North Dakota Law Review

Volume 31 | Number 3 Article 4

1955

Civil Judicial Procedure - Statute of Limitations - Effect of Non-Resident Motorist Service on Tolling Statute

David Vaaler

RECENT CASES

CIVIL JUDICIAL PROCEDURE — STATUTE OF LIMITATIONS — EFFECT OF NON-RESIDENT MOTORIST SERVICE ON TOLLING STATUTE — Plaintiff and defendant, both nonresidents, were involved in an automobile collision in South Dakota. Jurisdiction over the defendant was obtained pursuant to the Nonresident Motorist Service Statute[1]. Although more than two years had elapsed since the collision, plaintiff contended that the statute of limitations was tolled because of the defendant's absence from the state and the plaintiff's consequent inability to obtain personal service. The Supreme Court in reversing the decision of the trial court, which had accepted plaintiff's contention, *held*, that where provision is made for substituted service in actions arising out of motor vehicle accidents the defendant is as subject to process as if he resided in the state and the statute providing for the tolling of the statute of limitations is inapplicable. *Busby v. Shafer*, 66 N.W.2d 910 (S. D. 1954).

Prior to enactment of substituted service statutes the only method of obtaining personal jurisdiction over a nonresident defendant was by service upon him while within the state[2]. However, in order to protect a plaintiff whose recovery was frustrated through no fault of his own, many states enacted statutes providing for the suspension of the statute of limitations during a nonresident defendant's absence from the state[3]. These statutes have generally been held inapplicable if the defendant, while himself temporarily absent, still maintained a residence or place of business within the state and was thus not considered a nonresident in terms of the statute[4], or if the defendant was present within the state so that a plaintiff, with the exercise of reasonable diligence, could have served process upon him[5].

The fact that the statute of limitations did not run was small comfort to a plaintiff if the defendant perpetually absented himself from the jurisdiction of the courts of the plaintiff's state. He was still without an effective means of obtaining redress for his injuries. Recognizing that the increased use of the automobile as a means of interstate transportation made this unfair situation vastly more prevalent, many legislatures passed statutes providing that the use of state highways by a nonresident constitutes appointment of a state official as the personal representative of such nonresident for the purpose of service of process in any action which might accrue against him while within its jurisdiction[6]. "The obvious purpose of this . . . was to afford a

1. S. D. Code §33-0809 (1939) "The use or operation by a nonresident or his agent of a motor vehicle upon and over the highways of this state shall be deemed an appointment by such nonresident of the Secretary of State of South Dakota to be his true and lawful attorney upon whom may be served legal process in any action or proceeding against such nonresident growing out of such use of a motor vehicle over the highways of this state resulting in damage or loss to persons or property, and said use or operation shall be a signication of such nonresident's agreement that any such process in any action against him which is so served shall be of the same legal force and validity as if served upon him personally . . .".

2. *See* Coombs v. Darling, 116 Conn. 643, 166 Atl. 70 (1933).

3. *E.g.*, Conn. Rev. Gen. Stat. §8330 (1949); Ill. Rev. Stat. c. 83 §19 (1945); Mich. Comp. Laws §609.17 (1948); N. D. Rev. Code §28-0132 (1943); S. D. Code §33-0203 (Supp. 1939); Wis. Stat. §330.30 (1947).

4. Dorus v. Lyon, 92 Conn. 55, 101 Atl. 490 (1917); Niblack v. Goodman, 67 Ind. 174 (1879); Crowder v. Murphy, 61 Wash. 626, 112 Pac. 742 (1911).

5. Sims v. Tigrett, 229 Ala. 486, 158 So. 326 (1934); Foster v. Butler, 164 Cal. 623, 130 Pac. 6 (1913); Mack v. Mendels, 249 N. Y. 356, 164 N.E. 248 (1928).

6. *E.g.*, Mass. Gen. Laws c. 90 §3A (1932); Neb. Rev. Stat. c. 25 §530 (1943); N. D. Rev. Code §28-0611 (1953); S. D. Code §33-0809 (1939); Wis. Stat. §85.05 (1947).

means by which the equivalent of personal service might be made upon a nonresident although he was not actually within the state"[7]. Courts considering the application of tolling statutes in conjunction with nonresident motorist service statutes must, of course, decide whether an exception should be made to the tolling statute so that substituted service becomes the only avenue of relief available to the plaintiff, or whether the defendant's absence should suspend the period of limitation so that plaintiff may at his own option proceed by substituted service or wait until personal service is possible[8].

The majority of courts hold that since the substituted service statutes provide the plaintiff with a complete remedy within the state the statute of limitations will continue to run[9]. The minority view, set forth in the dissenting opinion in the instant case[10], is that in the absence of an expressed exception in the tolling statute dealing with cases where the plaintiff could have statutory service of process on the defendant, it is not within the province of the court to create an exception[11]. Courts upholding the majority opinion reason "that it is the intent of that body (*i. e.* the legislature) that governs and not the literal meaning of the words employed."[12]

It is submitted that the majority holding is the more justifiable. It is the basic purpose of the tolling statute to prevent one from avoiding judgment by evading the service of process[13]. However, service remains impossible if the defendant continues to remain unavailable. The use of statutory substituted service removes this possibility and provides a method for a plaintiff to bring such cases to bar within the statutory period.

DAVID A. VAALER

CONSTITUTIONAL LAW — SIXTH AMENDMENT — RIGHT OF CONFRONTATION — Plaintiff, warden of a state penitentiary, instituted mandamus proceedings to compel defendant judges to vacate orders requiring plaintiff to produce a convicted felon as a witness for the accused in a criminal prosecution. Plaintiff refused on the strength of an Oregon statute authorizing examination of imprisoned felons by deposition.[1] The court *dismissed* the writ of mandamus. That part of the statute invoked by plaintiff was unconstitutional since it

---

7. Coombs v. Darling, 116 Conn. 643, 166 Atl. 70 (1933).
8. *See* 33 Ill. L. Rev. 351 (1938).
9. Scorza v. Deatherage, 208 F.2d 660 (8th Cir. 1954); Tublitz v. Hirchfeld, 118 F.2d 29 (2nd Cir. 1941); Coombs v. Darling, 116 Conn. 643, 166 Atl. 70 (1933); Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d (1952); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938); Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189 (1947).
10. Judge Rudolph in his dissent said, "The majority opinion now writes into the statute another exception. It is my view that such action usurps the legislative function. 'Where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such cases the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted' ".
11. Gotheiner v. Lenihan, 20 N. J. Misc. 119, 25 A.2d 430 (1942); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).
12. *See* Read v. Jerauld County, 70 S. D. 298, 17 N.W.2d 269 (1948); Brookings County v. Murphy, 23 S. D. 311, 121 N.W. 793 (1909).
13. *See* Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189 (1947).

1. Ore. Rev. Stat. 44.230(3) (1953).