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CIVIL PROCEDURE-STATUTE OF LIMITATIONS-POSSIBILITY OF SERVICE UNDER NONRESIDENT MOTORIST SERVICE ACT AS PREVENTING TOLLING OF STATUTE

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CIVIL PROCEDURE—STATUTE OF LIMITATIONS—POSSIBILITY OF SERVICE UNDER NONRESIDENT MOTORIST SERVICE ACT AS PREVENTING TOLLING OF STATUTE—Plaintiffs, while riding as passengers in defendant's automobile, were injured in an accident in Iowa. Two of the four plaintiffs brought suit in Kansas against defendant, a citizen of Kansas, but their suits were dismissed upon the sustaining of demurrers. The four then sued defendant in Iowa, obtaining service upon him under the nonresident motorist service act.[1] De-

[1] Iowa Code (1950) I.C.A. §321.498 to 321.511.

fendant pleaded the statute of limitations,[2] and plaintiffs countered with the tolling statute.[3] Issue was raised over the interpretation to be given the word "nonresident" in the tolling statute. Plaintiff contended it was to be given a literal interpretation, that is, that the statute of limitations was tolled while defendant was in fact outside the state. Defendant, on the other hand, contended that the word was to be interpreted in light of the purposes underlying the tolling statute, that is, that the statute of limitations was to be tolled only when service could not be made on the defendant. The trial court accepted the latter contention and rendered judgment for the defendant. On appeal, *held*, affirmed. The term "nonresident" in the tolling statute means not subject to service of process from the Iowa courts. *Kokenge v. Holthaus*, (Iowa 1952) 52 N. W. (2d) 711.

This decision, although it seems to stretch the language of the tolling statute, is consistent with its underlying theory. One of the basic reasons for the statute of limitations is to force the holder of a cause of action to sue on it while the facts are still fresh in the minds of the witnesses and the parties.[4] However, tolling statutes were enacted to mitigate the harsh effect of a mechanical application of the statute of limitations to cases where the holder of a cause of action is prevented from suing on it because he is unable to secure service on a defendant who is outside the jurisdiction of the court.[5] Applying the policy underlying these statutes to the situation in the principal case, there is no need to allow the tolling statute to cut off the full force of the statute of limitations. Plaintiffs in this instance could have secured service of process on defendant at any time by virtue of the nonresident motorist service act. If the policy behind the statute of limitations is worthwhile, there is no reason for not applying it in this situation. The courts, however, are not unanimous in this regard.[6] The court in the principal case states that it is applying the majority view.[7] Courts applying the minority view reason that, since there is no expressed exception in the tolling statute to cover cases where plaintiff could have service of process on defendant, it is not for them to imply such an exception.[8] No doubt this view is in accord with a literal interpretation of the

[2] Iowa Code (1950) I.C.A. §614.1.

[3] Iowa Code (1950) I.C.A. §614.6.

[4] Reed v. Rosenfield, 115 Vt. 76, 51 A. (2d) 189 (1947); Peters v. Tuell Dairy Co., 250 Ala. 600, 35 S. (2d) 344 (1948).

[5] Ibid.

[6] Annotations in 17 A.L.R. (2d) 516 (1951); 119 A.L.R. 859 (1939); and 94 A.L.R. 485 (1935).

[7] It is to be noted, however, that research disclosed only nine courts which have passed on this question. This "majority" position is taken in Reed v. Rosenfield, note 4 supra; Peters v. Tuell Dairy Co., note 4 supra; Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W. (2d) 566 (1938); Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933); Pomeroy v. National City Co., 209 Minn. 155, 296 N.W. 513 (1941) (where service could be made on the secretary of state to bind a foreign corporation that had withdrawn from the state).

[8] Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934); Couts v. Rose, 152 Ohio St. 458, 90 N.E. (2d) 139 (1950); Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S. (2d) 749 (1938), affd. 278 N.Y. 576, 16 N.E. (2d) 110 (1938); Gotheimer v. Lenihan, 20 N.J. Misc. 119, 25 A. (2d) 430 (1942).

statute, but the court should look further than the mere words of the statute. They should consider these statutes in the light of the fundamental policies when applying them to any fact situation. The majority view is attacked in some quarters as doing injustice to the wording of the tolling statute. This writer believes, however, that the policy of requiring suits to be brought while the facts are still clear in the minds of the witnesses and parties, on penalty of forfeiting the right to sue on the cause of action, should be placed above a literal interpretation of the tolling statute. It is submitted that this decision is well founded in both law and reason.

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