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Civil Procedure—For Purposes of Civil Practice Act Section 21 A Wrongful Death Action "Exists" at Time of Accident

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As to the question of whether the court or the arbitrators should decide the applicability of Section 3813 of the Education Law, there is no direct precedent. There is a line of cases containing dicta to the effect that all issues arising subsequent to the making of the contract should be decided by the arbitrators, and that the only issues a court may consider is the making of a valid contract or the failure to comply with it.[44] In these cases the courts, desirous of upholding the intention of the parties, reason that since the parties provided for arbitration they must have wanted all issues to be decided by the arbitrators. However, in the instant case the Court apparently felt that this dicta did not apply, because the question of notice is a pre-requisite to the jurisdiction of the arbitrators.

CIVIL PROCEDURE

FOR PURPOSES OF CIVIL PRACTICE ACT § 21 A WRONGFUL DEATH ACTION "EXISTS" AT TIME OF ACCIDENT.

A wrongful death action was commenced on July 14, 1958, arising from an automobile accident that occurred on March 6, 1955, allegedly due to the negligence of defendant's intestate, who received fatal injuries and died on the day of the accident. Three days later, on March 9, 1955, the defendant's intestate was followed in death by plaintiff's intestate. The Appellate Division[1] affirmed the lower court's order granting plaintiff's motion to strike out the defense of the Statute of Limitations. Although the wrongful death action had not yet accrued at the time of the wrongdoer's death, the Court of Appeals, in *Gibson v. Meehan*,[2] affirmed the Appellate Division and held that the provisions of Section 21 of the Civil Practice Act,[3] which suspends the applicable Statute of Limitations for a period of 18 months when "a person against whom a cause of action exists" dies, applied so as to toll the two year statute.

The courts of New York have found no difficulty in applying Section 21 in those cases where the wrongdoer had died after the respective claim had once accrued.[4] However, they have previously refused to apply it in cases

44. In re Terminal Auxiliar Maritima, 6 N.Y.2d 294, 189 N.Y.S.2d 655 (1959); In re Paloma, 3 N.Y.2d 572, 170 N.Y.S.2d 509 (1958); In re Lipman, 289 N.Y. 76, 43 N.E.2d 817 (1942); In re Tuttman, 274 App. Div. 395, 83 N.Y.S.2d 651 (1st Dep't 1948).

1. 7 A.D.2d 986, 183 N.Y.S.2d 988 (1st Dep't 1959).
2. 7 N.Y.2d 93, 195 N.Y.S.2d 649 (1959).
3. N.Y. Civ. Prac. Act § 21:
Effect of death of person liable: The term of 18 months after the death within this state of a person against whom a cause of action exists, or of a person who shall have died within 60 days after an attempt shall have been made to commence an action against him pursuant to the provision of this article, is not a part of the time limited for the commencement of an action against his executor or administrator.
4. Butler v. Price, 271 App. Div. 359, 65 N.Y.S.2d 688 (4th Dep't 1946); In re McGowan's Estate, 174 Misc. 928, 22 N.Y.S.2d 224 (Surr. Ct. 1940).

where the wrongdoer had died prior to the accrual of the action.[5] *In re Richman's estate,* held that the section applied only to claims upon which the general Statute of Limitations had begun to run prior to the death of the wrongdoer.[6]

This appears to be a case of first impression in the courts of New York. To wit, is an alleged wrongdoer who dies prior to the accrual of an action of wrongful death a "person against whom a cause of action exists" under the provisions of Section 21 of the New York Civil Practice Act. In determining that he is, the Court of Appeals felt that when Section 21 is read in conjunction with the 2nd paragraph of Section 118 of the Decedants Estate Law,[7] which recognizes the survival of a wrongdoer's potential liability for acts done in his lifetime by preserving a cause of action against his legal representative in a situation of this nature—i.e. when the wrongdoer predeceases his victim, it seems abundantly clear that the Legislature intended that the cause of action envisioned by Section 21, including an action for wrongful death, exists in the sense that it arises from the decedant's tortious act. Therefore it appears that in cases arising under Section 118 of the Decedant's Estate Law the New York Court of Appeals is willing to give Section 21 a broader interpretation than has been previously given to it by lower courts in other types of cases. In short, the word "exists" as is found in Section 21 is, in those cases arising under Section 118 of the Decedant's Estate Law, not to be interpretated as being synonymous with the word accrues, but is to be given a true literal meaning such as to allow for its application when the wrongdoer dies prior to the accrual of the action.

However, by failing to articulate their view as to what interests they felt the Legislature was attempting to protect by Section 21 (although they have given a thorough explanation of the purpose of the 2nd paragraph of Section 118 of the New York Decedant's Estate Law), it appears that the Court has left questions yet unanswered.

As stated in *Butler v. Price,* in discussing Section 21 in an action of wrongful death where the wrongdoer had died after the accrual of the action: "The Legislature seems to have recognized that there is inevitably a period of time following the death of a person when it would be difficult, if not impossible, to commence an action against his estate. In order, therefore, to prevent any hardships or loss of rights to a plaintiff under such circumstances,

5. In re Intini's Estate, — Misc. —, 138 N.Y.S.2d 768 (Surr. Ct. 1954); In re Richman's Estate, 168 Misc. 834, 6 N.Y.S.2d 528 (Surr. Ct. 1938).

6. Supra note 5.

7. N.Y. Dec. Est. Law § 118:
Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occur simultaneously with or after the death of a person who would have been liable therefore if his death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect, or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the executor or administer of such a person.

the Legislature, by its enactment of Section 21 suspended the running of the Statute for a period of eighteen months after the death of the person against whom a cause of action exists."[8]

It seems obvious from the previous discussion that the Legislature, by its enactment of Section 21, intended to prevent a plaintiff's cause of action from becoming legally ineffective or burdensome by reason of the wrongdoer's death, and such protection appears to be both reasonable and meritorious in a situation as was presented in the *Butler* case where there was no party in existence for the plaintiff to sue.

However, the need for similar protection does not appear as obvious in the present case or under similar situations which could arise under Section 118 of Decedant's Estate Law, for the wrongdoer's death, of and by itself, could not possibly affect the legal efficacy of a cause of action which does "exist" but which has not yet legally accrued. It is the additional fact that letters of administration were not issued to defendant's estate until June of 1958—approximately three years after the accrual of action—that raised the same dilemma in the present case that was presented by *Butler v. Price* and cases similar to it, and to which the Legislature, by its enactment of Section 21, addressed itself. To wit, an ineffective cause of action due to the absence of a liable legal representative to the wrongdoer's estate.

The question that faces us then is: will the courts be as willing to invoke Section 21 as it did here in other cases arising under Section 118 of Decedant's Estate Law where an administrator has already been appointed to the wrongdoer's estate when the action accrues? It would appear not since the reason for invoking Section 21 would no longer exist and any such use of it (Section 21) would obviously be a windfall to plaintiff or his estate. The question, however, appears to be left open by this case. It appears the holding is limited to cases involving Section 118 and is not an overruling of the rule set forth in the *Richman* case.[9]

COLLATERAL ESTOPPEL UNDER SECTION 59 (NOW 388) OF THE VEHICLE AND TRAFFIC LAW

Plaintiffs' administrators commenced the present wrongful death actions as a result of an automobile accident on a New York highway. The car in which the plaintiffs' intestates were killed was owned by the defendants, one of whom had loaned the car to other persons previous to the accident. Prior to the instant actions, the plaintiffs had brought suit in New Hampshire against the driver, one O'Rourke, seeking to impose liability on the insurer of the car. The insurance policy furnished coverage to the named insured and also to any person using the automobile with the insured's permission. In a declaratory judgment the New Hampshire court found that the limitation im-

8. Supra note 4 at 362, 65 N.Y.S.2d 690 (4th Dep't 1946).
9. Supra note 5.