives the non-resident owner's address incorrectly, and the plaintiff is not able to discover the non-resident's correct address, then the defendant is not amenable to process within the meaning of Section 253 of the Vehicle and Traffic Law. Hence, CPA § 19(1) was inapplicable and, during the period of time it took the plaintiff to discover the non-resident's address, the statute of limitations was tolled.

Although the CPLR was inapplicable to *Ellis*, the decision hints that the rule would be the same under CPLR 207(3),²² assuming, of course, due diligence on the part of the plaintiff.

CPLR 210(b): Held to be a tolling provision.

CPLR 210(b) provides that the "period of eighteen months after the death . . . of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his executor or administrator." This provision is "substantially unchanged"²³ from its predecessors, CPA §§ 12 and 21, which were uniformly held to mean that the death of the potential defendant immediately tolled the statute of limitations for eighteen months.²⁴

Regardless of the legislative and decisional history surrounding this section, the supreme court, Bronx County, in *Schwartz v.*

²⁰ *Harvey v. Fussell*, 13 Misc. 2d 602, 177 N.Y.S.2d 234 (Sup. Ct. Queens County), *aff'd*, 7 App. Div. 2d 742, 181 N.Y.S.2d 198 (2d Dep't 1958). Section 253(1) provides that when a non-resident's motor vehicle is involved in an automobile accident in New York, jurisdiction may be had over him by service of process on the Secretary of State. Section 253(2) provides that such service is sufficient if notice of service, a copy of the summons and a copy of the complaint are sent by or for the plaintiff to the defendant by registered mail with return receipt requested. Section 254 makes the provisions of section 253 applicable to service on a resident absent from the state for more than thirty days. It has been ruled that the giving of an incorrect address at the time of the accident estops the defendant from claiming as an affirmative defense plaintiff's non-compliance with section 253.

²¹ 53 Misc. 2d 615, 279 N.Y.S.2d 382 (Sup. Ct. Kings County 1967).

²² CPLR 207(3), similar to CPA § 19, makes the tolling provision of 207 inapplicable where "jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state."

²³ FIFTH REP. 46.

²⁴ For a succinct analysis of the history of CPA §§ 12 and 21, see *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 285-87 (1966).

Public Administrator,²⁵ read CPLR 210(b) as granting the injured party an *extension* of eighteen months after the potential defendant's death to initiate an action in the event that the statute of limitations expired during that period.²⁶ The appellate division, first department, reversed, and held that CPLR 210(b), as did its predecessors, tolls the statute of limitations for an eighteen-month period in the event of the potential defendant's death.²⁷

CPLR 214(7): Period of limitation is a condition precedent.

CPLR 214(7) states that an action to annul a marriage on the ground of fraud must be commenced within three years of the discovery of the fraud.²⁸ As with all periods of limitation, it must be determined whether this statutory period constitutes a statute of limitations or a condition precedent. If it is a statute of limitations, it is only a *limitation* on the cause of action and must be asserted as a defense. But, if it is a condition precedent, it is an *ingredient* of the cause of action which the plaintiff must establish as part of his case. If he cannot establish that the suit was brought within the three-year period, the cause of action is extinguished completely. A general test to ascertain the nature of the period is to look to the common law. If the cause of action was known at common law, the limiting period is merely a statute of limitations. But, if a statute created the cause of action and attached a limitation of time to the commencement of the action, then the limitation period is a condition precedent.²⁹

Although it seems that at common law there was no right to annul a marriage on the ground of fraud, and, consequently, any period of limitation would be a condition precedent,³⁰ in the 1910 decision of *McNair v. McNair*³¹ it was ruled that this period was a defense, which, if not raised, was waived. This position was affirmed in 1959 in the case of *Rogers v. Rogers*.³²

²⁵ 50 Misc. 2d 200, 266 N.Y.S.2d 873 (Sup. Ct. Bronx County 1966).

²⁶ *E.g.*, if the defendant died with one year left for the plaintiff to sue, under prior law the plaintiff would have one year and eighteen months from the date of the defendant's death in which to commence his action. However, under the interpretation given CPLR 210(b) by the supreme court in *Schwartz*, the plaintiff would only have a total of eighteen months from the defendant's death in which to sue.

²⁷ *Schwartz v. Public Adm'r*, 27 App. Div. 2d 913, 278 N.Y.S.2d 968 (1st Dep't 1967) (memorandum decision).

²⁸ The section is based upon CPA § 49(9), and no change was intended from the CPA. SECOND REP. 69; FIFTH REP. 55. Section 1750 of the Code of Civil Procedure provided that an action to annul a marriage for fraud could be initiated "at any time." This language was kept until the CPA was amended in 1955. See N.Y. Sess. Laws 1955, ch. 257.

²⁹ See McLaughlin, *Annual Survey, New York Practice*, 15 SYRACUSE L. REV. 381, 393 (1963).

³⁰ See *Montgomery v. Montgomery*, 3 Barb. 132 (N.Y. Ch. 1848).

³¹ 140 App. Div. 226, 125 N.Y.S. 1 (2d Dep't 1910).

³² 19 Misc. 2d 487, 187 N.Y.S.2d 575 (Sup. Ct. Nassau County 1959).