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Notes

LIMITATION OF ACTION—EFFECT OF THE DEATH OF THE PARTY AGAINST WHOM AN ACTION HAS ACCRUED—SUITS AGAINST THE PERSONAL REPRESENTATIVE WHO QUALIFIES AFTER THE REGULAR PERIOD OF LIMITATION HAS EXPIRED.

The general rule in the absence of a statute is that the death of one against whom a cause of action has already accrued does not suspend the running of the statute of limitations. If the cause of action survives, it can be brought against the estate of the deceased party, but, in order to be effective, it must be instituted within the period of limitation which would have applied had not death intervened.¹

However, since 1852, there has been in Kentucky a statute the effect of which is to extend the period of limitation on the death of the person liable under certain conditions. In its present form it provides:

If a person against whom any action mentioned in KRS 413.090 to 413.160 may be brought dies before the expiration of the time limited for its commencement and the cause of action survives, an action may be commenced against his personal representative, devisees or heirs, or all, after the expiration of that time, and within one year after the qualification of his personal representative. If there is no personal representative, the action may be brought against his heirs or devisees, or both, after the expiration of the time limited for bringing it, and within two years after his death.²

An analysis of the terms of the statute reveals that there are at least three essential conditions which must be fulfilled before it will operate to extend the time within which an action may be brought against the personal representative beyond the regular period.

(1) The death of the party liable must have occurred prior to the expiration of the regular period of limitation. Otherwise, the cause of action is barred and the subsequent death of the party has no effect.³

¹ Langford's Admr. v. Gentry, 7 Ky. (4 Bibb) 468 (1816). "The law has not provided that the death of either party, to the original cause of action, shall suspend the operation of the statute of limitations, if before the death, it shall have begun to run." Caldwell v. Irvine's Admr., 27 Ky. (4 J.J. Marsh.) 107, 109 (1830); 54 C.J.S. Limitation of Actions, sec. 246 (1948).

² Ky. Rev. Stat., sec. 413.180(3) (1956).

³ See note 23, *infra*, for examples of statutes which allow suit against the personal representative although the regular period has elapsed thirty to sixty days *prior* to the death of the party liable.

(2) The administrator or executor must not have qualified more than one year prior to the regular period of limitation. Though this condition is not expressed in the statute, it is necessarily implied from the content and purpose thereof. The object of the statute is not to shorten the regular period of limitation, but to extend it. If the personal representative qualifies more than a year prior to expiration, an action may be instituted against him at any time before the statute would normally have run, though this be more than a year after the date of his qualification.⁴

(3) The action must be brought within one year after the date of the qualification of the personal representative. This requirement is the substance of one of the clauses of the statute itself.

Though in most cases the personal representative qualifies shortly after the death of the party liable, where there is any considerable lapse of time between death and qualification, a situation may arise which creates a problem not covered expressly by the statute and, it appears, has not been dealt with directly by the Kentucky Court. A hypothetical set of facts will serve to illustrate the source of the difficulty:

A cause of action for personal injury accrues against "D" on January 1, 1957, in favor of "P." "D" dies on July 25, 1957, within the one year period of limitation in actions of this type. "P," waiting to determine whether his injuries are of a permanent nature, does not institute an action against "D" before "D's" death. "A" does not qualify as administrator of the estate of "D" until January 5, 1958, *after* the expiration of the regular period of limitation. "P" brings an action against "A" on April 10, 1958, clearly within one year after his qualification.

The three conditions outlined above have been fulfilled: (1) "D's" death occurs within the period of limitation, (2) "A" did not qualify more than one year before the regular period of limitation elapsed, and (3) "P's" action was brought within one year after "A's" qualification. If "P" is to be barred from maintaining his action against "A", there will have been added to these an additional requirement—namely, that the personal representative must qualify prior to the expiration of the regular period of limitations. The remainder of this note will be devoted to the question whether KRS 413.180(3) should be interpreted to allow any action against a personal representative who qualifies *after* the regular period of limitation has expired. The authorities for and against imposing such an additional condition may be grouped

⁴ Johnson v. Equitable Life Assurance Society, 137 Ky. 437, 125 S.W. 1074 (1910); Jones v. Mitchell, 9 Ky. L. Rep. 858 (1888).

roughly into four categories: (1) Dicta of the Kentucky Court in cases in which this question has not been directly presented; (2) Decisions of the court interpreting KRS 413.180(1), a companion statute which deals with the effect of the death of one entitled to bring an action and contains language similar to that with which we are concerned; (3) Statutes of other jurisdictions which contain similar provisions, and cases interpreting them; and (4) Arguments of policy and convenience.

Johnson v. Equitable Life Assurance Society,⁵ contains the most comprehensive discussion of this statute by the court. The facts of the case are for our purpose briefly stated: The cause of action for relief on the ground of fraud accrued on April 26, 1902. The decedent, against whom the action lay, died on December 26, 1903, and an administrator was appointed two days later. Suit was filed on July 25, 1907, more than five months after the expiration of the regular five year limit for suits of this type.

The plaintiff insisted that he was entitled to have the six months period within which no suit could have been brought against the administrator under Ky. Stat. 3847⁶ added to the regular period, so as to extend the period of limitation to October 26, 1907. In support of this proposition, it cited the case of *Southern Contract Company's Assignee v. Newhouse*.⁷ There the court, in a dictum unnecessary to the disposition of the matter at hand, discussed the legislative purpose of Ky. Stat. 2528, the predecessor of KRS 413.180(3). It was concluded that, though the party liable had died well within the five year period of limitation applicable, the time within which the executrix, who had qualified only a month later, could be sued was extended beyond the usual limit by seven months. One month was allowed during which there was no representative, and six months when suit could not have been filed against the executrix. In the *Johnson* case the court passed on the argument of the plaintiff as follows:

Section 3847, . . . which provides that no suit shall be brought against an administrator during the next six months next after his qualification, does not confer the right contended for. The purpose of this section of the statutes was to give the administrator a reasonable time to settle the claims against his decedent's estate without being harassed with lawsuits and put to the cost and expense which litigation would necessarily entail. It does not deal with the subject

⁵ *Supra*, note 4.

⁶ Now Ky. Rev. Stat., sec. 395.270 (1956), which provides:

Five months must run after the date of the qualification of the first personal representative of a decedent's estate before an action shall be commenced against an executor or administrator thereof. . . .

⁷ 119 Ky. 704, 66 S.W. 730 (1902).

of limitation, and clearly was not intended to extend the five year period. . . .⁸

In explanation of the full effect of Ky. Stat. 2528, and its relationship to the "non-claim" statute and the regular period of time statute, the court reasoned:

Considering Sections 2515, 2528, and 3847 together, we conclude that in all causes of action . . . , where the right of action accrues during the life of the debtor and the debtor dies and an administrator is appointed for estate more than one year before the expiration of the time limit within which an action might be brought, Section 2528 has no application and does not stop the running of the statute during the first six months after the administrator is appointed, for the evident reason that, as the creditor still has at least six months in which to sue before the expiration of the time limit, the necessity for the passage of any remedial statute or enabling act was wanting. On the other hand, if the debtor dies, and administration is granted on his estate less than one year before the expiration of the time limit within which the suit must be brought, Section 2528 applies, provided the suit is commenced within one year after the administration is granted.⁹

In so holding, the court recognized that the court in the *Newhouse* case had expressed a contrary rule, and in doing so had followed two earlier cases¹⁰ decided before the adoption of the statute, which fact the court in the *Newhouse* case seemed to have overlooked. In these cases, the court had held that the death of the debtor before the expiration of the time limit within which suit might be brought operated to extend the period of limitation by the six months in which the statute had provided no suit could be brought against the personal representative. Apparently this was a judicially created rule, without basis in statute. While the decision in the *Johnson* case did not specifically overrule the *Newhouse* case, the disapproval of it which was expressed therein would seem to curtail any significance it might previously have had.

The expressions of the court in the *Johnson* case have been followed and reiterated in subsequent cases.¹¹ Certain of these statements,

⁸ 137 Ky. 437, 457, 125 S.W. 1074, 1081 (1910).

⁹ *Id.* at 460, 125 S.W. at 1082.

¹⁰ *Caldwell v. Irvine's Admr.*, 27 Ky. (4 J.J. Marsh.) 107 (1830); *Field v. Wallace's Admr.*, 22 Ky. (4 T.B. Mon.) 333 (1827).

¹¹ In *Johnson's Admr. v. Hogg*, 165 Ky. 1, 176 S.W. 350 (1915), the cause of action on an open note accrued against the maker thereof in June, 1893. The party liable died in May, 1907, and his administrator qualified in June, 1907. Suit on the note was brought on July 21, 1908. Thus, the administrator was appointed more than one year before the institution of the suit and more than one year before the fifteen-year statute of limitation applicable had run. In holding that action on the note was barred, the court relied on the ruling in *Johnson v. Equitable Life*, *supra* note 4, and quoted extensively from the opinion therein. In *Walker v. Bennett*, 209 Ky. 675, 273 S.W. 548 (1925), the last case before the court which deals with this problem, the party against whom an action would lie died *prior* to the accrual of the action. The court, in a brief opinion in which it

which were unnecessary to the disposition of the issue before it, may be thought to indicate that the court would have been constrained to deny that the statute could apply where the personal representative had not qualified prior to the expiration of the regular period, had such a situation been presented to it. For example, the court says:

It is apparent that the Legislature only intended section 2528 to apply to that class of cases where the debtor died and the administrator was appointed one year or less before the expiration of the time limit within which suit might be brought.¹²

Though on their face these words might support such a contention, when they are examined in context, it is evident that the court was merely contrasting this situation with that presented by the facts of the case. The court here was not attempting to formulate a general rule applicable to all situations. It was showing that where the personal representative, qualifies *less than one year* prior to the expiration of the regular period the time within which an action may be brought is extended; where he qualifies *more than one year* prior to expiration it is not. Substantially the same thought was voiced by the court in *Jones v. Mitchell*¹³ in language which can hardly be said to imply an additional condition. There the court stated:

It is only where the time within which an action may be brought expires after the death of the debtor and *before* the expiration of one year after the qualification of his administrator, . . . that there is any extension of the period of limitation by [the statute].¹⁴

Though the personal representative fails to qualify until after the regular period has elapsed, the statutory requirements as they are set

relied entirely on the ancient case of *Field v. Wallace's Admr.*, *supra* note 10, held that the effect of K.S. 3847, the "non-claim" statute which forbade any suit against his executrix for six months following her qualification, was to exclude this period in the computation of the time within which suit could be filed. Since in this case the executrix also qualified prior to the accrual of the cause of action, the regular period of limitation had never actually begun to run until six months after the date of qualifications.

While this decision appears to be contrary to the rule of the *Johnson* case, it may be distinguished from it by the fact that the party liable had died prior to the accrual of the cause of action. It is doubtful whether KRS 413.180(3) was designed to apply in these circumstances, since a literal interpretation of the language used therein would indicate that it contemplated that the decedent would be liable at the time of his death, the statute having begun to run prior to that time. However, at worst the case seems to represent an oversight on the part of the court of the precedent established by the *Johnson* case *et seq.*, and it is unlikely that it could be said to have overruled them by implication. The general rule where the cause of action accrues after the death of the person against whom it lies is that limitations do not begin to run until after there is a grant of administration on the estate, for prior thereto there is no person in existence against whom the action may be brought. 54 C.J.S. Limitation of Actions sec. 246; see also 34 Am. Jur. Limitation of Actions secs. 113, 114, 212, 213.

¹² 137 Ky. 437, 460, 125 S.W. 1074, 1081 (1910).

¹³ 9 Ky. L. Rep. 858 (1888).

¹⁴ *Ibid.*

forth in this case are satisfied. If the regular period expires before the *qualification* of the personal representative, *a fortiori* it expires before one year *after* the qualification.

Before leaving our consideration of Kentucky decisions in this area, special notice must be taken of *Covington & Lexington Railroad Co. v. Bowler's Heirs*.¹⁵ As nearly as can be ascertained from the record, the facts pertinent to our discussion are thus: The cause of action to declare and enforce an implied trust accrued on December 22, 1859. The party liable died intestate on July 4, 1864, within the regular statutory period of five years for this type of action. There was no administration on his estate in this state until February 13, 1865, to all appearances *after* the regular period had expired. In holding an action instituted against his personal representative, *et alia*, on September 30, 1865, *valid*, the court reasoned:

The death of Bowler so far interrupted the running of the statute as to authorize appellant to commence its action against his heirs and representatives after the expiration of five years from the accrual of its cause of action, provided it instituted its suit within a year after the qualification of his personal representative. It did commence its suit within a year after administration in this state, and its right to sue was saved by the exception stated.¹⁶

Several factors combine to reduce the conclusiveness of this decision on the point under discussion. Among them are its antiquity, the lack of clarity as to when the action in fact accrued, and the uncertainty as to whether the personal representative was a necessary party thereto. Despite these, however, the case remains the strongest authority in decisions of the Kentucky Court for the proposition that the regular period of limitation may be extended even where the qualification of the personal representative does not take place until after the expiration thereof.

Though, with the exception of the case last mentioned, there appears to be no case directly in point under KRS 413.180(3) or its forerunners, the court has on frequent occasion uniformly construed similar language in KRS 413.180(1) to hold that a personal representative of a party *entitled* to bring an action must have qualified *before* the expiration of the regular period of limitation or else suit *by* him is barred, though brought within one year after his qualification.¹⁷

¹⁵ 72 Ky. 468 (1872).

¹⁶ *Id.* at 485.

¹⁷ This statute (KRS 413.180(1)) provides:

If a person entitled to bring any action mentioned in KRS 413.090 to 413.160 dies before the expiration of the time limited for its commencement and the cause of action survives, the action may be brought by his representative after the expiration of that time, if commenced within one year after the qualification of the representative.

One of the first instances where this doctrine was enunciated was in *Louisville & Nashville R.R. Co. v. Brantley's Admr.*¹⁸ Although it is not mentioned in the record, the administrator of the deceased injured party must not have qualified until after the expiration of one year from the date of the injury, the regular period of limitation for personal injury actions. In holding the action barred by lapse of time, the court elaborated:

The death of the injured party does not stop the running of the statute; therefore, unless a personal representative shall qualify within one year from the injury, the action is barred. If he does so qualify, he is given another year within which to bring the action.¹⁹

In *Fix's Ex'r. v. Cook*,²⁰ the court, in deciding the issue according to the established rule, made this policy argument for such a doctrine:

If a nominated executor or the beneficiaries of a decedent may, by their voluntary conduct, suspend or interrupt the running of the statute against their ancestor or decedent for eleven years, they may do so for a longer period; and it is quite beyond our conception that there was ever any legislative purpose looking to this end. On the contrary, it is our view that the section quoted applies only to the qualifications of personal representatives before the statutory period has expired, and has no application to a qualification by a personal representative after the limitation period has expired.²¹

It is on the basis of such an argument that the analogy between the similarly worded provisions of KRS 413.180(1) and 413.180(3) breaks down. For, to insist on the same rule for both statutes would enable a nominated executor of one against whom an action has accrued, by the simple, voluntary act of delaying his qualification until the regular period has elapsed, to forever bar any action against him. This would force the party in whose favor the action lay to bring suit, if at all, against the heirs and devisees of the deceased. In an era when mobility of population is the rule rather than the exception, the latter course is often beset with jurisdictional and other practical difficulties which render a result completely satisfactory to the plaintiff well nigh impossible.

That there is a marked distinction in the legislative policy and

¹⁸ 106 Ky. 849, 51 S.W. 585 (1899).

¹⁹ *Id.* at 854, 51 S.W. at 586. The same ruling was made in *Wilson's Admr. v. Illinois Cent. Ry. Co.*, 29 Ky. L. Rep. 148, 92 S.W. 572 (1906). This decision reflects the severity and strictness with which this rule is applied, since, on the facts of the case, only a year and a day had elapsed between the death of the injured party, when the action accrued in his favor, and the qualification of his administrator. At the other extreme, insofar as time elapsed is concerned, is *Boughner v. Sharp*, 144 Ky. 320, 138 S.W. 375 (1911). There the personal representative failed to qualify until almost eighteen years after the death of the party entitled to sue, and was held barred from bringing an action on some notes by the expiration of the regular fifteen-year period of limitation.

²⁰ 192 Ky. 731, 234 S.W. 453 (1921).

²¹ *Id.* at 737, 234 S.W. at 455.

intent behind statutory provisions for suits *by* representatives and suits *against* representatives is borne out by an examination of the statutes of the various states on these matters. With regard to the effect of the death of a party *entitled* to sue, the "typical" statute reads:

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, *and within one year from his death.*²² (Emphasis added).

On the other hand, the statutes which pertain to the effect of the death of the party *liable* to be sued, even in many of the same states, more often provide:

If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of the letters testamentary or of administration.²³

On its face, this statute is quite similar to KRS 413.180(3). Therefore, let us consider for a moment how the courts in a jurisdiction where this and similar legislative provisions are found have handled the issue as to when the personal representative must qualify.

In several states the statute itself contains a clause which limits in whole or in part the time within which qualification of the representative must take place. In North Carolina, letters testamentary or of

²² Gen. Stat. N. Car. ch. 1, sec. 1-22 (1953). For similar statutes, see Ark. Stat. Ann. tit. 37, sec. 37-219 (1947); Cal. Code Civ. Proced. sec. 353 (six months); Gen. Stat. Conn. tit. 63, ch. 414, sec. 8334 (1949); Ida. Code tit. 5, ch. 2, sec. 5-231 (1947); Ill. Rev. Stat. ch. 83, sec. 20 (1957); Mo. Rev. Stat. sec. 516.190 (1949); Rev. Code Mont. tit. 93, ch. 27, sec. 93-2704 (1947); Nev. Rev. Stat. sec. 11.310 (1) (1957); N. Mex. Stat. Ann. ch. 23, sec. 23-1-11 (1953); N. Dak. Rev. Code ch. 28-01, sec. 28-0126 (1957); Ore. Rev. Stat. sec. 12.180 (1957); Code Laws S. Car. tit. 10, ch. 2, sec. 10-107 (1952); Utah Code Ann. ch. 12, art. 3, sec. 78-12-37 (1953); Rev. Code Wash. sec. 4.16.200 (1956); Wis. Stat. sec. 330.34 (1957).

²³ Utah Code Ann. ch. 12, art. 3, sec. 78-12-27 (1953). For similar statutes, see Cal. Code Civ. Proced. sec. 353; Ida. Code tit. 5, ch. 2, sec. 5-231 (1947); Ill. Rev. Stat. ch. 83, sec. 20 (1957) (w/i nine months); Rev. Code Mont. tit. 93, ch. 27, sec. 93-2704 (1947); Nev. Rev. Stat. sec. 11.310(1) (1957); Gen. Stat. N. Car. ch. 1, sec. 1-22 (1953); N. Dak. Rev. Code ch. 28-01, sec. 28-0126 (1957); Ore. Rev. Stat. sec. 12.190 (1957); Code Laws S. Car. tit. 10, ch. 2, sec. 10-107 (1952); Rev. Code Wash. sec. 4.16.200 (1956); Wis. Stat. sec. 330.34 (1957).

Comp. Laws Mich. ch. 9, sec. 609.18 (1948) provides if one liable to an action dies before or within thirty days after the expiration of the regular period of limitations, an action may be commenced against his personal representative at any time within two years after the granting of letters testamentary or of administration. For similar provisions, see Rev. Stat. Maine ch. 112, sec. 100 100 (1954) (action within twenty months); Ann. Laws Mass. ch. 260, sec. 10 (1956) (action within one year); Gen. Laws R.I. ch. 1, sec. 9-1-21 (1956) (death before or within sixty days after expiration, action brought within one year after letters); Vt. Stat. tit. 9, ch. 81, sec. 1705 (1947).

administration must have issued within ten years of the death of the person liable.²⁴ In Oregon, no suit may be maintained against the estate of a person liable where no letters have issued before the expiration of six years after the death of the decedent.²⁵ Under the Nevada statute,²⁶ no real estate may be liable for debts other than recorded incumbrances unless letters are granted within three years from the death of the decedent. A similar statute²⁷ in Washington provides no real estate of a deceased person shall be liable for his debts unless letters are granted within six years from the date of death.

In several of these states, there have been no cases in which the personal representatives have not qualified prior to the expiration of the regular period of limitation. However, in jurisdictions where the courts have passed directly on this question, they have invariably allowed a suit brought against a personal representative within a year after his qualification, though he did not qualify until after the regular period of limitation had run.

In *Casey v. Gibbons*,²⁸ the Supreme Court of California held that an action to foreclose a mortgage was not barred when brought on June 2, 1900, though the debt had matured on July 2, 1889. The mortgagor had died on November 1, 1892 and no letters of administration had issued until April 2, 1900, after the regular ten-year period of limitation had expired. This position was reiterated in the more recent case of *Prytz v. Associated Farms*,²⁹ where a judgment was entered on June 3, 1940, and the judgment debtor died on July 4, 1942. The administratrix of his estate was not appointed until November 14, 1946, after the elapse of the five-year period of limitation on judgments. In holding that the motion of the judgment creditor filed within one year after the appointment of the administratrix for leave to enforce the judgment against the estate was properly granted, the court expressed the opinion that, unless it decided in favor of the creditor, "the heirs of the deceased debtor could defeat valid judgments by refraining from probating his estate until after five years from the rendering thereof."³⁰

In *Clark v. George*,³¹ the Utah court held that, under the statute

²⁴ Gen. Stat. N. Car. sec. 1-22 (1953). See *Geitner v. Jones*, 176 N. Car. 542, 97 S.E. 494 (1918), for an instance in which the court allowed an action to be commenced within one year after the qualification of the personal representative, where such qualification took place subsequent to the expiration of the regular period, though within ten years from the death of the party liable.

²⁵ Ore. Rev. Stat. sec. 12.190 (1957).

²⁶ Nev. Rev. Stat. sec. 11.310(2)(b) (1957).

²⁷ Rev. Code Wash. sec. 11.04.270 (1956).

²⁸ 136 Cal. 368, 68 P. 1032 (1902).

²⁹ 88 Cal. App. 2d. 1, 198 P. 2d. 110 (1948).

³⁰ *Id.*, 198 P. 2d at 111.

³¹ 120 Utah 350, 234 P. 2d 844 (1951).

quoted above,³² even a long unreasonable delay in the failure to have an administrator appointed did not prohibit an action, brought within one year after issuance of letters of administration, from being timely commenced. In this case, the party liable died in 1938, and no administrator was appointed until 1948, long after the lapse of the four-year period of limitation.

One of the most recent judicial pronouncements on this question came from the Supreme Court of Montana in *Kajich v. Lillie*.³³ The causes of action for personal injuries and death accrued out of an automobile accident on November 26, 1941. From injuries sustained therein, the party liable died shortly thereafter. An administrator of his estate was not appointed until December 13, 1944, after the expiration of the regular three-year period. Nevertheless, the court sustained without hesitation an action brought against the administrator on December 11, 1945, within one year after the issuance of letters of administration.

In the face of this consistent interpretation by other state courts, it would appear that unless there exists some situation peculiar to Kentucky which would demand a contrary holding, it would not be at all unreasonable to expect the court to extend the period within which an action may be brought against the personal representative of the party liable, though such representative had not qualified until after the expiration of the regular period of limitation.

The prime factor which distinguishes KRS 413.180(3) from the statutes found in other jurisdictions is the additional provision for an action against the heirs or devisees of the party liable within two years of his death, in the event no personal representative qualifies. It may be urged that such a provision, which is unique among statutes of this type, precludes any action against a representative who qualifies after such period has elapsed.

Unquestionably, the intent of the legislature was to provide a longer period within which to sue the heirs and devisees where no representative had been appointed within a reasonable time after the death of the party liable, and meanwhile the regular period of time for commencing an action had lapsed.³⁴ However, this is far from saying that the legislature thereby intended to drastically qualify the foregoing provision so as to curtail any action against a representative who qualified shortly after the expiration of the regular period, well within

³² Supra note 23.

³³ Supra note 23.

³⁴ As was pointed out in *Johnson v. Equitable Life*, supra note 4, this part of the statute is much narrower in its application, as it applies only where the party liable dies within two years prior to the expiration of the regular period.

two years of the death of the party liable.³⁵ All in all, where the personal representative failed to qualify within two years after the death of the party liable, this provision of the statute *might* be said to operate to bar action against him, on the theory that the person entitled to sue should have acted against the heirs and devisees within that time.³⁶ On the other hand, where the representative qualifies within two years after death, it should have no effect, though the date of his qualification be subsequent to the running of the regular period.

No doubt the major objection to the interpretation given this statute by the state courts above is based on convenience. By Statute³⁷ in this state, a personal representative may qualify at any time within twenty years after the death of the testator or intestate. If the court were to allow an action to be commenced against him within one year after qualification in all cases, in an extremely rare situation, this could be as much as thirty-five years after the action accrued.³⁸

As a practical matter, such a situation is not likely to occur. Seldom, if ever, could the heirs or legatees afford to postpone settlement of an estate for so long a period. On the other hand, it is quite possible, as the California court pointed out, that these parties might be willing to endure the inconvenience involved in order to delay the qualification of the personal representative until after the expiration of the regular period of limitation.³⁹ This would be all the more true where the

³⁵ This would have been the case under the hypothetical state of facts posited at the beginning of this article. In such a situation, if the plaintiff attempted to sue the heirs or devisees, he might be met with the defense that, since a personal representative had been appointed, the two-year provision did not apply to extend the time for commencement of an action against the heirs and/or devisees. In this connection, it should be noted that the language of the statute permits an action against the heirs and/or devisees even where there is a personal representative, provided it is commenced within one year after the qualification thereof.

³⁶ The strongest argument for this proposition is that otherwise the two-year provision would be meaningless. However, this need not be the case. Even if suit be allowed against an administrator or executor who qualifies more than two years after the death of the party liable, and after the expiration of the regular period, this would not benefit the plaintiff if no administrator or executor ever qualified. The two-year provision would provide him with the alternative remedies of going against the heirs and/or devisees within this period, or of waiting to bring suit against the personal representative, and taking the risk that none will ever qualify.

³⁷ Ky. Rev. Stat., sec. 395.010 (1956) provides:

Original administration shall not be granted after the expiration of twenty years from the death of the testator or intestate, and if made after that time, it shall be void.

³⁸ Such a result could occur, for instance, where one against whom an action on a written contract lay dies shortly before the expiration of the regular period of fifteen years and his personal representative failed to qualify until some nineteen years later. The chances of such a chain of circumstances is, however, extremely rare.

³⁹ Ky. Rev. Stat. sec. 395.040(2) (1956) provides:

If no person mentioned in subsection (1) applies for administration at the second county court from the death of an intestate, the court

length of the delay would be only a matter of months or weeks, as in tort actions, and an impending action threatened to consume the entire estate.

Therefore, in the absence of any statutory provision or judicial decision to the contrary, and in order to reach a fair and equitable result in the majority of instances likely to arise, KRS 413.180(3) should be interpreted to allow any action against the personal representative of a person against whom an action has accrued prior to death, which is commenced within one year after his qualification, though such qualification does not occur until after the regular period of limitation has expired.

The possibility that, on an extremely rare occasion, the consequences of such an interpretation might be somewhat inconvenient is not enough to justify an opposite conclusion.

John T. Bondurant

REVERSE EMINENT DOMAIN: A NEW LOOK AND RE-DEFINITION

*Introduction*¹

In Kentucky, the rule of sovereign immunity prevents recovery against a sovereign arm when an injury occurs to a citizen or his property while the sovereign is carrying on a "governmental function." Some relief from this harsh rule is given by a doctrine called "reverse eminent domain" which permits recovery in cases where the sovereign

may grant administration to a creditor, or to any other person, in its discretion.

Ky. Rev. Stat. sec. 395.050(1) (1956) provides:

If no executor is appointed by the will, or if all the executors die, refuse the executorship or fail to give bond the court may grant administration with will annexed to the person who would have been entitled to administration if there had been no will. . . .

These provisions allow a person who has a cause of action against the decedent to take some affirmative steps to see that a personal representative of his estate is appointed, where the heirs and/or devisees seem reluctant to do so. However, the relief they afford is at best incomplete, since it often depends to a great extent on circumstances not within the control of the party entitled to sue and may necessarily be invoked too late to secure qualification before the regular period of limitation has elapsed. For a general discussion of the scope and applicability of these statutes, see *Adams v. Readover*, 134 Ky. 230, 120 S.W. 279 (1909).

¹ A very comprehensive series of three articles entitled "Claims Against the State of Kentucky" by Paul Oberst and Thomas Lewis appear in 42 Ky. L.J. 65, 163, 334 (1953-54). General reference is made to the second article in that series, 42 Ky. L.J. 163 (1953), in which the authors discuss the theory and development of reverse eminent domain. That article is extremely thorough in its treatment of the Kentucky cases on the problem of reverse eminent domain and is an invaluable research aid on the subject.