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Constitutional Law - Sixth Amendment - Right of Confrontation

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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.

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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

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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).

conflicted with a subsequent statute,[2] which was the legislative "definition and construction" of the Oregon constitutional provision[3] allowing the accused to confront *"the witnesses face to face."* This was construed to mean witnesses for as well against the accused. Justice Lusk concurred on the ground that the statute relied upon by plaintiff was an unconstitutional infringement of the right of the accused in a criminal prosecution to compulsory process for obtaining witnesses in his favor. *State* ex. rel. *Gladden v. Lonergan,* 269 P.2d 491 (Ore. 1954).

The common law "right of confrontation" was incorporated in the Sixth Amendment of the United States Constitution,[4] which states: ". . . in all prosecutions the accused shall enjoy the right to be confronted with the witnesses *against him.* . . ." This guarantees that the accused has the right to hear and cross examine only the witnesses against him.[5] In contrast, the Oregon Constitution guarantees the right to confront the "witnesses face to face." There is a presumption against inadvertence when the framers of a constitution, in basing its provisions on a former constitution, omit a word or words.[6] Though the result under the Sixth Amendment of the Federal Constitution would differ from the instant case, the Sixth Amendment is, of course, only a limitation on the acts of the federal government.[7]

It has been held that the essence of confrontation is the assurance that the accused shall have the right to cross examine.[8] Referring to confrontation and cross examination, one case stated, "The right to the latter was . . . secured only . . . by . . . the former and in reality it is an instance of the same right exemplified by different terms."[9] Thus it would seem that confrontation of a friendly witness would be purposeless since cross examination would not be appropriate. However, confrontation involves advantages other than cross examination. The conduct of the witness on the stand can be observed in judging the value of the testimony.[10] In this respect confrontation could benefit the accused whether the witness is friendly or hostile. In any event, it appears clear that the Constitution of Oregon does guaranty the right to confront even friendly witnesses. However, reasoning that the existence of this right leads necessarily to the conclusion that the prisoner-witness must be produced may involve a *non sequitur.*[11] Normally, a right of confrontation is asserted to prevent the admission of a deposition of a witness,[12] not to compel a custodian to produce a witness in his custody. The fact that the deposition is inadmissable could as well mean that the testimony of the witness is unavailable as that his custodian can be compelled to produce him in in person.

The plaintiff's refusal to produce the prisoner might have been upheld

2. Ore. Rev. Stat. 136.530 (1953) 'In a criminal action, the testimony of a witness shall be given orally in the presence of the court and jury, except in the case of a witness whose testimony is taken by deposition by order of the court. . ."
3. Ore. Const. Art. I, §11.
4. United States v. Barrocota, 45 F. Supp. 38 (S.D. N.Y. 1942).
5. United States v. Barrocota, *supra* note 4.
6. Cawley v. Pershing County, 50 Nev. 237, 225 Pac. 1073 (1927).
7. Blass v. Weigel, 85 F. Supp. 775 (D. N.J. 1949); *Ex parte* Carter, 14 N. J. Super. 591, 82 A.2d 652 (1951).
8. Dowdell v. United States, 221 U. S. 325 (1911); Brown v. State, 81 Okla. Crim. 314, 164 P.2d 401 (1945).
9. People v. Werblow, 123 Misc. 204, 205 N. Y. Supp. 617 (1924).
10. 2 Wigmore, Evidence §1365 (3d ed. 1940).
11. *Cf.* Instant case at 505 (concurring opinion).
12. Mattox v. United States, 156 U. S. 237 (1895).

if a deposition of the prisoner had been admissable. Generally the right of confrontation prohibits the use of depositions of a witness if the witness is within the jurisdiction of the court and it is possible to obtain his presence by proper process.[13] There are certain exceptions to this rule. If a witness dies after giving testimony at a prior trial where the accused had an opportunity to cross examine, his testimony may be read at subsequent trial for the same offense.[14] If the accused has not had an opportunity to cross examine, depositions of an absent or deceased witnes are inadmissable,[15] unless the accused has caused the witness to be absent.[16] Statutes permitting the admission of depositions in criminal actions where the witness is in imminent danger of death or is residing without the state are constitutional if the accused is afforded the opportunity to be present when the deposition is taken so that he can confront and cross examine the witness.[17]

The use of depositions in the instant case would not come within any of the recognized exceptions to the rule of confrontation. Of course, since a friendly witness is involved here, the accused would not object to the introduction of the testimony by the use of a deposition, if it were necessary to do so.

The question in the instant case would arise only in states having constitutions following the language of the Oregon document.[18] The majority of the states with constitutional provisions on the point substantially follow the federal constitution.[19] North Dakota follows the majority, but the right of confrontation is purely statutory.[20]

The result in the instant case appears correct, but as indicated in the concurring opinion, a sounder ground for the decision would seem to be that the statute requiring testimony of imprisoned felons to be taken by deposition denies the constitutional right to compulsory process.[21]

KENNETH R. YRI

COURTS — JURISDICTION — FORUM NON CONVENIENS. — Plaintiff, a resident and citizen of Nebraska, was injured in a railroad accident in that state. The defendant railroad company did business in both Nebraska and Minnesota. Plaintiff brought an action under the Federal Employers' Liability Act in the District Court, Washington County, Minnesota. The action was dismissed without prejudice on ground of *forum non conveniens*. On appeal, it was *held*, that the trial court has the discretionary power to invoke the doctrine *forum*

13. Catron v. Commonwealth, 268 Ky. 536, 105 S.W.2d 618 (1937).
14. Walls v. State, 194 Ark. 578, 109 S.W.2d 143 (1937); State v. Barnes, 274 Mo. 625, 204 S.W. 267 (1918); State v. Maynard, 184 N.C. 653, 113 S.E. 682 (1922).
15. Harrison v. Commonwealth, 266 Ky. 840, 100 S.W.2d 837 (1937); State v. Hutchinson, 163 La. 146, 111 So. 656 (1927).
16. Reynolds v. United States, 98 U. S. 145 (1878).
17. People v. Chin Hane, 108 Cal. 597, 41 Pac. 697 (1895); People v. Fish, 125 N. Y. 136, 26 N.E. 319 (1891); Drew v. Shaughnessy, 212 Wis. 322, 249 N.W. 522 (1933). *But see* State v. Potter, 6 Idaho 584, 57 Pac. 431, 432 (1899); State v. Chambers 44 La. 603, 10 So. 886 (1892).
18. Ill. Const. Art. II, §9; Ind. Const. Art. I §65; Tenn. Const. Art. 1 §9.
19. Ark. Const. Art. II, §10; Ariz. Const. Art. II, §24; Minn. Const. Art. I, §6; N. J. Const. Art. I, §8; S. D. Const. Art. VI, §7.
20. N. D. Rev. Code, §29-0106 (1943) "In all criminal prosecutions the party accused shall have the right to meet the witnesses against him face to face."
21. Rudolph v. Ryan, 327 Mo. 728, 38 S.W.2d 717 (1931); approved at 8 Wigmore, Evidence 111 (3rd ed. 1940). *Contra*: Pirkle v. State, 31 Ala. App. 464, 18 So.2d 694 (1944); Tiner v. State, 110 Ark. 251, 161 S.W. 195 (1913).