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-

defendant pleaded the statute of limitations, and plaintiffs countered with the
tolling statute. 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 de­
fendant was in fact outside the state. Defendant, on the other hand, con­
tended 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. However,
tolling statutes were enacted to mitigate the harsh effect of a mechanical applica­
tion 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 de­
fendant who is outside the jurisdiction of the court. 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 limita­
tions. Plaintiffs in this instance could have secured service of process on de­
fendant 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. The court in the principal case states that it is applying the majority
view. 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 excep­
tion. No doubt this view is in accord with a literal interpretation of the

4 Reed v. Rosenfeld, 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); Coutts v. Rose, 152 Ohio St.
458, 50 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.
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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