

**Statute of Limitations--Section 21 of New York Civil Practice Act  
Held Applicable to Suspend Two-Year Period of Limitations in  
Wrongful Death Action (McDonough v. Cestare, 3 A.D.2d 201 (2d  
Dep't 1957))**

St. John's Law Review

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Perhaps the most significant problem raised by the present case is the interpretation to be given the words "subject-matter." If "subject-matter," as used in the statute, has a broader meaning than "issue," as used in the common law, possible applications of the statute are proportionately increased. The relation of lunacy proceedings to probate proceedings is only one aspect of the problem. The relations between other actions which may at first blush seem to be distinctly different in "issue" may be similar in "subject-matter" and testimony may be carried over from one to the other. The exact content and limits to be given "subject-matter" will, however, have to await further judicial pronouncements.



STATUTE OF LIMITATIONS — SECTION 21 OF NEW YORK CIVIL PRACTICE ACT HELD APPLICABLE TO SUSPEND TWO-YEAR PERIOD OF LIMITATIONS IN WRONGFUL DEATH ACTION.—Plaintiff-administratrix brought a wrongful death action against defendant-administrator two years and nine months after the death of plaintiff's intestate. Defendant claimed that the two-year period of limitation under Section 130 of the New York Decedent Estate Law was a bar to the action. Plaintiff relied upon Section 21 of the New York Civil Practice Act which provides that in the case of the death of a person who would have been liable if he had lived, a period of eighteen months is not a part of the period of limitation for the commencement of an action against his executor or administrator. The Appellate Division *held* that Section 21 was applicable and suspended the running of the statute of limitations for eighteen months. *McDonough v. Cestare*, 3 A.D.2d 201, 159 N.Y.S.2d 616 (2d Dep't 1957).\*

When the legislature, which has the power to create a new right otherwise unknown to the law, does so, and in the statute of creation imposes a limitation, such limitation is part of the grant of power. The time within which such action may be instituted is subject to such limitation and to no other limitation.<sup>1</sup> A contrary view holds that the problem is basically one of statutory construction and the fact that the limitation is contained in the statute of creation is but *one* factor to consider in interpreting the legislative intent.<sup>2</sup>

\* *Motion for leave to appeal denied*, 3 A.D.2d 861, 163 N.Y.S.2d 376 (2d Dep't 1957).

<sup>1</sup> *Engel v. Davenport*, 271 U.S. 33 (1926); *The Harrisburg*, 119 U.S. 199 (1886); *Cimo v. New York*, 306 N.Y. 143, 116 N.E.2d 290 (1953); *Gatti Paper Stock Corp. v. Erie R.R.*, 247 App. Div. 45, 268 N.Y. Supp. 669 (1st Dep't), *aff'd mem.*, 272 N.Y. 535, 4 N.E.2d 724 (1936).

<sup>2</sup> ". . . [T]he fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a

An action for wrongful death, unknown at common law,<sup>3</sup> was originally created by Lord Campbell's Act in England in 1846.<sup>4</sup> One year later it became part of New York law.<sup>5</sup> Today, the right of action is found in the Decedent Estate Law<sup>6</sup> and is protected by the New York State Constitution.<sup>7</sup>

Many New York statutes contain their own periods of limitation.<sup>8</sup> The periods of limitation for other actions, usually those which existed at common law, are found in Article 2 of the Civil Practice Act,<sup>9</sup> which also contains many general or beneficial provisions.<sup>10</sup> Whether to apply these provisions *only* to actions whose periods of limitation are also found in Article 2 or to *extend* them to statutes containing their own periods of limitation is a basic problem.

In *Hill v. Board of Supervisors*,<sup>11</sup> the Court of Appeals refused to apply the predecessor of Section 23 of the Civil Practice Act<sup>12</sup> to an action, unknown at common law, which had been created by the legislature. The court said:

. . . [T]hat, as this action is brought under a special law and is maintainable

ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." *Davis v. Mills*, 194 U.S. 451, 454 (1904).

<sup>3</sup> PRASHKER, *NEW YORK PRACTICE* § 24 (3d ed. 1954); PROSSER, *TORTS* § 105, at 705 (2d ed. 1955).

<sup>4</sup> 9 & 10 VICT., c. 93 (1846).

<sup>5</sup> Laws of N.Y. 1847, c. 450.

<sup>6</sup> N.Y. DECED. EST. LAW § 130. Before 1935, if the defendant who by his act or neglect negligently caused the death of the plaintiff also died, the cause of action abated with the death of the defendant. In that year, the action was made to survive the defendant's death and the defendant's estate was held liable for the damages. *Id.* § 118.

<sup>7</sup> N.Y. CONST. art. 1, § 16.

<sup>8</sup> See, e.g., N.Y. INS. LAW § 168(6) (b) (one year to commence an action to recover on a New York standard fire insurance policy); N.Y. LIEN LAW § 189(3) (one year for a hospital to enforce a lien).

<sup>9</sup> See, e.g., N.Y. CIV. PRAC. ACT § 48 (six years to commence an action upon a contract obligation or liability, express or implied); *id.* § 49 (three years to commence an action to recover damages for injuries to property or person arising from negligence); *id.* § 51 (one year to commence an action to recover damages for libel and slander).

<sup>10</sup> See, e.g., N.Y. CIV. PRAC. ACT §§ 17, 23. The material portion of § 17 states that "an attempt to commence an action in a court of record is equivalent to the commencement thereof . . . when the summons is delivered, with the intent that it shall be actually served, to the sheriff. . . ." The material portion of § 23 states that "if an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or termination."

<sup>11</sup> 119 N.Y. 344, 23 N.E. 921 (1890).

<sup>12</sup> See note 10 *supra*.

solely by its authority, the limitation of time is so incorporated with the remedy given as to make it an integral part of it and the condition precedent to the maintenance of the action at all.<sup>13</sup>

Notwithstanding the *Hill* case, the general provisions of Article 2 have been extended to statutes containing their own periods of limitation.<sup>14</sup> The rationale of the *Hill* case has been limited to cases where a new cause of action has been created and the tendency today is to extend the application of the general provisions to statutory enactments containing their own periods of limitation.<sup>15</sup> In so doing, the courts find sanction in legislative intent.<sup>16</sup> The tendency also finds support in the Civil Practice Act itself.<sup>17</sup>

In 1847, the wrongful death statute in New York contained a proviso<sup>18</sup> stating that the action could be brought ". . . provided that every such action shall be commenced within two years. . . ." <sup>19</sup> The

<sup>13</sup> *Hill v. Board of Supervisors*, 119 N.Y. 344, 347, 23 N.E. 921 (1890). The plaintiff brought the action, unknown at common law, under a special law which allowed recovery if one's property was destroyed by rioting. The act stated that no action could be maintained "unless . . . brought within three months after the loss." The action was brought within three months in the county court which dismissed it for want of jurisdiction. After the three months had expired but within one year after the dismissal, the plaintiff tried to bring a new action under the predecessor of § 23 of the Civil Practice Act. The action was dismissed.

<sup>14</sup> *Gaines v. City of New York*, 215 N.Y. 533, 109 N.E. 594 (1915), which involved basically the same fact pattern as the *Hill* case; *Connoly v. Hyams*, 176 N.Y. 403, 68 N.E. 662 (1903); *Hamilton v. Royal Ins. Co.*, 156 N.Y. 327, 50 N.E. 863 (1898), which applied the predecessor of § 17 of the Civil Practice Act (see note 10 *supra*) in an action to recover on a New York standard fire insurance policy.

<sup>15</sup> *Gaines v. City of New York*, note 14 *supra*; *Hamilton v. Royal Ins. Co.*, note 14 *supra*; *Lebrecht v. Orence*, 199 Misc. 1025, 105 N.Y.S.2d 318 (Sup. Ct. App. T. 1951); *Kerr v. St. Luke's Hosp.*, 176 Misc. 610, 28 N.Y.S.2d 193 (Sup. Ct. 1940), *aff'd mem.*, 262 App. Div. 822, 29 N.Y.S.2d 141 (1st Dep't), *aff'd mem.*, 287 N.Y. 673, 39 N.E.2d 291 (1941). *Contra*, *Kaplan v. Uribe*, 286 App. Div. 156, 142 N.Y.S.2d 41 (1st Dep't 1955).

<sup>16</sup> *Hamilton v. Royal Ins. Co.*, *supra* note 14, at 334, 50 N.E. at 865; *Hayden v. Pierce*, 144 N.Y. 512, 516, 518, 39 N.E. 638, 639, 640 (1895).

<sup>17</sup> N.Y. CIV. PRAC. ACT § 2. Section 10 of the Civil Practice Act states that the periods of limitation contained in Article 2 contain all the rules of limitation, except where a different limitation is specially prescribed by law or by the written contract of the parties. This phrase, rules of limitation, has been held to refer to the specific periods of limitation contained in Article 2, *i.e.*, libel and slander, one year, and not to the general provisions. *Titus v. Poole*, 145 N.Y. 414, 40 N.E. 228 (1895); *Hayden v. Pierce*, *supra* note 16; *accord*, *Hamilton v. Royal Ins. Co.*, *supra* note 14. Thus § 10 is not a ground for implying that the general or beneficial provisions are not to be applied to special statutes.

<sup>18</sup> A proviso is a clause which removes special cases from the general enactment and provides for them specially. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4830 (3d ed. 1943). Its purpose is to restrict the general operation of the enacting part of the act. 2 SUTHERLAND, *op. cit. supra* § 4932. The tendency today is to interpret the proviso according to the legislative intent. *Ibid.*

<sup>19</sup> Laws of N.Y. 1847, c. 450, § 2.

proviso was maintained in the death action until 1880 when the latter was brought over into the Code of Civil Procedure with the proviso omitted.<sup>20</sup> The wrongful death action was considered in New York and in other states to be an entirely new cause of action. Hence, all of its provisions were looked upon as conditions precedent.<sup>21</sup> Then, in 1915 the Court of Appeals in *Sharrow v. Inland Lines Ltd.*<sup>22</sup> expressly held that the two-year period of limitation was merely a limitation upon the remedy and not a limitation upon the right itself.<sup>23</sup> The chief reason given was that the omission in 1880 of the proviso by the legislature was not "unintentional" or "ineffectual."<sup>24</sup> Under the principle of the *Sharrow* case, the complaint in a wrongful death action need not now allege that the action was commenced within two years. The defense must be raised by answer.<sup>25</sup>

Section 21 of the Civil Practice Act<sup>26</sup> was passed to make certain that the confusion attendant upon the death of a defendant would not prevent the plaintiff from bringing the action.<sup>27</sup> It does not enlarge the time stated in the statute of limitations but merely suspends its operation.<sup>28</sup> A plaintiff in a wrongful death action has also been allowed, upon the underlying theory of the *Sharrow* case, to avail

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<sup>20</sup> N.Y. CODE CIV. PROC. § 1902.

<sup>21</sup> *The Harrisburg*, 119 U.S. 199, 214 (1886); *Pernisi v. "John Schmalz" Sons (Inc.)*, 142 App. Div. 53, 126 N.Y. Supp. 880 (2d Dep't 1910); *Gulledge v. Seaboard Air Line Ry.*, 147 N.C. 234, 60 S.E. 1134 (1908); *accord*, *Colell v. Delaware, L. & W.R.R.*, 80 App. Div. 342, 80 N.Y. Supp. 675 (2d Dep't 1903). *Contra*, *Chiles v. Drake*, 59 Ky. 146 (1859).

<sup>22</sup> 214 N.Y. 101, 108 N.E. 217 (1915).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.* at 105, 108 N.E. at 218. Furthermore, other reasons were that the action had been made a constitutional right by the people; the novelty of the action in the courts had disappeared; and the fact that no valid reason existed why the benefits of the general provisions of the Code of Civil Procedure should not be given to a plaintiff in a wrongful death action. *Ibid.*

<sup>25</sup> *Corico v. Smith*, 178 App. Div. 33, 164 N.Y. Supp. 190 (4th Dep't), *modified*, 180 App. Div. 916, 166 N.Y. Supp. 1090 (4th Dep't 1917); *Agresta v. Federal Steam Nav. Co.*, 169 App. Div. 467, 155 N.Y. Supp. 343 (2d Dep't 1915). However, if the death action arises in a foreign state which considers the provisions of the death action as conditions precedent, New York will also consider the provisions as conditions precedent. See *Schwertfeger v. Scandinavian Air Lines*, 186 App. Div. 89, 174 N.Y. Supp. 147 (1st Dep't), *aff'd*, 226 N.Y. 696, 123 N.E. 888 (1919); *McKinney v. Schuster*, 202 Misc. 450, 110 N.Y.S.2d 74 (Sup. Ct. 1952).

<sup>26</sup> The material portion of § 21 states that "the term of eighteen months after the death within this state of a person against whom a cause of action exists . . . is not a part of the time limited for the commencement of an action against his executor or administrator."

<sup>27</sup> See *Butler v. Price*, 271 App. Div. 359, 362, 65 N.Y.S.2d 688, 690 (4th Dep't 1946).

<sup>28</sup> *Id.* at 361, 65 N.Y.S.2d at 690.

himself of Section 19<sup>29</sup> of the Civil Practice Act.<sup>30</sup> However, the general provisions of Article 2 cannot be availed of if the death action contains a provision *expressly* to the contrary.<sup>31</sup>

The instant case strengthens the trend to extend and liberalize the general provisions of Article 2 with respect to statutes containing their own periods of limitation.

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<sup>29</sup> The material portion of § 19 states that "if, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more . . . the time of his absence . . . is not a part of the time limited for the commencement of the action."

<sup>30</sup> *Philips v. Apuzzo*, 241 App. Div. 762, 270 N.Y.S.2d 973 (2d Dep't 1934), *aff'd mem.*, 266 N.Y. 579, 195 N.E. 208 (1935).

<sup>31</sup> *Jones v. 416 Pleasant Ave. Holding Corp.*, 304 N.Y. 893, 110 N.E.2d 886 (1953) (mem. opinion). Although the right to relief in a wrongful death action accrues on the appointment of the executor or the administrator, the death statute specifically provides that the two-year period of limitation is to be computed from the time of the decedent's death. *Id.* at 894.