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Procedure - Statute of Limitations - Effect of Nonresident Motorist Service on Tolling Provisions. Bergman v. Turpin, 206 Va. 539 (1965)

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The Supreme Court of Appeals should continue to uphold the validity of a second marriage in the absence of strong evidence that a prior marriage had not been dissolved, but in so doing the Court should use language which would be consistent with the actual standard of evidence required to rebut this presumption.

Joseph Howard

Procedure—STATUTE OF LIMITATIONS—EFFECT OF NONRESIDENT MOTORIST SERVICE ON TOLLING PROVISIONS. In *Bergman v. Turpin*,[1] Mitchell E. Bergman, plaintiff, and Iford L. Turpin, defendant, were involved in an automobile accident in Botetourt County, Virginia on May 30, 1959, whereby the plaintiff sustained personal injuries. At the time of the accident the defendant was a resident of Virginia but shortly thereafter, on November 1, 1959 he became a resident of the District of Columbia. The plaintiff was, at all times pertinent to the controversy, a resident of North Carolina.

On May 29, 1961, plaintiff instituted an action against the defendant in the proper federal court in Virginia. Service was made on the defendant pursuant to the Virginia nonresident motorist statutes.[2] The

1. 206 Va. 539, 145 S.E.2d 135 (1965).

2. VA. CODE ANN., Sec. 8-67.1 (1950).

The acceptance by a nonresident of the rights and privileges conferred by article 6 (46-110 et seq.) of chapter 3 of Title 46 as evidenced by his operation, either in person or by agent or employee, of a motor vehicle, trailer or semitrailer hereunder, or the operation by a nonresident, either in person or by an agent or employee, of a motor vehicle, trailer or semi-trailer in this State otherwise than under such article, shall be deemed equivalent to an appointment by such nonresident of the Commissioner of the Division of Motor Vehicles or his successors in office to be the true and lawful attorney of such nonresident upon whom may be served all lawful process against and notice to such nonresident in any action or proceeding against him growing out of any accident or collision in which such nonresident or his agent or employee may be involved while operating a motor vehicle, trailer or semi-trailer in this Commonwealth, and such acceptance or operation shall be a signification of his agreement that any such process against or notice to him which is served shall be of the same legal force and validity as if served upon him personally in the county or corporation in which such accident or collision occurred or in which a resident defendant, if any, resides.

The term 'nonresident' includes any person who though resident when the motor vehicle accident or collision occurred, has been continuously outside the State for at least sixty days next preceding the day on which notice or process is left with the Commissioner.

court dismissed the plaintiff's action without prejudice because of improper venue.

On August 22, 1963, plaintiff instituted a second suit on the same cause of action in the Circuit Court of Botetourt County, Virginia and had the defendant served at his Washington, D. C. address in accordance with Sections 8-67.1 and 8-67.2 of the Virginia Code.[3] The defendant then filed a plea of the statute of limitations on the grounds that the plaintiff had not instituted his action within two years as required by statute.[4] Plaintiff filed a reply to defendant's plea alleging that Section 8-33 of the Code tolled the running of the statute of limitations as long as the defendant resided outside the state of Virginia, and thus his action was not barred.[5]

The court held that Section 8-33 was not applicable, since under the nonresident motorist statutes the plaintiff could have obtained service of process on the defendant at any time within two years from the date of his cause of action and thus the plaintiff's claim was barred by the statute of limitations. The case was dismissed with prejudice and the plaintiff was granted a writ of error to the Supreme Court of Appeals of Virginia.

VA. CODE ANN., Sec. 8-67.2 (1950).

Service of such process or notice shall be made by leaving a copy of the process or notice, together with a fee of three dollars, plus one dollar additional for each defendant over one to be served, in the hands of the Commissioner of Motor Vehicles or in his office in the city of Richmond, Virginia, and such service shall be sufficient upon the nonresident, provided that notice of such service and a copy of the process or notice are forthwith sent by registered mail, with registered delivery receipt requested, by the Commissioner of Motor Vehicles to the defendant and an affidavit of compliance herewith by the Commissioner, or some one designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action.

The mailing required by this section shall be to the last known post office of the defendants but if there is left with the Commissioner, along with the notice of process, an affidavit of the plaintiff that he does not know and is unable to ascertain any post office address of the defendant or defendants, service of the notice or process shall be valid without the mailing otherwise required by this section.

3. *Ibid.*

4. VA. CODE ANN., Sec. 8-24 (1950). Which provides in part: "Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. * * "

5. VA. CODE ANN., Sec. 8-23 (1950). Which provides in part: "When any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same * * or by any other indirect way or means obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within such right might or ought to have been prosecuted. * * *"

The Virginia Supreme Court of Appeals affirmed the decision of the lower court stating that where the plaintiff has a method of substituted service available, whereby the defendant can be served and a valid personal judgment obtained, his remedy is complete and the tolling statute is not applicable.[6] The court further held that the case of *Flicken's Ex'r v. Carrington*,[7] relied on by the plaintiff in support of his contention, was decided long before the first Virginia nonresident motorist statute was enacted and was no longer controlling.[8]

There are basically two views followed by courts in determining whether or not the tolling statutes apply to nonresident defendants. The minority view is based upon a literal interpretation of the statutes.[9] The theory of the minority is that if the legislatures had intended the nonresident motorist acts to be an exception to the tolling statutes they would have made exceptions therein; and since they did not, these statutes must be applied with strict interpretations.[10]

The majority follows a more liberal view that where there is a means of substituted service giving a court personal jurisdiction over the defendant, such as the nonresident motorist statutes, there is no reason to apply the tolling statutes. In *Reed v. Rosenfeld*[11] the court stated that it would greatly prejudice the defendant's right to allow stale claims against him where the witnesses might have died or disappeared and documentary evidence might have been lost or destroyed. The majority not only give a broader interpretation to the nonresident motorist statutes, but also try to adapt them to their intended purpose,[12] maintaining that where the plaintiff's remedy is complete and unaffected by the defendant's absence the tolling statutes on nonresident defendants do not apply.[13]

While both of the above stated views have merit, the reasoning

6. Bergman v. Turpin, *supra* note 1, at 542.

7. 72 Va. (31 Gratt.) 219, 226 (1878).

8. VA. CODE ANN., *supra* note 2.

9. Gotheiner v. Lenihan, 20 N. J. Misc. 119, 25 A. 2d 430 (1942); Macri v. Flaherty, 115 F. Supp. 739 (D. C. 1953), which provides for the literal interpretation of statutes where there are no exceptions provided therein. Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957).

10. Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Lemke v. Bailey, 41 N.J. 295, 196 A.2d 532 (1963).

11. 115 Vt. 76, 51 A.2d 189 (1947).

12. Nelson v. Richardson, 295 Ill.App. 504, 15 N.E.2d 17 (1938), in this case the purpose of the nonresident motorist statute was interpreted as an exception to the tolling statute.

13. Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938).

adopted by the decisions in line with the majority seems to be better. The primary fault of the minority view is that it fails to consider the context of the tolling statute in its relation to the whole concept of justice. Men are entitled to a speedy and fair adjudication of their rights. By allowing actions to be delayed for indefinite periods the door is left open for fraud and deceit. Permitting the tolling statutes to operate where the plaintiff has other means of service could cause great hardship, for a defendant might not know for years that he had even been charged with negligence. By considering the implications of a literal interpretation the majority view reaches a solution which is fairer to all parties concerned.

The Virginia Supreme Court of Appeals in the instant case adopted the majority rule. The decision of *Bergman v. Turpin* thus adopts a more rational interpretation of the law, and sets a precedent which should be easy to follow in future Virginia cases. However, in making this exception to the tolling statute the court could have perhaps strengthened its argument by using *Wilson v. Kootz*[14] and *Brown v. Butler*.[15] These cases support the majority rule and are based on an early opinion by Chief Justice John Marshall which stated that the plaintiff's rights to a suit or action must have been "actually or constructively obstructed" before the tolling statute applies. This would have given the court a sounder answer to the plaintiff's contention that the *Ficklin's Case* should apply, and also would have provided them with somewhat of a precedent for their decision in Virginia.

Mark S. Dray

Federal Procedure—DIVERSITY JURISDICTION—UNINCORPORATED LABOR UNIONS. In *United Steelworkers of America v. Bouligny*,[1] Respondent, a North Carolina corporation, commenced an action in a state court seeking damages for defamation. The Petitioner, an unincorporated labor union whose principal place of business is in Pennsylvania, removed the case to a federal district court asserting diversity of citizenship as a basis for removal.

14. 7, Cranch (11 U. S.) 202 (1812).
15. 87 Va. 621, 13 S.E. 71 (1891).

1. 86 S. Ct. 272 (1965).