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Some Aspects of the Period of Limitation Governing the Action for Wrongful Death in New York

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NOTES AND COMMENT

SOME ASPECTS OF THE PERIOD OF LIMITATION GOVERNING THE ACTION FOR WRONGFUL DEATH IN NEW YORK

Under the common law of the Anglo-American jurisdictions the death of a human being as the result of the tortious act of another was not an injury that could be the subject of complaint in civil courts.[1] Moreover the civil action for damages which the decedent could have otherwise maintained abated because death resulted from the personal injuries suffered.[2] In effect the rules thus stated rendered the tortfeasor immune from civil liability for the ultimate consequences of his wrongful act while subjecting the decedent's family to unrecompensed deprivation of services and earnings. Those patently harsh and unjust common law principles governed the wrongful death problem for many centuries.

In 1846 the first cause of action for wrongful death was created in England.[3] It is to be noted that the remedy did not arise through decisional evolution but rather by means of legislative enactment. The statutory nature of the cause of action has prompted considerable juridical diminution of its effectiveness through strict construction.[4]

On the thirteenth day of December, 1847, the Legislature of the State of New York created a similar cause of action for wrongful death.[5] Several important changes have been made with regard to the New York death statutes during the past century. In 1880 the statutes were incorporated into the Code of Civil Procedure.[6] The New York State Constitution was revised in 1896 at which time a provision was included therein which guaranteed that the cause of action for wrongful death would not be abrogated nor would the amount of damages recoverable in such actions be subject to statutory limitation.[7] The more simplified Civil Practice Act was substituted

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[1] *See* Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). For an interesting critique of the common rule, see 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 333-336 (1934).

[2] See PROSSER, HANDBOOK OF THE LAW OF TORTS 954-961 (1941).

[3] Lord Campbell's Act, 1846, 8 & 10 VICT. c. 93 (also termed the "Fatal Accidents Act").

[4] As a general rule statutes deemed to be in derogation of the common law are strictly construed. See 3 SUTHERLAND, STATUTORY CONSTRUCTION §§ 5301-5305 (3d ed. 1943) for a treatment of the various aspects of the strict construction rule.

[5] Laws of N. Y. 1847, c. 450.

[6] N. Y. CODE CIV. PROC. §§ 1902-1904.

[7] N. Y. CONST. Art. I, § 15 (1896)—presently located in Art. I, § 16.

for the Code of Civil Procedure in 1920.[8] When this change was made many sections of the old Code were transferred to other statutory headings in the consolidated laws of New York.[9] The death statutes were then shifted to their present location—the Decedent Estate Law.[10]

Briefly, the New York wrongful death statutes permit the personal representative of the deceased to maintain an action for damages in behalf of the surviving spouse and next of kin against a natural person, or corporation, who would have been liable to the decedent for personal injuries occasioned within the state by the defendant's wrongful act, neglect or default, had death not ensued.[11] On the trial of such an action the statutory burden is placed upon the defendant to plead and prove the decedent's contributory negligence if such defense is available.[12] The time limitation for the commencement of the action is two years from the death of the decedent.[13] The damages recoverable are in the nature of compensation to the surviving spouse and next of kin for the pecuniary loss resulting to them because of the death.[14] The section of the law governing the damages recoverable permits the recovery of reasonable medical and funeral expenditures in addition to the approximated pecuniary loss.[15] However, excessive damages may not be awarded.[16] The interest on the judgment runs from the date of the decedent's death.[17]

In addition to the action for wrongful death the personal representative may also prosecute a statutory action for the personal injuries sustained by the deceased.[18] If the decedent had commenced the prosecution of such a claim prior to death the action may be continued by the personal representative.[19] The damages recoverable under these survival provisions are limited to those accruing before death.[20] The maintenance of this action does not preclude the action

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[8] See PRASHKER, NEW YORK PRACTICE § 3 (1947).

[9] For example: The 1913 amendment to § 1780 of the New York Code of Civil Procedure is currently to be found in New York General Corporation Law §§ 224, 225. There are many other such examples.

[10] N. Y. DEC. EST. LAW §§ 130-134.

[11] N. Y. DEC. EST. LAW § 130. This section presupposes that the right of action has not been barred by the statute of limitations, or released, or compromised by the decedent or the next of kin. *See* Fontheim v. Third Ave. Ry., 257 App. Div. 147, 12 N. Y. S. 2d 90 (1st Dep't 1939), *appeal dismissed,* 289 N. Y. 624, 43 N. E. 2d 840 (1942); Pieczonka v. Pullman Co., 89 F. 2d 353 (C. C. A. 2d 1937).

[12] N. Y. DEC. EST. LAW § 131.

[13] N. Y. DEC. EST. LAW § 130.

[14] N. Y. DEC. EST. LAW § 132.

[15] *Ibid.*

[16] *See* Somogyc v. New York Central Ry., 269 App. Div. 923, 57 N. Y. S. 2d 731 (4th Dep't 1945), *aff'd,* 295 N. Y. 790, 66 N. E. 2d 301 (1946).

[17] N. Y. DEC. EST. LAW § 132.

[18] N. Y. DEC. EST. LAW §§ 118, 120.

[19] N. Y. DEC. EST. LAW § 120.

[20] *Ibid.*

for wrongful death.[21] In fact the actions may be consolidated.[22] On the trial of the consolidated actions the personal representative is relieved from the burden of pleading and proving decedent's freedom from contributory negligence even as to the personal injury claim.[23] Where the two claims are joined the verdicts rendered thereon must be separate and distinct.[24] The separation of the verdicts is essential because the damages recovered under the survival statute are deemed assets of the decedent's estate and are subject to decedent's creditor's claims, while the damages recovered under the wrongful death statutes are payable for the direct benefit of the surviving spouse and next of kin and are not subject to the creditor's rights.[25] Since 1935 neither the personal injury or wrongful death causes of action, as prosecuted by the personal representative of the deceased, are subject to abatement by reason of the death of the wrongdoer.[26]

Thus in form the New York wrongful death statutes appear to afford adequate relief from the intolerable common law rules. However, the outward appearance of statutes should be considered in the light of judicial interpretations placed thereon. It is from those considerations that the full effect of the statutory enactments may be determined.

Limitations of space preclude a detailed consideration of the manifold provisions of the New York wrongful death statutes. A fair indication of the manner of judicial interpretation and its effect upon the remedial nature of the statutory cause of action may be obtained through an analysis of one of its more important and controversial requirements. With that thought in mind the two-year period of limitation,[27] which governs the availability of the remedy, has been selected as the subject of analysis here. This requirement is important because the failure to comply therewith places the surviving spouse and next of kin back under the cloud of the common law rule unless, perchance, its operation may be tolled or extended for some good cause. It is controversial because the ever-evolving judicial interpretation of the two-year limitation is, in some important respects, still unsettled and uncertain.

An analysis of the nature and effect of the limitation as to the period of time within which the statutory action for wrongful death must be commenced necessarily involves the consideration of some collateral factors. For example, it is to be remembered that the construction given to the periods of limitation controlling the death statutes of other jurisdictions have little weight in construing the com-

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[21] See N. Y. DEC. EST. LAW § 120.
[22] N. Y. DEC. EST. LAW § 120.
[23] N. Y. DEC. EST. LAW § 131.
[24] N. Y. DEC. EST. LAW § 120.
[25] N. Y. DEC. EST. LAW §§ 120, 130.
[26] See N. Y. DEC. EST. LAW §§ 118, 119.
[27] See N. Y. DEC. EST. LAW § 130.

parable statutory period governing the right of action in New York because the foreign statutory provisions, as interpreted, most generally differ in content and substance.[28] It is to be noted also that the period of limitation governing the New York death statutes begin to run from the decedent's death [29] though it has been frequently stated that the cause of action does not accrue until the letters testamentary of the decedent's personal representative have been granted.[30] This is not an anomaly. The personal representative, though nominal, is a necessary party to the action.[31] Thus, while the right of action vests upon death,[32] it may be prosecuted only by the personal representative of the decedent and that party cannot act in the representative capacity until letters testamentary have been issued.[33]

For many years the courts of New York held the conviction that the two-year period of limitation governing the commencement of the action for wrongful death was something more than a mere statute of limitations. The bases of that conviction were twofold; first, the death statute was considered to be in derogation of the common law and hence must be strictly limited to effectuate only its express terms; [34] and secondly, the express terms of the original statute granted the right of action upon the *proviso* that the action should be commenced within two years from the decedent's death.[35] Consequently, the courts in construing the provision found that compliance therewith was in the nature of a condition precedent to the right

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[28] See Note, 132 A. L. R. 292 (1940).

[29] N. Y. DEC. EST. LAW § 130; Cohen v. Steigman, 249 App. Div. 819, 292 N. Y. Supp. 750 (2d Dep't 1937).

[30] Crapo v. Syracuse, 183 N. Y. 395, 76 N. E. 465 (1906); Barnes v. Brooklyn, 22 App. Div. 520, 48 N. Y. Supp. 36 (2d Dep't 1897).

[31] Rice v. Postal Telegraph-Cable Co., 174 App. Div. 39, 160 N. Y. Supp. 172 (4th Dep't 1916), *aff'd mem.*, 219 N. Y. 629, 114 N. E. 1081 (1916); Davis v. N. Y. C. & H. Ry., 233 N. Y. 242, 135 N. E. 277 (1922).

Note: Under New York Decedent Estate Law § 130, by express provision, a foreign administrator can bring an action for wrongful death without first procuring ancillary letters of administration.

[32] Matter of Meekin v. B. H. Ry., 164 N. Y. 145, 58 N. E. 50 (1900); Matter of Brennan, 160 App. Div. 401, 145 N. Y. Supp. 549 (3d Dep't 1914).

[33] *See* Boffe v. Consolidated Telegraph & El. Subway Co., 171 App. Div. 392, 157 N. Y. Supp. 318 (1st Dep't 1916), *aff'd mem.*, 226 N. Y. 654, 123 N. E. 856 (1919).

Failure to procure the necessary letters testamentary is not correctable by a *nunc pro tunc* order. Smith v. New York Central R. R., 183 App. Div. 478, 171 N. Y. Supp. 64 (2d Dep't 1918). The federal rule is contra. *See* McCarthy v. New York Central R. R., 247 App. Div. 50, 286 N. Y. Supp. 598 (1st Dep't 1936).

[34] This is in keeping with general construction principles adhered to by the courts, namely, that which did not evolve out of the sanctimonious common law past was to be viewed with suspicion.

[35] Laws of N. Y. 1847, c. 450.

of action.[36] There are no cases in point which construe the precise terminology of the original statute. However, several rather interesting cases adopted the condition precedent view by way of *obiter dicta.*[37] When the death statute was incorporated into the Code of Civil Procedure in 1880 the wording of the limitation provision was changed from, ". . . provided that every such action shall be commenced within two years after the death of such deceased person," [38] to, "such action must be commenced within two years after decedent's death." [39] The foregoing change in terminology did not immediately cause the New York courts to change their conviction as to the nature of the limitation. The courts construing the new provision were apparently influenced by the *dicta* which had established the condition precedent view towards the original limitation proviso. In *Pernisi v. Schmalz Sons, Inc.,*[40] wherein the new terminology was construed, it was held that the two-year period was a limitation upon the remedy and upon the right of action. Similarly, the federal circuit court construing the New York death statute in *Kavanaugh v. Folsom,*[41] reached the conclusion that the limitation affected the right and the remedy with the net result that the complaint in the wrongful death action must allege that the suit is brought within the two-year period else a demurrer would lie on the ground that no cause of action was stated.

It is significant that the New York cases following the condition precedent view were all decided in lower appellate courts and that the Court of Appeals never squarely approved the position taken in those courts. However, the condition precedent view has been adopted, and is still followed, in an overwhelming majority of the American jurisdictions.[42] In some of the states the peculiar terminology of the respective limitational provisions fairly sustains the majority position.[43] In most jurisdictions the majority view is upheld on the theory that statutes in derogation of the common law must be strictly construed.[44] A few states adopt the contrary position.[45] The minority view concedes that a wrongful death statute is essentially remedial in nature and should be liberally construed.[46]

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[36] Pernisi v. Schmalz' Sons, Inc., 142 App. Div. 53, 126 N. Y. Supp. 880 (2d Dep't 1910); Kavanaugh v. Folsom, 181 Fed. 401 (S. D. N. Y. 1910).

[37] *See* Williams v. Quebec S. S. Co., 126 Fed. 591 (S. D. N. Y. 1903); Cavanaugh v. Ocean Steam Nav. Co., 13 N. Y. Supp. 540 (Sup. Ct. 1890—not officially reported).

[38] Laws of N. Y. 1847, c. 450.

[39] N. Y. CODE CIV. PROC. § 1902.

[40] 142 App. Div. 53, 126 N. Y. Supp. 880 (2d Dep't 1910).

[41] 181 Fed. 401 (S. D. N. Y. 1910).

[42] See Note, 132 A. L. R. 292 (1940).

[43] *Id.* at 295.

[44] *Ibid.*

[45] See Note, 132 A. L. R. 292, 305 (1940).

[46] *Ibid.*

If an allegation that the action for wrongful death is commenced within the statutory period limited thereon is treated as a condition precedent to the defendant's liability the failure to so allege renders the complaint demurrable on the ground that a cause of action is not stated.[47] It would seem to follow that unless an express tolling or saving provision is included in the death statute an invalid allegation of compliance with the period of limitation would in like manner render the complaint demurrable. A death statute which contains express tolling or saving provisions would be exceptional indeed. Most general statutes of limitations, on the other hand, permit a tolling or extension where the plaintiff is unable to commence his action within the time limited thereon because of some act or omission on the part of the defendant, or because of some personal incapacity or disability of the plaintiff.[48] General statutes of limitation affect the remedy, but do not bar the right of action,[49] therefore such statutes may be waived by the defendant even where an extension or saving provision would be inapplicable.[50] Where the period of time is treated as a limitation upon the right of action as well as upon the remedy it would seem that the express or implied exceptions of the general statutes of limitations could afford no relief.[51] Similarly a waiver of such a limitation would appear to be a nullity. Consequently most of the jurisdictions which adhere to the condition precedent doctrine refuse to imply exceptions to the time requirements and hold the express and implied exceptions to the general statutes of limitations inapplicable to death actions.[52] Some of the states which are espoused to the doctrine that compliance with the time limitational requirements constitutes a condition precedent to the defendant's liability have nevertheless implemented their death statutes with some implied exceptions to the general statute of limitations.[53] In those states there is partial recognition of the arbitrary effect of the majority view.

As previously indicated the lower appellate courts in New York strictly adhered to the condition precedent doctrine for many years. In 1915 the problem was finally placed before the Court of Appeals in *Sharrow v. Inland Lines, Ltd.*[54] In that case the defendant had demurred to the complaint in the wrongful death action upon the ground that a cause of action was not stated because the complaint contained no allegation that the action had been commenced within

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[47] See note 36 *supra.*

[48] For a general treatment of this subject, see PRASHKER, NEW YORK PRACTICE §§ 34-40 (1947).

[49] See 2 CARMODY, NEW YORK PRACTICE § 400 (Perm. ed. 1930).

[50] For a general treatment of waiver, see PRASHKER, NEW YORK PRACTICE §§ 32, 33 (1947).

[51] See Note, 132 A. L. R. 292, 295, 298 (1940).

[52] *Id.* at 295.

[53] See note 51 *supra.*

[54] 214 N. Y. 101, 108 N. E. 217 (1915).

the two-year period limited thereon. The highest court of the state held that the two-year period constituted a limitation upon the remedy but not upon the right of action. The demurrer was overruled. The *ratio decidendi* of the court is extremely interesting. The history of the action for wrongful death in New York was discussed. The court placed great weight upon two factors in that historical development. First, it was pointed out that the right of action had been considered so important that the people of the state had afforded it protective constitutional guarantees.[55] This step was deemed indicative of the fact that the death action had ceased to be special and peculiar in New York. Secondly, the court stressed the fact that when the death statutes were incorporated into the Code of Civil Procedure the terminology of the time limitation had been changed by the legislature from the absolute proviso ". . . that every such action shall be commenced within two years after the death of such deceased person," to, "such action must be commenced within two years after decedent's death." The court felt that such a change in language was not meaningless or unintentional. It was concluded that the time provision, as modified, was intended to become a permanent part of the jurisprudence of the state under the general statutory provisions of the Code. It is submitted that the decision is sound. It is a significant and forward step toward a more liberal construction of a statute that is essentially remedial in nature. The case has been cited with favor on many occasions and has never been criticized or overruled in New York. The transfer of the death statutes from the Code of Civil Procedure to the Decedent Estate Law has not operated to affect or impair the holding because the time limitational provision was transferred without change in terminology.[56]

In effect the *Sharrow* decision stands for the proposition that the period of limitation governing the wrongful death action in New York is in the nature of a general statute of limitations.[57] Through the logic of that construction exceptions to the general statute of limitations have been applied to toll or extend the period limiting the remedy under the death statutes. While the current tendency is toward a more liberal construction the decisions concerned with the applicability of such exceptions clearly indicate the persistence of some vestigial remnants of the era of strict construction. Therefore a brief consideration of these exceptions and the judicial interpretations as to their applicability is essential to a fuller understanding of the construction problem.

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[55] N. Y. CONST. Art. I, § 16.

[56] See N. Y. DEC. EST. LAW § 130.

[57] *See* Streeter v. Graham & N. Co., 263 N. Y. 39, 188 N. E. 150 (1933); see Note, 132 A. L. R. 292, 306 (1940).

Practically speaking, the exceptions to the general statutes of limitation partake of a twofold nature. First, there are exceptions which apply because of some act, event, or omission affecting the cause of action. Secondly, there are exceptions which apply because of some personal disability of the plaintiff or defendant. These exceptions will be considered in that general categorical order.

The general statutes of limitations and the exceptions thereto are to be found in the New York Civil Practice Act. The exceptions which toll or extend the operation of general statutes of limitations because of an act, event, or omission affecting the cause of action are rather numerous. Some of these exceptions have never been construed in connection with the death statute because they are obviously inapplicable.[58] Other such exceptions have been held applicable to the period of limitation governing the statutory cause of action for wrongful death. It is interesting to note that under Section 10 of the Civil Practice Act the general limitation provisions and the exceptions to those provisions are not applicable to situations governed by a statute which contains a special limitation. Judicial construction over a period of years has effected the determination that Section 10 does not prevent the application of the exceptions to statutory causes of action wherein the special time limitation is not in the nature of a condition precedent to the right of action.[59] The period of limitation governing the action for wrongful death is not, under the *Sharrow* doctrine, construed as a condition precedent. Thus the exceptions may be applied to the death statutes. The indicated construction of Section 10 has not been extended to cover exceptions which arise because of the personal disability of the plaintiff in wrongful death action.[60]

In *Kerr v. St. Luke's Hospital*,[61] Section 17 of the Civil Practice Act was held applicable to extend the period of limitation in an action for wrongful death. This section permits service of summons upon the sheriff of the county wherein the defendant resides when service upon the latter had not been effected. The service upon the sheriff must be made before the expiration of the two-year period

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[58] For example: New York Civil Practice Act § 43, which deals exclusively with real property actions.

[59] McKnight v. City of New York, 186 N. Y. 35, 38, 78 N. E. 576 (1906); Matter of Keys, 241 App. Div. 556, 272 N. Y. Supp. 713 (4th Dep't 1934), *aff'd mem.*, 266 N. Y. 583, 195 N. E. 210 (1935). *See also* Kerr v. St. Luke's Hospital, 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 1941), *aff'd mem.*, 287 N. Y. 673, 39 N. E. 2d 291 (1941).

[60] Mossip v. F. H. Clement & Co., 256 App. Div. 469, 10 N. Y. S. 2d 592 (4th Dep't 1939), *aff'd mem.*, 283 N. Y. 554, 27 N. E. 2d 278 (1940). *But consider* Stutz v. Guardian Cab Corporation, 273 App. Div. 4, 74 N. Y. S. 2d 818 (1st Dep't 1947).

[61] 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 1941), *aff'd mem.*, 287 N. Y. 673, 39 N. E. 2d 291 (1941).

governing the death action. Such service acts to extend the period within which service may be made upon the defendant by 60 days from the expiration date of the normal limitational provisions.

Section 19 of the Civil Practice Act operates to toll the general statutes of limitations where the defendant is continuously absent from the state or resides therein under a false name. This section has not been construed in New York as to its effect upon the period of limitations encompassed in the death statutes.

Casey v. American Bridge Co.[62] is a most interesting case treating this problem and it may well serve as a guide to the New York Courts when the situation is presented. That case involved the construction of the Oklahoma death statutes and practice provisions. The State of Oklahoma operates under a general code containing both the practice and death statutes. The Oklahoma Code is akin to the old New York Code of Civil Procedure in that respect. The construction given to the Oklahoma death statute as to its basic nature is comparable to the doctrine enunciated by the New York Court of Appeals in the *Sharrow* case. The Oklahoma Code contains a provision essentially similar to Section 19 of the New York Civil Practice Act. In this instance the fatal accident occurred in Oklahoma. Before service could be effected the defendant fled to Minnesota from whence he did not return. Several years after the expiration of the two-year period limiting the remedy under the Oklahoma death statute the decedent's personal representative instituted the death action in Minnesota. The defendant complained that the action could not be maintained because of the expiration of the statutory period. The Minnesota court, applying the law of the place where the accident occurred, determined that under the law of Oklahoma the period of limitation had been tolled by the defendant's continued absence from that state and, resultantly, the period limiting the availability of the remedy had not expired. Thus the action was held to be maintainable.

Under Section 23 of the New York Civil Practice Act an extension of one year is afforded to recommence suit on causes of action which have been commenced within the time limited thereon and have been terminated in a manner other than a voluntary discontinuance, a dismissal for neglect to prosecute the action, or a final judgment on the merits. This section has been held applicable to actions for wrongful death.[63]

Section 24 of the Act, which deals with the effect of a stay of the commencement of the action, has not been construed in connec-

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[62] 116 Minn. 461, 134 N. W. 111 (1912).

[63] Hoffman v. Delaware & Hudson Co., 163 App. Div. 50, 148 N. Y. Supp. 509 (3d Dep't 1914)—construing § 405 of the New York Code of Civil Procedure which is now § 23 of the New York Civil Practice Act. *See also* Boffe v. Consolidated Telegraph & El. Subway Co., 171 App. Div. 392, 157 N. Y. Supp. 318 (1st Dep't 1916), *aff'd mem.*, 226 N. Y. 654, 123 N. E. 856 (1919).

tion with the death statutes. On the basis of the construction given to other limitational exceptions it would seem to be applicable to death actions should a proper situation arise.

The second category of exceptions to the general statutes of limitations are those which apply because of some personal disability accruing to the plaintiff. In this regard Section 60 of the Civil Practice Act is of utmost importance. This section provides that the general statutes of limitations may be extended because of the insanity, imprisonment for a crime for a term less than life, or infancy of the party to whom the right of action accrued. The maximum time allowed as an extension varies with each of the disabilities but a consideration of such technicalities will not be important for our purposes unless it is finally determined that the disabilities mentioned will extend the period of limitation governing the action for wrongful death. The disabilities of insanity and imprisonment have not been judicially construed in connection with the wrongful death statutes. Prima facie it would seem that such construction will never be required because neither an insane person or a prisoner would be appointed as personal representative of a decedent. However, a recent decision [64] enunciates the doctrine that the extension provisions arising from disabilities run to the real party in interest rather than the *administrator ad prosequendam.* If this doctrine be sound then we may well have construction of the insanity and imprisonment disability provisions in connection with a wrongful death action where the disabled parties are in fact the real parties in interest. The "real party in interest" doctrine will be considered in greater detail at a later stage in this article.

The disability of infancy has been judicially construed with regard to its effect upon the period of limitation contained in the death statutes. The problem is fully treated in *Mossip v. F. H. Clement & Co.*[65] In that case the administratrix was the decedent's widow. She commenced the death action, after the two-year period had expired, solely for the benefit of the decedent's two minor children. The defendant moved to dismiss the complaint on the ground that the cause of action did not accrue within the time limited by law for the commencement of an action thereon. The plaintiff sought to overcome the defendant's motion by reliance upon the infancy of the next of kin for whose benefit the action was commenced. The defendant's motion was granted. On appeal the Appellate Division affirmed the decision of the trial court. The Court of Appeals also affirmed the decision, but without opinion. The crux of the decision was held to lie in the fact that Section 60 of the Civil Practice Act

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[64] Stutz v. Guardian Cab Corporation, 273 App. Div. 4, 74 N. Y. S. 2d 818 (1st Dep't 1947).

[65] 256 App. Div. 469, 10 N. Y. S. 2d 592 (4th Dep't 1939), *aff'd mem.*, 283 N. Y. 554, 27 N. E. 2d 278 (1940).

permitting an extension of the general statutes of limitations where the right of action accrued to an infant could not possibly apply to the wrongful death action because under the death statutes the right to maintain that action accrued to the personal representative of the decedent and not to the parties for whose benefit the action was commenced. Obviously under such construction the benefits of the infancy provisions of Section 60 would never be applicable in death actions because an infant being unable to sue or be sued in his own name could not be appointed as personal representative of the decedent. The decision is harsh and tends to circumvent the remedial intent which prompted the enactment of the death statute.

Another personal disability is to be found in Section 27 of the Civil Practice Act. This section provides that the effect of war on the right of an enemy alien is to extend the period of limitation for the commencement of actions accruing to said alien for the period of the disability. A 1948 amendment to Section 13 of the Civil Practice Act has extended similar protection to those in enemy occupied countries. There has been no construction of the provisions in connection with the death statutes. It should be noted that all of the disabilities embodied in Sections 27 and 60 must exist as of the time of the accrual of the cause of action. This requirement would make the applicability of Section 27 to wrongful death actions unlikely under our present laws because enemy aliens would not be appointed as personal representatives of decedents by the Surrogate.[66]

Thus far it has been indicated that in New York the period of limitation governing the action for wrongful death is in its nature akin to the general statutes of limitations. The exceptions to the general statutes of limitations have been held to affect the period of limitation in the death statutes in properly applicable situations. Where the exception claimed involves a disability personal to the party to whom the right of action accrues the courts have intimated that unless the disability inures to the benefit of the personal representative in his representative capacity the exception is inapplicable. These are basic factors in the analysis of the problem of the construction of the period limiting the remedy in wrongful death actions. There are other factors which remain to be considered which affect that problem in a very real sense.

In 1941 the Military Law of the State of New York was amended to include a war measure—the Soldiers' and Sailors' Civil Relief Act.[67] The provisions of this Act were intended to "maintain, secure, and protect the civil and property rights of persons in the military service." [68] The Act further elaborates upon that enuncia-

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[66] N. Y. CIV. PRAC. ACT § 28. The disability must exist when the right of action accrues.

[67] N. Y. MILITARY LAW §§ 300-323.

[68] N. Y. MILITARY LAW § 300.

tion of the public policy of the state by declaring that "all the provisions of this article shall be liberally construed for the accomplishment of this purpose." [69] These statutes are similar to the current Federal Soldiers' and Sailors' Civil Relief Act [70] and the analogous federal statutes enacted during the first world war which were binding upon the courts of New York at that time.[71] At the present writing the Federal and New York Relief Acts are still in full force and effect. Section 308 of the Military Law is a significant feature of the New York Act. This section provides that the ". . . period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

In *Stutz v. Guardian Cab Corporation*,[72] Section 308 of the Military Law was construed in connection with an action for wrongful death. This decision is important because it may aid in an extension of the liberal construction principles which should be applicable to death actions. It is most appropriate therefore that this case was decided in 1947—the year in which the State of New York observed the 100th anniversary of the enactment of its first death statute.

The factual situation in the *Stutz* case is extremely interesting. In March, 1943, the deceased was struck by a taxicab owned by the defendant corporation and operated by its driver who was also a named defendant in the action. The injuries inflicted were of such a nature that death ensued in a matter of hours. The action was brought by the personal representative of the decedent to recover damages on two causes of action, *i.e.*, for wrongful death and for the personal injuries sustained by the decedent because of the alleged negligence of the defendants. The complaint alleged that the plaintiff administrator was the only child and sole next of kin of the deceased. The action was commenced in September, 1946, more than three years from the date of the decedent's death. It was further alleged in the complaint that the plaintiff was in the service of the Armed Forces of the United States during the period from May, 1942, to March, 1946. The defendants moved to dismiss the complaint on the ground that the action had not been brought within the time limited by law for the commencement of the suit. The motion was granted in the Supreme Court as to both the wrongful death and personal injury claims. On appeal, the Appellate Division determined that in the light of Section 308 of the Military Law the

[69] *Ibid.*

[70] 54 STAT. 1178, 50 U. S. C. APP. §§ 501-590 (1940).

[71] *See* Erickson v. Macy, 231 N. Y. 86, 131 N. E. 744 (1921); Clark v. Mechanic's American Nat. Bank, 282 Fed. 589 (C. C. A. 8th 1922).

[72] 273 App. Div. 4, 8, 74 N. Y. S. 2d 818, 822 (1st Dep't 1947).

action for wrongful death was commenced within the time limited by law. The Supreme Court decision, thus modified, was affirmed with regard to the personal injury claim.

The rationale of the Appellate Division in the *Stutz* case is most impressive. The court recognized the fact that the action for wrongful death exists solely for the benefit of the decedent's surviving spouse and next of kin, though, *pro forma,* the legal representative of the deceased is the party upon whom the statute confers the right to maintain the action. It was indicated that the right to have the personal representative of the deceased sue for wrongful death is a property right of the beneficiary which becomes a part of the beneficiary's estate if the latter dies prior to the recovery. Emphasis is placed upon the fact that the administrator holds the proceeds of the recovery in such action in trust for the "exclusive benefit of the statutory distributees." [73] In the instant case the only beneficiary of the trust was the plaintiff individually as the sole next of kin of the decedent. Thus it was determined that the plaintiff in his individual capacity was the real party in interest in the action. Justice Callahan, speaking for the court, expressed the view that since the first cause of action in the complaint was one ". . . to compensate the plaintiff individually as sole next of kin for his pecuniary loss suffered through the negligent killing of the deceased . . . it logically follows that his rights as the real party in interest are protected by the Soldiers' and Sailors' Civil Relief Acts, Military Law, § 308; U. S. Code Tit. 50, Appendix, § 525, . . . and that these statutes serve to toll the statute of limitations with respect to the cause of action for wrongful death during the time of his military service." [74] Following its determination that the tolling provisions of the Soldiers' and Sailors' Civil Relief Acts inured to the benefit of the real party in interest in the action the court concluded that the plaintiff, in his representative capacity, could avail himself of the benefits which were bestowed upon him in his individual capacity. The court did not intimate that a different conclusion would result where the representative and the real party in interest were not one and the same person. The dismissal of the complaint as to the personal injury claim was affirmed by the Appellate Division. Since the right of action for damages for the personal injuries sustained accrued to the decedent in the first instance, the derivative action instituted by the personal representative was for the benefit of the decedent's estate. It was held that the decedent's estate could not lay claim to the benefits of the Soldiers' and Sailors' Civil Relief Acts on the "real party in interest" theory. The court pointed out that in the personal injury claim the rights sought to be enforced are primarily those of the decedent who was never in military service and that there

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[73] *Ibid.*
[74] *Ibid.*

". . . is no warrant for extending the benefit of these statutes to the deceased civilian or her estate as such." [75]

Under the "real party in interest" doctrine it would seem that the applicability of the personal disability tolling and extension provisions of the general statutes of limitations could be extended to actions for wrongful death if the personal representative and the real party in interest need not be one and the same person. Much depends, therefore, upon the effect that the *Stutz* decision will have upon future judicial consideration of the problem. If that case is to be treated as a singular one, and consequently limited to its particular facts, no extension of the personal disability provisions of the general statutes of limitations will ensue. If, on the other hand, the "real party in interest" doctrine is extended to implement those disability provisions in death actions there remains a serious question as to just how far the courts will go in effectuating such an extension on the basis of the *Stutz* decision.

There were several salient side-issues raised by implication in the *Stutz* case which the court found unnecessary to answer in the course of its deliberation. For example, the court does not clearly indicate what its determination might be if the real party in interest and the administrator, or executor, who institutes an action for wrongful death were not, in fact, the same person. Logically it would appear reasonable that the court's conclusion should be the same. A real party in interest is the owner of a claim.[76] The decision does indicate that the beneficiary has a vested right to have the personal representative of the decedent maintain the death action. One who has such a right may fairly be termed the owner of a claim. Under the Civil Practice Act, with certain specified exceptions, every action must be prosecuted in the name of the real party in interest.[77] One of the specified exceptions arises where the action is brought by an executor or administrator.[78] Therefore the fact that the action is commenced by the personal representative of the decedent does not preclude the existence of another who is really the party beneficially interested in the successful prosecution of the action.

There is a second difficulty which arises out of the *Stutz* decision. It is to be remembered that the court in that case was faced with a situation where the party who claimed the benefit of the tolling provision was the sole next of kin of the decedent. The action for wrongful death is generally recognized as a single action brought to recover all of the damages which accrued to the surviving spouse and all of the next of kin.[79] If there is but one person entitled to such recovery the implementation of a tolling provision does not pose any

[75] 273 App. Div. 4, 10, 74 N. Y. S. 2d 818, 824 (1st Dep't 1947).
[76] See PRASHKER, NEW YORK PRACTICE § 153 (1947).
[77] N. Y. CIV. PRAC. ACT § 210.
[78] *Ibid.*
[79] *See* Whitford v. The Panama R. R., 23 N. Y. 465, 470 (1861).

difficulty with respect to the "single action" consideration. Where one of several parties thus beneficially interested in the recovery could claim the benefits of a tolling provision such as the Soldiers' and Sailors' Civil Relief Act a serious problem is presented. In practice that is the typical situation which would arise. Regrettably that problem was not before the court, hence no solution of it is offered in the *Stutz* case. If the party for whose benefit the tolling provision inures seeks to compel the prosecution of the death action after the period of limitations has barred the remedies of his co-beneficiaries it would seem that the court might adopt any one of three courses of action:

(1) The personal representatives might be permitted to bring the action in behalf of all the parties beneficially interested. Such a course of action would, in effect, resurrect the barred actions by judicial act. It is doubtful whether the courts have the inherent power to accomplish such a resurrection.[80] Moreover, even if the courts possessed the power, it is extremely unlikely that they would attempt to exercise it under the circumstances.

(2) As a matter of policy the action might be held barred as to all parties. It would appear that this course of action would effect an arbitrary deprivation of the property right vested in the party to whom the tolling provision inured. This procedure would avoid the problem of split causes of action but it is questionable whether the courts would have the power or the inclination to adopt it.

(3) The party claiming the benefit of the tolling provision may be allowed to recover the damages for the pecuniary loss resulting to him while the remedies of the co-beneficiaries are to be deemed extinguished. Whether or not this procedure would involve a splitting of the cause of action is a neat question. In New York a claimant may not split his entire and indivisible claim and prosecute multiple actions thereon.[81] With regard to this rule there arises a further qualification to the effect that the prosecution of the action for less than the full amount of the damages collectable operates to make the whole claim res judicata at the determination of the action.[82] Under

[80] Apparently this power vests only in the legislature and then it is only operative where vested rights to tangible properties are not involved. *See* Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483 (1885).

[81] Bendernagle v. Cocks, 19 Wend. 207, 215, 32 Am. Dec. 448 (N. Y. 1838); White v. Adler, 289 N. Y. 34, 44, 43 N. E. 2d 798, 803 (1942). For a more complete treatment, see PRASHKER, NEW YORK PRACTICE § 140 (1947).

[82] *See* Silberstein v. Begun, 232 N. Y. 319, 133 N. E. 904 (1922); PRASHKER, NEW YORK PRACTICE § 140 (1947).

this third alternative it is submitted that the court would not be countenancing a split cause of action. It is true that the action for wrongful death is a single action brought to recover the damages accruing to all the next of kin. However, each party thus beneficially interested has a vested right to have the personal representative bring the action.[83] In reality the representative is prosecuting, in one action, as many claims as there are next of kin entitled to recover. Where some of those remedies are barred the number of claims sought to be enforced are reduced accordingly provided that the defendant raises the proper objections. Where all the claims save one are thus extinguished the representative is prosecuting the action to enforce the single claim. The net result in such a situation is to bring the case within the scope of the *Stutz* decision. There is only one action commenced—thus the problem of multiple suits is avoided. In fact there never was one entire and indivisible claim. The fact that the court's ultimate determination is res judicata as to the rights of the other parties beneficially interested is of no great significance because those remedies were already extinguished through the operation of the statute of limitations. The result would not be otherwise if there were more than one of several next of kin who could claim the benefit of tolling provisions—the action would be to enforce their rights. There might be some difficulty in computing the pro rata share of the damages which must be paid to the successful representative as trustee for the party (or parties) beneficially interested whose claim survived. That such a difficulty is not insurmountable is indicated in *Halle* v. *Cavanaugh*,[84] a New Hampshire decision, which is analogous to the *Stutz* case. The New Hampshire court stated, "The suggestion is made that if the husband (the party to whom the tolling provision inured) owns only a part interest in the estate the result of allowing him to appear and prosecute the suit would be to compel a complex computation to determine his ultimate net interest therein so that recovery should be limited accordingly. The question does not now arise except incidentally and as a collateral test for the correctness of the conclusion that he can maintain the action . . . . If the rule suggested is sound, it does not present an insuperable obstacle. In any event, his share would have to be determined before distribution and if that share is all that can be recovered, and is in fact less than the whole, judgment on the verdict can

[83] Matter of Meekin v. B. H. Ry., 164 N. Y. 145, 58 N. E. 50 (1900). See also N. Y. Dec. Est. Law § 130, whereby a husband or wife can compel prosecution of the death action provided they are not to share in the decedent's estate.

[84] 79 N. H. 418, 111 Atl. 76 (1920).

be postponed until the amount to which he is entitled is determined." [85]

Upon principle it thus appears that the aforementioned third alternative course of action offers compelling reasons for its adoption by the courts. While it was unnecessary to decide the issue in the *Stutz* case, Justice Callahan, speaking for the court, declared, "We appreciate that a case may arise where a serviceman is only one of the next of kin and thus owns only a part of a claim for wrongful death barred for lack of prosecution within the usual period of limitation. We need not determine the rule to be applied in a situation of that kind. We have considered the possibility of such a case merely as a collateral test for the correctness of our conclusion and find it does not alter our view that the plaintiff may maintain this suit on the cause of action for wrongful death. (See Halle v. Cavanaugh . . . .)" [86] It would be fair to assume that had the issue been squarely presented the court might have felt constrained to adopt the third course of action suggested above.

Another issue in the *Stutz v. Guardian Cab Corporation* decision arises out of the distinction which the Appellate Division makes between that case and the case of *Mossip v. F. H. Clement Co.* [87] The court ignores the fact that the fundamental basis of the *Mossip* decision was that the tolling provision of Section 60 of the Civil Practice Act inured to the benefit of the decedent's next of kin who were not permitted under the terminology of the death statutes to maintain the action. It was held that the action must be maintained by the personal representative of the deceased. The person acting in the representative capacity was not the party benefited by the operation of Section 60. Consequently the action was held to be barred by the statute of limitations. In the *Stutz* case the court distinguishes the *Mossip* decision by saying with regard to that case, "It was held that the provisions of Section 60 of the Civil Practice Act excluding the disability of infancy from periods of limitation were limited by the provisions of Section 10 of the Civil Practice Act excepting a case where a different limitation is specially prescribed by law. Inasmuch as the period of limitation in an action for wrongful death is specially prescribed by law under Section 130 of the Decedent Estate Law, it was decided that the period of infancy of the decedent's children was not to be excluded in computing the time within which to bring the action. With respect to a person in the military service, however, it is expressly provided that the limitation

[85] 79 N. H. 418, 111 Atl. 76, 78 (1920).

[86] Stutz v. Guardian Cab Corporation, 273 App. Div. 4, 9, 74 N. Y. S. 2d 818, 823 (1st Dep't 1947).

[87] 256 App. Div. 469, 10 N. Y. S. 2d 592 (4th Dep't 1939), *aff'd mem.*, 283 N. Y. 554, 27 N. E. 2d 278 (1940).

of any law for bringing an action is tolled by the period of his military service." [88] It is submitted that the proposition for which the court thus cites the *Mossip* case is purely *dicta* in that decision. The theory that the period limiting the action for wrongful death is a special period of limitation within the meaning of Section 10 of the Civil Practice Act is not supported by the weight of authority in New York. The majority of the cases dealing with the problem hold that the only special periods of limitations within the meaning of Section 10 are those which operate in the nature of a condition precedent to the right of action.[89]

The *Mossip* case was affirmed by the Court of Appeals without opinion.[90] The lack of a written opinion by the highest court of the state did not have the effect of transforming the *dicta* of the lower Appellate Court into the square holding of the case. Therefore, under the precise holding of the *Mossip* case, unless the disability is one which the personal representative can claim in his representative capacity the court does not have to consider whether or not the provisions of Section 60 will operate in connection with an action for wrongful death. This doctrine, while limited in application to personal disability exceptions to the general statutes of limitations as construed in connection with the death statutes, is, nonetheless, diametrically opposed in theory and in principle to the "real party in interest" doctrine as evidenced by the *Stutz* decision. Admittedly the tolling provisions of the Soldiers' and Sailors' Civil Relief Acts are to be liberally construed.[91] It is also true that those provisions are broader in scope than the tolling provisions encompassed in the general statutes of limitations. If great weight is to be given to those factors the "real party in interest" doctrine will not be extended beyond the factual limitations of the *Stutz* decision. If this doctrine is to be extended to apply to the personal disability exceptions to the general statutes of limitations the *Mossip* case must be overruled. The Court of Appeals or the legislature of the state are the bodies with the authority and power to achieve such an end result.

The three basic problems which were left undecided in the *Stutz* case have been considered. It is reasonably certain that the administrator and the real party in interest need not be the same person. Furthermore, it is wholly logical to assume that the doctrine propounded in that decision will be applicable in situations where the real party in interest in the action who claims the personal benefit of a tolling provision is not the sole surviving next of kin. However, the *Mossip* case stands as a firm block in the path of an exten-

[88] 273 App. Div. 4, 9, 74 N. Y. S. 2d 818, 823 (1st Dep't 1947).
[89] See note 59 *supra*.
[90] 283 N. Y. 554, 27 N. E. 2d 278 (1940).
[91] N. Y. MILITARY LAW § 300; Parker v. State of New York, 185 Misc. 584, 57 N. Y. S. 2d 242 (Ct. of Claims 1945); Boone v. Lightner, 319 U. S. 561, 575, 87 L. ed. 1587, 1596 (1943)—construing the Federal Act.

sion of the "real party in interest" doctrine to Sections 27, 28 and 60 of the Civil Practice Act as construed in conjunction with actions for wrongful death.

The *Stutz* case which construes the tolling provisions of the Soldiers' and Sailors' Civil Relief Act is sound. It has long been recognized that under the New York death statutes the administrator, though a necessary party, is a formal one.[92] Many cases cite with approval the doctrine that the right to have the decedent's personal representative institute the action for wrongful death was a property right which vested in the beneficiaries.[93] The rule that the administrator receives the pecuniary damages recovered as trustee for the surviving spouse and next of kin is fundamental in the law.[94] The fact that the tolling provision under consideration was to be liberally construed is not too significant because it would, by its very terms, operate to toll "any law" be it a mere statute of limitations or a condition precedent to the right of action.[95] The outstanding feature of the case is the liberality with which the court construed the salient provisions of the death statute. By advancing the trust theory one step further the "real party in interest" doctrine was declared and the remedial nature of the action for wrongful death was given full effect.

The *Mossip* decision, on the other hand, is strict and harsh. There are declarations in the Civil Practice Act to the effect that the provisions of the Act "shall be liberally construed,"[96] and that "The rule of the common law that a statute in derogation of the common law is to be strictly construed does not apply to this Act."[97] The period of limitation governing the action for wrongful death had been construed to be a mere statute of limitations.[98] The exceptions which tolled the general statutes of limitations where the action itself was affected were applied without question to death actions on many occasions.[99] The strict holding of the *Mossip* case was not

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[92] Central N. Y. Coach Lines v. Syracuse Herald Co., 277 N. Y. 110, 13 N. E. 2d 598 (1938); Davis v. N. Y. C. & H. Ry., 233 N. Y. 242, 135 N. E. 277 (1922).

[93] Matter of Meekin v. B. H. Ry., 164 N. Y. 145, 58 N. E. 50 (1900). *See also* Doyle v. New York O. & W. Ry., 66 App. Div. 398, 72 N. Y. Supp. 936 (4th Dep't 1901), wherein it was held that the next of kin can validly and bindingly settle the cause of action without resort to the services of the administrator.

[94] Hamilton v. Erie Ry., 219 N. Y. 343, 114 N. E. 399 (1916). *See also* N. Y. DEC. EST. LAW § 133.

[95] N. Y. MILITARY LAW § 308.

[96] N. Y. CIV. PRAC. ACT § 2.

[97] N. Y. CIV. PRAC. ACT § 3. It is to be noted that this same provision was formerly § 3345 of the now extant New York Code of Civil Procedure.

[98] Sharrow v. Inland Lines, Ltd., 214 N. Y. 101, 108 N. E. 217 (1915).

[99] For example: Kerr v. St. Luke's Hospital, 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 1941), *aff'd mem.*, 287 N. Y. 673, 39 N. E. 2d 291 (1941)—§ 17;

consonant with the liberal construction rules applicable to the sections of the Civil Practice Act. The *dictum* of the court to the effect that Section 10 of the Civil Practice Act precluded the application of Section 60, of the same Act, to the action for wrongful death because the latter was governed by a limitation especially prescribed by law is not consistent with the construction given to other tolling provisions in connection with death actions.[100] The doctrine that the benefits of Section 60 could not possibly be considered to extend to death actions unless the benefit first ran to the plaintiff-administratrix in her representative capacity amounted to a conclusion that Section 60 could never apply to such actions because a party who was thus disabled could not be appointed as personal representative of a deceased person. Patently, the *Mossip* case negates the remedial aspects of the statutory action for wrongful death. It arbitrarily placed the minor children of the deceased beneath the cloud of the common law rule. An alleged tortfeasor was rendered immune from liability without a fair determination of innocence or guilt. It is true that the claim should be litigated within a reasonable time—however, under the facts of the instant case greater liberality in construing both the Civil Practice Act and the death statutes would not have intolerably prejudiced the defendant. The court's ultimate determination cannot be viewed as a glowing triumph of justice.

The statutory cause of action for wrongful death is essentially remedial in nature. The statutes encompassing that right should be liberally construed. Mr. Justice Cardozo, considering wrongful death statutes generally, wrote graphically on the construction problem in *Van Beeck v. Sabine Towing Co.*,[101] wherein he declared, "Death statutes have their roots in dissatisfaction with the archaisms of the law . . . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be and if it has intimated its will, however indirectly, that will should be recognized and obeyed.' (Quoting from Holmes, Circuit Justice, in Johnson v. United States, 163 Fed. 30, 32.)"[102]

With regard to the problem of the construction to be afforded the period of limitation governing the action for wrongful death it

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Hoffman v. Delaware & Hudson Co., 163 App. Div. 50, 148 N. Y. Supp. 509 (3d Dep't 1914)—§ 23.

[100] See note 59 *supra*.

[101] 300 U. S. 342, 81 L. ed. 685 (1937).

[102] *Id.* at 350, 81 L. ed. at 690. For the New York affirmation of this doctrine, *consider* Greco v. Kresge Co., 277 N. Y. 26, 12 N. E. 2d 557 (1938).

has been noted that the principal factors affecting that problem, the death statutes, the Civil Practice Act, and the Soldiers' and Sailors' Civil Relief Act, are all to be liberally construed. It follows logically that similar construction is to be afforded those factors when considered in conjunction with the period limited by law for the commencement of the death action. Much progress has been made by the courts of New York with respect to such construction. The treatment of the period of limitation in the death statutes as a mere statute of limitations was a major step in effectuating the remedial nature of that statutory cause of action. The application of tolling provisions of the general statutes of limitations which affect the cause of action to the period of limitation in the death action was another progressive milestone. The doctrine of the *Mossip* case marked a detour and a backward step which should be rectified. The development of the "real party in interest" theory in the *Stutz* case points the way toward the elimination of the *Mossip* doctrine with a resultant extension of the personal disability tolling provisions of the general statutes of limitations to actions for wrongful death.

From a particularized analysis of a single phase of the death action it has been possible to observe the general trend of judicial construction of all aspects of that statutory cause of action. It is submitted that the courts of New York have made noteworthy progress in extending the effectiveness of the death statutes. The indicated trend shows that a liberal construction policy will continue to be followed by those courts within the sound dictates of reason and possibility.

CORNELIUS J. BARRY, JR.

CHARITABLE TRUSTS FOR RELIGIOUS PURPOSES

Recently, an English appellate court decided that a gift in trust for a Carmelite convent was not for a charitable purpose.[1] The court held that public benefit was a necessary element even where the trust is for the advancement of religion. The Carmelites are a cloistered order, and they engage in no exterior material works such as teaching or care of the sick. The court said that the nuns applied themselves to being good, not to doing good, and that the purpose of the gift was not sufficient as to constitute a charity.

The obvious argument that would occur to anyone familiar with religious organizations such as the Carmelites is that the court

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[1] *In re* Coats' Trusts (Coats v. Gilmour), W. N. 108, Mar. 20, 1948.