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to require that the need to restrict speech be well-documented and that the statutory restriction be precisely limited to addressing that need.

George W. Scofield

WRONGFUL DEATH: PRESCRIPTION? PEREMPTION? CONFUSION!

Plaintiff's parents were murdered by an unknown assailant during an apparent robbery. It was more than two years later before the identity of the alleged murderer was established when an inmate of the state penitentiary, who was free on a weekend pass at the time of the crime, was indicted for this offense. Plaintiff then sued the State Department of Corrections for damages arising from the wrongful death of her parents.¹ The First Circuit, reversing the trial court, *held* that the one year period in which a wrongful death action must be brought is not a period of peremption but rather is the one year prescriptive period of article 3536 of the Civil Code,² which had been suspended by the application of the doctrine of *contra non valentem*.³ *McClendon v. State Department of Corrections*, 357 So. 2d 1218 (La. App. 1st Cir. 1978).⁴

1. Plaintiff contended that the Department should be held (1) strictly liable or (2) negligent for granting a furlough to a man with two prior homicides on his record. Plaintiff also claimed damages for personal property allegedly stolen by the murderer.

2. "The following actions are . . . prescribed by one year: . . . [t]hat for damages . . . resulting from offenses or quasi offenses." LA. CIV. CODE art. 3536.

3. *Contra non valentem agere non currit prescriptio* means no prescription runs against a person unable to bring an action. *Aegis Ins. Co. v. Delta Fire & Cas. Co.*, 99 So. 2d 767, 772 (La. App. 1st Cir. 1957).

4. This note will not discuss the holding that the applicable time limitation for an action for damages to the property of the deceased provided by article 2315 to the deceased's legal heirs is the one year prescriptive period of article 3536. Though this is apparently the first case in which the question arose, there was little doubt that the time limitation for damages to the deceased's property was the prescriptive period of article 3536. See Johnson, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1, 31 n.148 (1976).

Neither will this note discuss the general application of the doctrine of *contra non valentem* in Louisiana. For the application of the doctrine in Louisiana, see generally Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 71 So. 598 (1916); Dagenhart v. Robertson Truck Lines, Inc., 230 So. 2d 916 (La. App. 1st Cir. 1970); Note, *Offenses and Quasi-Offenses—Prescription—Contra Non Valentem*, 32 TUL. L. REV. 783 (1958).

The history of the wrongful death action in Louisiana is a storied one. At common law the death of a human being did not give rise to a civil action for damages in favor of a living person who was harmed by the death.⁵ However, in France such an action was permitted under the *Cour de cassation's* interpretation of the Code Napoleon's basic tort article.⁶ Louisiana adopted this article verbatim as article 2294 in the Civil Code of 1825.⁷ Nevertheless, in 1851 the Louisiana Supreme Court refused to interpret the article as the French courts had, holding instead that since there was no statute specifically authorizing such an action, a wife could not recover for the wrongful death of her husband.⁸

In 1855 the legislature amended the article to read: "the right of this action [i.e., the right to bring a tort action] shall survive in cases of death . . . for the space of one year from the death" in favor of certain named beneficiaries.⁹ It is possible that this amendment was a response to the supreme court's decision that, absent an authorizing statute, no action for wrongful death was available in Louisiana.¹⁰ But regardless of what may have been the legislature's intent, in 1865 the supreme court held that under the article as amended, only damages suffered by the victim of the tort survived to those named

5. *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965). For a discussion of the recovery of damages at common law through a seldom used criminal action, see Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TUL. L. REV. 201, 208-11 (1931). The principle that the death of a human being did not give a civil action to a living person injured by the death was consistent with Roman law, which likewise had not allowed such an action. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 436-37 (1916).

6. Voss, *supra* note 5, at 219.

7. *Id.* Article 2294 of the Civil Code of 1825 read: "Every act whatever of man, that causes damage to another, obliges him, by whose fault it happened, to repair it."

8. *Hubgh v. New Orleans and Carrollton R.R. Co.*, 6 La. Ann. 495 (1951). For a criticism of the court's use of common law methodology and its disregard of French jurisprudence interpreting the identical article from the Code Napoleon, see Voss, *supra* note 5, at 219-20; *King v. Cancienne*, 316 So. 2d 366, 368-69 (La. 1975). In fact the court in *King* said "*Hubgh* was in error." 316 So. 2d at 369.

9. 1855 La. Acts, No. 223.

10. See *Earhart v. New Orleans and Carrollton R.R. Co.*, 17 La. Ann. 243, 245 (1865); Comment, *Wrongful Death and Survival of Tort Actions in Louisiana*, 1 LOY. L. REV. 84, 85 (1941).

in the article; the beneficiaries had no right to recover additional damages for their personal injuries sustained as a result of the victim's death.¹¹ In 1884 the legislature acted to remedy the situation, amending what was by then article 2315 of the 1870 Civil Code¹² to provide for a wrongful death action by adding the sentence: "The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."¹³

Significantly, this amendment adding the wrongful death language to article 2315 was silent concerning the time limit within which the action had to be exercised.¹⁴ The prescriptive

11. *Earhart v. New Orleans and Carrollton R.R. Co.*, 17 La. Ann. 243 (1865).

12. Article 2294 had become article 2315 with the revision of the Civil Code in 1870.

13. 1884 La. Acts, No. 71.

14. In 1960 article 2315 was amended to read in pertinent part:

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi-offense, if the injured person dies, shall survive for a period of one year from the death of the deceased The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased.

LA. CIV. CODE art. 2315, as amended by 1960 La. Acts, No. 30.

An argument can be made that this amendment tied the time period for wrongful death to the time period for the survival action because the death action is granted to those "in whose favor" the survival action survived. If an action has not been instituted within the year period, then arguably there are no longer any survivors "in whose favor" a survival action survived and thus none to whom the death action is granted. Thus, arguably the wrongful death time is fixed by the statute granting the action and is preemptive. See note 16, *infra*, and accompanying text.

However, this argument was apparently rejected in *Callais v. Allstate Insurance Co.*, 334 So. 2d 692 (La. 1976). There, on original hearing, the supreme court rejected the argument that this same language creates only one cause of action. "The language quoted above means no more than that *named survivors* upon whom devolve the right to assert deceased's cause of action for his injuries are also the parties who may sue for their own injuries resulting from the death." 334 So. 2d at 695. On rehearing the court reversed its conclusion in the case; however, it did not repudiate this statement. 334 So. 2d at 699-701.

Though this sentence was addressed to a one-cause-of-action argument, the force of it applies to an argument that the "in whose favor" language ties the wrongful death

period for tort actions is one year;¹⁵ the time limitation provided by the 1855 amendment granting the "survival" action is also one year. In Louisiana, however, it has long been recognized that where a statute creates a right of action and stipulates the time in which it must be exercised, the period is one of peremption, a time within which the right must be exercised or the cause of action ceases to exist.¹⁶ Though both time limits are one year periods, prescription is subject to interruption and suspension,¹⁷ while peremption is not.¹⁸ Thus, the following question is posed: Is the stipulation of time found in article 2315 applicable to both the survival¹⁹ and wrongful death actions granted by the article, or does the general prescriptive period for torts govern the wrongful death action?

and survival action together, thereby fixing the time in which a wrongful death action can be brought. Since the language "means no more than" that the named survivors can also sue for wrongful death, then the better argument is that the actions are tied together insofar as the same beneficiaries may bring both actions, but no further. See also Johnson, *supra* note 4, at 33-34.

The court's interpretation in *Callais* seems proper because the explicit purpose of the 1960 amendment to article 2315 was "[t]o implement the adoption of the Louisiana Code of Civil Procedure." 1960 La. Acts, No. 30. The only substantive changes in 2315 dealt with abatement and damages to personal property of the deceased. LA. CODE CIV. P. art. 428, comment (d). The change in the language of article 2315 did not otherwise evidence an intent to change its meaning. Johnson, *supra* note 4, at 30.

15. LA. CIV. CODE art. 3536. See note 2, *supra*.

16. *Guillory v. Avoyelles Railway Co.*, 104 La. 11, 28 So. 899 (1900), was the first case in Louisiana which clearly articulated this notion. Though the language doing so was dicta, the principle has become firmly ensconced in Louisiana law. Note, *Peremption—Prescription—Workmen's Compensation—Interruption of Workmen's Compensation Limitative Period by Filing Suit*, 4 LA. L. REV. 624, 627-28, & 627 n.16 (1942). See, e.g., *Ancor v. Belden Concrete Products, Inc.*, 260 La. 372, 256 So. 2d 122 (1971); *Succession of Pizzillo*, 223 La. 328, 65 So. 2d 783 (1953).

A pre-1900 case had recognized that where a grant of a right was coupled with the condition that it be exercised within a specified time period, "the lapse of time thus prescribed by law is more in the nature of a term of forfeiture than a term of prescription . . . [The] right is destroyed by inaction during the prescribed time." *Ashbey v. Ashbey*, 41 La. Ann. 102, 110, 5 So. 539, 543 (1889).

17. See LA. CIV. CODE arts. 3516-27.

18. *Flowers, Inc. v. Rausch*, 364 So. 2d 928 (La. 1978); *Succession of Pizzillo*, 223 La. 328, 65 So. 2d 783 (1953); *Dainow, The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Prescription*, 33 LA. L. REV. 235 (1973).

19. It is generally accepted that the time period for the survival action is peremptive because the statute granting the action fixes the time in which it must be invoked. See, e.g., *Gabriel v. United Theatres*, 221 La. 219, 59 So. 2d 127 (1952), *Romero v. Sims*, 68 So. 2d 154 (La. App. 1st Cir. 1953). But see Johnson, *supra* note 4, at 36-41.

This is a question that the jurisprudence has never adequately answered. The supreme court has called the period prescriptive but has done so only in cases where the issue of peremption was not considered.²⁰ However, the jurisprudence and scholarship dealing with wrongful death contain unqualified expressions that the time period is one of peremption.²¹ The division on the question is clearly illustrated in state appellate court decisions. There is one line of cases treating the period as preemptive²² and another line of cases treating the limitation as a prescriptive one.²³ A third group of cases has

20. *Trahan v. Liberty Mut. Ins. Co.*, 314 So. 2d 350 (La. 1975); *Stephenson v. New Orleans Ry. & Light Co.*, 165 La. 132, 115 So. 412 (1928); *Vernon v. Illinois Cent. R.R. Co.*, 154 La. 370, 97 So. 493 (1923); *Rady v. Fire Ins. Patrol of New Orleans*, 126 La. 273, 52 So. 491 (1910); *Goodwin v. Bodcaw Lumber Co.*, 109 La. 1050, 34 So. 74 (1902). *Goodwin* is sometimes cited for the proposition that the time period is prescriptive, but the court held that the prescription of article 3536 runs against minors by virtue of article 3541 of the Code. In dicta, the court said "the right of action itself is conditioned upon its being exercised within a year from the time of death," citing *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 So. 539 (1889), as one of the cases supporting this proposition. 109 La. at 1066, 34 So. at 80. Thus, while treating the period as prescriptive, there is language in dicta suggesting that the period might be preemptive.

Though the supreme court has never called the period preemptive, in *Davis v. State Farm Mutual Insurance Co.*, 208 So. 2d 412 (La. App. 4th Cir.), *cert. denied*, 252 La. 175, 210 So. 2d 55 (1968), and *Succession of Roux v. Guidry*, 182 So. 2d 109 (La. App. 4th Cir.), *cert. denied*, 248 La. 1106, 184 So. 2d 27 (1966), the court in refusing writs said there was "no error of law" in the Fourth Circuit judgments which treated the period as preemptive.

21. See, e.g., *Smith v. Monroe Grocery Co.*, 171 So. 167, 171 (La. App. 2d Cir. 1937), wherein it is stated that it is "well-settled doctrine that the delay provided . . . is one of peremption." See also Comment, *Survival of Actions in Article 2315 of the Louisiana Civil Code: The Victim's Action and the Wrongful Death Action*, 43 Tul. L. Rev. 330, 344 (1969).

22. See, e.g., *Davis v. State Farm Mut. Ins. Co.*, 208 So. 2d 412 (La. App. 4th Cir.), *cert. denied*, 252 La. 175, 210 So. 2d 55 (1968); *Succession of Roux v. Guidry*, 182 So. 2d 109 (La. App. 4th Cir.), *cert. denied*, 248 La. 1106, 184 So. 2d 27 (1966); *Smith v. Monroe Grocery Co.*, 171 So. 167 (La. App. 2d Cir. 1937); *Matthews v. Kansas City S. Ry. Co.*, 10 La. App. 382, 120 So. 907 (2d Cir. 1929).

23. However, in none of these cases was the question of peremption considered. If the period had been treated as preemptive, the results would apparently have been no different. Where prescription had not been interrupted, the preemptive period would also have expired; those cases which found that prescription was interrupted by the filing of suit apparently would have also found that a preemptive period had been "interrupted." See text at notes 26-28, *infra*. See, e.g., *Favors v. Southern Indus. Inc.*, 344 So. 2d 693 (La. App. 1st Cir. 1977); *Hazel v. Allstate Ins. Co.*, 240 So. 2d 431 (La. App. 3d Cir. 1970); *Myers v. Gulf Pub. Serv. Corp.*, 15 La. App. 589, 132 So. 416 (2d Cir. 1931).

avoided the issue by treating the two periods as functionally indistinguishable for purposes of those decisions. Thus, they have labelled the limitation a "prescriptive or peremptive period."²⁴ On the other hand the federal courts have, with only one exception, consistently treated the period as peremptive.²⁵

Further confusing the matter is a group of cases holding the wrongful death time limitation to be subject to interruption or suspension by filing of suit in a court of competent jurisdiction despite either a suggestion or holding that the time period is peremptive. Thus, when another suit was filed more than a year after the death, it was held that the claim had not perempted.²⁶ This result contradicts the rule that a period of per-

24. *Wick v. Sellers*, 309 So. 2d 909, 913 (La. App. 3d Cir. 1975); *Marshall v. Southern Farm Bureau Cas. Co.*, 204 So. 2d 665, 667 (La. App. 3d Cir.), *cert. denied*, 251 La. 860, 206 So. 2d 711 (1967), *cert. denied*, 393 U.S. 883 (1968). *See also* *Cacibauda v. Gaienne*, 305 So. 2d 572 (La. App. 4th Cir. 1974); note 26, *infra*, and accompanying text.

25. *See, e.g.*, *Gaston v. B.F. Walker, Inc.*, 400 F.2d 671 (5th Cir. 1968); *Kenney v. Trinidad Corp.*, 349 F.2d 832 (5th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966); *Thompson v. Gallien*, 127 F.2d 664 (5th Cir.), *cert. denied*, 317 U.S. 662 (1942).

The solitary exception treating the period as prescriptive is *Brandon v. Kansas City Southern Railway Co.*, 7 F. Supp. 1008 (W.D. La. 1934), which did so because *Matthews v. Kansas City Southern Railway Co.*, 10 La. App. 382, 120 So. 907 (2d Cir. 1929), had said that filing suit in a competent court did not "interrupt" preemption. However, in 1940 *Matthews* was expressly overruled by *Mitchell v. Sklar*, 196 So. 392 (La. App. 2d Cir. 1940), a workman's compensation case which said that rules pertinent to interruption of prescription by filing suit were applicable to peremptive periods also. 196 So. at 394-96.

See also *Francis v. Herrin Transp. Co.*, 432 S.W.2d 710 (Tex. 1968), where the Texas Supreme Court when called upon to apply Louisiana law treated the period as peremptive, but subject to "interruption" by filing suit in a competent court. But see notes 26-28, *infra*, and accompanying text.

26. *Thompson v. Gallien*, 127 F.2d 664 (5th Cir.), *cert. denied*, 317 U.S. 662 (1942) (filing suit against a railroad "interrupted" the peremptive limitation against that railroad's reorganization trustee); *Wick v. Sellers*, 309 So. 2d 909 (La. App. 3d Cir. 1975) (the filing of suit against original defendants interrupted the "prescriptive or peremptive period of Article 2315" as to defendants now alleged to be solidarily liable, 309 So. 2d at 913); *Marshall v. Southern Farm Bureau Cas. Co.*, 204 So. 2d 665 (La. App. 3d Cir.), *cert. denied*, 251 La. 860, 206 So. 2d 711 (1967), *cert. denied*, 393 U.S. 883 (1960) (the pendency of suit in federal court "suspended the prescriptive or peremptive period." 204 So. 2d at 667).

Smith v. Monroe Grocery Co., 171 So. 167 (La. App. 2d Cir. 1937), is sometimes cited for the proposition that a peremptive period can be interrupted. However, that case dealt with an amending petition filed after the one year period averring the needed allegation that decedent was not survived by wife or children. The court acknowledged

emption cannot be interrupted or suspended.²⁷ What these cases have in common, however, is the fact that in each of them the plaintiff had exercised, in some form, the right granted by article 2315 within the one year limitation.²⁸

In *McClendon*, since the identity of the alleged murderer was not discovered until two years after the crime, the right of action was not exercised at all within the year after the murder. Not even those cases which had said that peremption could be "suspended" or "interrupted"²⁹ had gone so far as to say that something other than filing suit could "suspend" or "interrupt" the running of the preemptive time period. However, prescription can be interrupted by the application of the doctrine *contra non valentem* when the plaintiff is unable to bring suit because his cause of action is concealed from him by a tortfeasor.³⁰ The First Circuit was thus compelled to decide

that peremption is "not subject to interruption as in the case of prescription, properly speaking" but said the amendment would "not be the equivalent to the bringing of new actions so as to render applicable the one-year preemptive period stipulated in . . . art. 2315." 171 So. at 171.

27. The supreme court has recently re-affirmed that peremption "does not admit of interruption or suspension." *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 (La. 1978). The scholarship dealing with peremption has also recognized this. *E.g.*, "A period that admits of suspension or interruption cannot properly be called a preemptive period." Johnson, *supra* note 4, at 37 (emphasis removed); "[T]here can be no interruption by suit." *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Prescription*, 29 LA. L. Rev. 230, 231 (1969).

28. The courts have apparently not considered whether the notion that the exercise of the right operates to keep the right alive beyond the one year period (so that another suit may be brought on the same cause of action after the period expires) is consistent with the theory of peremption. See the authorities cited in note 27, *supra*, which strongly suggest that it is not.

One theory attempting to square this apparent contradiction was presented in *Thompson v. Gallien*, 127 F.2d 664, 665-66 (5th Cir. 1942). The Louisiana legislature had provided "[t]hat the filing of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon." 1932 La. Acts, No. 39. The court reasoned that "peremption affects the cause of action and prescription affects only the remedy." 127 F.2d at 666. Since the courts had long been applying the principle of interruption by suit to prescription, the court reasoned that "it may well be that the legislature intended . . . to apply the same principle of law to peremptions . . ." 127 F.2d at 666.

29. See notes 26-28, *supra*, and accompanying text.

30. See note 3, *supra*. See also *Aegis Ins. Co. v. Delta Fire & Cas. Co.*, 99 So. 2d 767 (La. App. 1st Cir. 1957).

if the time limitation for wrongful death is prescriptive or peremptive.

Noting first that article 2315, the source of the survival action and the wrongful death action, "contemplates two separate and distinct actions,"³¹ the court made reference to the fact that the one year limitation is found in the sentence of the article dealing with the survival action, while no mention of a time limitation is made in the wrongful death portion of 2315. The court observed "that it might be quite reasonable to provide different time limitations" for the two actions.³² The court then interpreted the word "also" in the sentence "the survivors in whose favor this right of action survives may *also* recover the damages which they sustained through the wrongful death of the deceased" to mean only that these beneficiaries could bring a wrongful death action in addition to the survival action. The view expressed in an earlier case that the use of the word "also" indicated that "the wrongful death action was based on the same conditions as the survival action and was subject to the same one year limitation" was rejected.³³ Article 2315 was deemed not to provide the limitation for wrongful death, so the governing period was not peremptive; rather, the court held that the prescriptive period of article 3536 was the applicable time limit.³⁴

Though the holding in *McClendon* is clear, the opinion is unsatisfying because it actually does little to alleviate the confusion surrounding the nature of the time limitation for a wrongful death action. In fact, it may have added to the confusion by its rather loose treatment of the jurisprudence. Noting the varying jurisprudential treatments of the time limitation,

31. *McClendon v. State Dep't of Corrections*, 359 So. 2d 1218, 1223 (La. App. 1st Cir. 1978).

32. *Id.* at 1224. This was a response to the language in *Matthews v. Kansas City Southern Railway Co.*, 10 La. App. 382, 120 So. 907 (2d Cir. 1929), in which the court had said that it would be unreasonable to suppose that the legislature intended otherwise.

33. 357 So. 2d at 1224 (emphasis added). *Matthews v. Kansas City Southern Railway Co.*, 10 La. App. 382, 120 So. 907 (2d Cir. 1929), had said that "also" meant the two actions were based on the same conditions and subject to the same limitation. 10 La. App. at 385, 120 So. at 909.

34. 357 So. 2d at 1224.

the court pointed to a line of cases which it said held the period to be prescriptive.³⁵ Yet, these cases³⁶ are not very persuasive authority for the proposition that the period is prescriptive rather than preemptive. In each of the cited cases, the court treated the period as prescriptive but found that the period had not been interrupted. Even if the period had been considered preemptive, the result in these cases would have been the same because the one year period had run without the right being exercised. Thus, in the cited cases the courts were not required to choose between prescription or preemption, that issue not being before them.

Moreover, the court in *McClendon* did not address the fact that the United States Fifth Circuit Court of Appeals, when forced to choose whether the period is preemptive in situations where the distinction was material, has *held* the period to be preemptive.³⁷ In the two cases where the court so held, a different disposition of the case would have followed had the period been determined to be prescriptive.³⁸ In both cases the holding

35. *Id.* at 1223.

36. *Trahan v. Liberty Mut. Ins. Co.*, 314 So. 2d 350 (La. 1975); *Stephenson v. New Orleans R.R. & Light Co.*, 165 La. 132, 115 So. 412 (1928); *Favors v. Southern Indus., Inc.*, 344 So. 2d 693 (La. App. 1st Cir. 1977); *Sansone v. Louisiana Power & Light Co.*, 164 So. 2d 151 (La. App. 1st Cir), *cert. denied*, 246 La. 596, 165 So. 2d 486 (1964).

37. *Gaston v. B.F. Walker, Inc.*, 400 F.2d 671 (5th Cir. 1968); *Kenney v. Trinidad Corp.*, 349 F.2d 832 (5th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966).

38. In *Gaston v. B.F. Walker, Inc.*, 400 F.2d 671 (5th Cir. 1968), a diversity suit arising out of an accident in Louisiana that was filed in Texas, the federal court was bound to apply Texas conflict of law rules. Plaintiffs argued that "a Texas court would look to the procedural rules of Texas in determining the application of a statute of limitations." 400 F.2d at 673. Thus, a suit filed thirteen months after the death would not have been barred because Texas had a two year statute of limitations, "generally characterized as procedural." 420 F.2d at 673. However, the court found that Texas courts had held "that where the statute creates a right and also incorporates a limitation upon the time . . . the limitation . . . becomes a part of the substantive law rather than procedural." 400 F.2d at 673, *quoting* *California v. Copus*, 158 Tex. 196, 309 S.W.2d 227, 231, *cert. denied*, 356 U.S. 967 (1958). The court then found the limitation to be given by the statute and thus to be preemptive, barring plaintiff's suit. Had the court found the period to be prescriptive, the longer two year period given by the Texas statute of limitations would have been applied, and plaintiff's claim would not have been barred.

Kenney v. Trinidad Corp., 349 F.2d 832 (5th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966), an action in admiralty for the wrongful death of a tugboat crew member drowned in the Mississippi, was not filed for several years after the death. Libellants

that the period was preemptive, a matter of substantive law, precluded the application of the longer time periods being urged by those bringing suit.³⁹

McClendon does, however, highlight a point not often discussed in the jurisprudence: the fact that the time limitation in article 2315 is not found in the sentence granting the wrongful death action.⁴⁰ The court could have further noted that the statute which created the wrongful death action was passed in 1884,⁴¹ some twenty-nine years after the statute creating the survival action which contained the one year limitation.⁴² While recognizing that the statute which created the wrongful death action also re-enacted the survival action,⁴³ it can be argued that according to the oft-stated criterion for determining whether a period is preemptive, the wrongful death period is not.⁴⁴ The statute creating the action did not prescribe the time limitation. The time limitation in 2315 was fixed by the statute which had created the survival action in 1855. Thus, this observation should be part of any argument that the period is prescriptive.⁴⁵

Another seldom discussed issue brought out by the court is the dissimilar natures of the survival and wrongful death actions. However, the court did not elaborate fully on the dif-

claimed that the maritime doctrine of laches excused the delay. The court, applying the state wrongful death statute, said: "[P]rocedural matters are governed by federal procedural law. . . . On the other hand, substantive matters which are integral parts of the state created rights . . . must be governed by state law." 349 F.2d at 837. Thus, in this case "the crucial point . . . is whether the time limit . . . is a matter of substance or . . . procedure." 349 F.2d at 837. The court noted that Louisiana law "distinguish[es] between a period . . . that is prescriptive and therefore procedural and one that is preemptive . . . and therefore substantive." 349 F.2d at 837. The court held the period to be preemptive and thus did not reach the question of excusable laches. 349 F.2d at 838.

39. See note 38, *supra*. See also *Dainow, supra* note 27, at 230, wherein the difference between prescription and preemption is explained. Prescription acts only as a "bar" to the action, whereas preemption "absolutely extinguishe[s] the action."

40. See note 14, *supra*.

41. 1884 La. Acts, No. 71.

42. 1855 La. Acts, No. 223.

43. *Id.*

44. See note 16, *supra*, and accompanying text.

45. The First Circuit might have also noted that the supreme court has always called the period prescriptive. See note 20, *supra*.

ferences between the two actions. The survival action is in the nature of a succession right; the plaintiffs' right to recovery is not based on harm to them, but rather the victim's right to recovery is transferred by operation of law to the plaintiffs.⁴⁶ On the other hand, the wrongful death action directly compensates the person injured by the death of another and thus is a tort action. Given that a wrongful death action is a tort action and that the survival action is in the nature of a succession right, it is not illogical for the two actions to be governed by different types of time periods.

One major problem the court failed to address is that if the time bar for the wrongful death action is prescriptive and the time bar for the survival action is peremptive (as the court said it is), then the two actions logically must constitute two separate causes of action.⁴⁷ But in 1931, in the celebrated case of *Reed v. Warren*,⁴⁸ the supreme court said that the two actions were "founded upon the same cause of action."⁴⁹ This proposi-

46. See *King v. Cancienne*, 316 So. 2d 366, 369 (La. 1975). In France it has been held that the action of the victim of a fatal accident dies with him and does not pass to his heirs. 2 M. PLAINIOL, CIVIL LAW TREATISE pt. 1, no. 389, at 221 n.1 (11th ed. La. St. L. Inst. transl. 1959). The theory apparently is that allowing such a recovery would be an unjust enrichment of the heirs. See Voss, *supra* note 5, at 216.

47. While the First Circuit did not explicitly say that the actions were two separate causes of action, the court noted that article 2315 "contemplates two separate and distinct actions." 357 So. 2d at 1223.

48. 172 La. 1082, 136 So. 59 (1931).

49. 172 La. at 1093, 136 So. at 63. *But see* Johnson, *supra* note 4, at 9, where it is contended that no such proposition was advanced. Professor Johnson asserts that the language saying there is "only one cause of action" refers only to the wrongful death claims of the multiple beneficiaries. Yet there is a reference in *Reed* two sentences earlier than the one quoted by Professor Johnson where the court said that the fact that Mrs. Reed's children could claim different amounts for damages resulting from wrongful death "is no reason why the defendant should be subjected to the annoyance and expense of defending five, or perhaps ten, lawsuits, all founded upon the same cause of action." 172 La. at 1092, 136 So. at 63 (emphasis added). The reference to ten lawsuits apparently is a reference to the fact that the five children of Mrs. Reed had each filed a separate suit. If the actions had been considered distinct, it might have been argued that the survivors each had the right to bring a suit under the wrongful death action and a suit under the survival action.

Of course the statements in *Reed* about wrongful death and survival constituting one cause of action are dicta. As the court phrased the issue:

The question in this case is whether several persons having a right of action for damages against one who inflicted personal injuries causing the death of another must be made parties to one suit for damages, or may bring as many

tion has not gone without criticism,⁵⁰ and it has been contended that the rule has not been followed when the issue had any real importance.⁵¹ However, the rule has not been clearly overturned,⁵² therefore, the First Circuit was remiss in not address-

suits as there are persons entitled to the right of action.

172 La. at 1084, 136 So. at 60. In this case Mrs. Reed's five children had brought five separate suits claiming both the survival action and the wrongful death action. 172 La. at 1084, 136 So. at 60. Thus, the question of whether wrongful death and survival actions might be brought in separate actions was not before the court. This question did arise in *Norton v. Crescent City Ice Manufacturing Co.*, 178 La. 135, 150 So. 855 (1933), and the court reiterated the one cause of action theory, holding that the two actions must be brought in the same suit. Whether the language in *Reed* that was adopted by the court in *Norton* regarding one cause of action is part of the *ratio decidendi* of any holding that the two actions must be brought in the same suit, or whether it is dicta that is not essential to any such holding, is arguable. In saying that the two actions must be brought in the same suit, the court in *Reed* seems to have been responding more to what it deemed to be the legislative intent than to anything inherent in the two actions that would preclude their being brought in separate suits. "We do not believe that the Legislature intended, by the act of 1884, to give to a survivor . . . the right to bring two suits . . ." 172 La. at 1089, 136 So. at 61-62. It was only after the court had determined this, that it said that there is just one cause of action. 172 La. at 1092, 136 So. at 62. Cf. Theis, *Zahn v. International Paper Co.: The Non-Aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 88, 105 n.88 (1974) (where it is stated that the holding in *Reed* that the defendant is entitled to have all the defendants joined in one suit "is based, at least in part, on considerations of convenience to the defendant, not the nature of the interest asserted by the plaintiffs"). See Johnson, *supra* note 4, at 8, where it is asserted that these same convenience factors played a part in the court's determination that the two claims cannot be brought in separate actions.

50. See Johnson, *supra* note 4, at 12-13.

51. Johnson, *supra* note 4, at 10. It should be noted that the cases cited by Professor Johnson are either lower court opinions or pre-*Reed v. Warren*. Especially noteworthy, however, is a First Circuit opinion which holds that a compromise of the survival action did not bar a wrongful death action. *Johnson v. Sundberry*, 150 So. 299 (La. App. 1st Cir. 1933). As Professor Johnson says, "surely this is not consistent with a one-cause-of-action theory." Johnson, *supra* note 4, at 10.

52. In its original opinion in *Callais v. Allstate Insurance Co.*, 334 So. 2d 692, 695 (La. 1976), the court did repudiate the one-cause-of-action theory, but on rehearing it modified its stance, saying that there are "two types of death actions" provided by article 2315. 334 So. 2d at 700.

See also *King v. Cancienne*, 316 So. 2d 366 (La. 1975), where Justice Barham took note of the fact that in France (from which our article 2315 originally came) it is recognized that "[t]he legal right and cause of action of one injured by loss of economic aid or love and affection was independent of any action which the deceased might have had and which would have passed to the heirs upon his death." 316 So. 2d at 369. The court went on to say that "*Hubgh* was in error." 316 So. 2d at 369. The inference might be drawn that the one-cause-of-action theory is also in error because

ing the issue. If there is only one cause of action, it logically follows that the time period for the wrongful death and survival actions must be the same. The court ignored the issue; consequently, the opinion loses credibility.

The opinion in *McClendon* is a significant break with the jurisprudence, which had never held that the period was prescriptive rather than preemptive.⁵³ Had the court treated the period as preemptive, a "strange principle" of law would have resulted—recovery would be denied when death ensues, yet recovery would be allowed when injury short of death results.⁵⁴ The holding that the period is prescriptive (and thus interruptible by the doctrine of *contra non valentem*) seems more compatible with contemporary notions of justice than a holding that plaintiff's claim had preempted. But the First Circuit failed to articulate clearly why the period is prescriptive rather than preemptive. Its inadequate treatment of both the statutes and the jurisprudence⁵⁵ merely adds to the confusion surrounding the issue. Nor is the court's reasoning as to why the period should be viewed as prescriptive rather than preemptive as persuasive as it could have been.⁵⁶ Perhaps the confusion can only be ended by legislative action⁵⁷ or by a clear statement by the supreme court on the nature of the time bar to the wrongful

the wrongful death action is described as an "independent action" given by the legislature in 1884 when the *Hubgh* error was corrected. 316 So. 2d at 369.

Also, in the original opinion in *Callais* the supreme court rejected the argument that article 2315's language gives the right of action for the wrongful death action only to those "in whose favor (the right to bring a survival) action survives." 334 So. 2d at 695. See note 14, *supra*.

53. *But see* Johnson, *supra* note 4, at 41, where it is asserted that "jurisprudential treatment of the period, whatever it is called, differs not at all from the treatment of a prescriptive period." However, this is true only in cases dealing with the "interruption" of preemption by filing suit. See notes 26-28, *supra*, and accompanying text. In other contexts the jurisprudential treatment of the period has differed depending on whether the period was considered to be one or the other. See notes 37-39, *supra*, and accompanying text. In the instant case, of course, the difference between preemption and prescription made the difference between plaintiff being heard on the merits or not.

54. See *The Tungus v. Skovgaard*, 358 U.S. 588, 611 (1959) (Brennan, J., dissenting), where the application of the principle in an admiralty case yielded such a result.

55. See text at notes 35-39, *supra*.

56. See text at notes 40-46, *supra*.

57. See Johnson, *supra* note 4, at 54-58.

death action. Short of either of these, opinions such as *McClendon* will only produce further problems.

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