St. Mary's Law Journal

Volume 1 | Number 1 Article 9

3-1-1969

The Two Year Statute of Limitations is Tolled by the Defendant's Absence from the State after the Accrual of the Action, Notwithstanding the Availability of a Statute Providing for Substitute Service of Process.

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tion, where the crime is known to have been committed.[63] To so distinguish would be making a distinction without a difference.[64]

The *Mackiewicz* opinion recognized that the defendant had voluntarily, unequivocally, and intelligently waived his constitutional rights.[65] *Miranda* requirements for a valid waiver of constitutional rights are full knowledge of those rights and the resulting consequences of their waiver.[66] The suspect in the usual tax fraud investigation may be generally ignorant of the fact that the potential consequence of tax fraud is criminal liability. He may also be unaware of the subtle procedures followed by revenue agents designed to elicit any damaging evidence without arousing the suspect's suspicions. The satisfaction of the above *Miranda* concept becomes important in securing due process of law to the suspect taxpayer. Its satisfaction would seem to require a more concrete standard than a mere nod or a cooperative attitude.

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LIMITATION OF ACTIONS—THE TWO YEAR STATUTE OF LIMITATIONS IS TOLLED BY THE DEFENDANT'S ABSENCE FROM THE STATE AFTER THE ACCRUAL OF THE ACTION, NOTWITHSTANDING THE AVAILABILITY OF A STATUTE PROVIDING FOR SUBSTITUTE SERVICE OF PROCESS. *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. Sup. 1968).

Vaughn and Deitz were involved in an automobile collision on a highway in Texas on January 11, 1964. Both parties were residents of Texas at the time of the collision. Petitioners moved from the State in June, 1964. On January 18, 1966, respondents filed suit against petitioners for damages arising from the collision. Service of process upon the petitioners was obtained by serving the Chairman of the

63 United States v. Gower, 271 F. Supp. 655 (M.D. Pa. 1967).
64 *Id.*
65 United States v. Mackiewicz, 401 F.2d 219, 221 (2d Cir.), *cert. denied*, 89 S. Ct. 253 (1968).
66 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

State Highway Commission under art. 2039a. The petitioners plead the two-year statute of limitations, art. 5526. The district court sustained the plea and the court of civil appeals reversed and remanded, 423 S.W.2d 113 (Tex. Civ. App.—Waco, 1967). Held—*Affirmed.* Art. 5537 suspended the statute of limitations while the defendant was absent from the State although substitute service of process was available.

Statutes of limitation provide a reasonable maximum period of time within which actions must be commenced.[1] They do not confer any right of action.[2] A view that the statutes are restrictive in nature has prevailed since their adoption.[3] The rationale of providing for maximum time periods is to prevent the litigation of stale claims and to prevent the loss of evidence and witnesses because of the lapse of time.[4] These objectives have been repeatedly expressed by the courts.[5]

Suspension statutes result in a suspension of the statute of limitations while a resident defendant is absent from the State.[6] The statute also applies to a non-resident defendant within the State at the time the action accrued.[7] The purpose of this statute is to protect the plaintiff from the defendant becoming immune from service of process and judgment by his own actions.[8]

A substitute service statute establishes a statutory agent who may be served with citation in lieu of the defendant.[9] When the statute applies, the service under it will be of the same legal force as if there were personal service on the defendant.[10] The object of such statutes

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1 Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. Sup. 1967); Gautier v. Franklin, 1 Tex. 732, 740 (1846); American Nat'l Ins. Co. v. Hicks, 35 S.W.2d 128, 130 (Tex. Comm'n. App. 1931, jdgmt adopted); Travis County v. Mathews, 235 S.W.2d 691, 697 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.).

2 American Nat'l Ins. Co. v. Hicks, 35 S.W.2d 128 (Tex. Comm'n App. 1931, jdgmt adopted); Travis County v. Mathews, 235 S.W.2d 691 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.).

3 Gaddis v. Smith, 417 S.W.2d 577 (Tex. Sup. 1967); Gautier v. Franklin, 1 Tex. 732, (1846).

4 Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. Sup. 1967); McAdams v. Dallas R. and Terminal Co., 149 Tex. 217, 229 S.W.2d 1012, 1015 (1950); Harrison Machine Works v. Reigor, 64 Tex. 89, 90 (1885); Callan v. Bartlett Elec. Co-op, 423 S.W.2d 149, 156 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.); Gray v. Laketon Wheat Growers, Inc., 240 S.W.2d 353, 355 (Tex. Civ. App.—Amarillo 1951, no writ); Buie v. Couch, 126 S.W.2d 565, 566 (Tex. Civ. App.—Waco 1939, writ ref'd); Wisconsin Chair Co. v. I. G. Ely Co., 91 S.W.2d 913, 914 (Tex. Civ. App.—Fort Worth 1936, no writ).

5 Cases cited note 4 *supra.*

6 Gibson v. Nadel, 164 F.2d 970 (5th Cir. 1947); Banana Distributors, Inc. v. United Fruit Co., 269 F.2d 790 (2d Cir. 1959).

7 Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876, 879 (1962); Gibson v. Nadel, 164 F.2d 970, 971 (5th Cir. 1947).

8 Cases cited note 6 *supra.*

9 Bergman v. Turpin, 145 S.E.2d 135 (Sup. Ct. of App. Va. 1965); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17 (1938).

10 Cases cited note 9 *supra.*

is to aid the plaintiff in effecting service and to expedite an adjudication of the rights of the parties.[11]

The relationship between statutes of limitation, suspension and substitute service has been interpreted in many jurisdictions. A majority of states do not suspend a statute of limitations during the defendant's absence when there is provision for substitute service of process.[12] By legislation some states are aligned with the majority.[13] The courts in a minority of states hold the suspension statute to operate regardless of any provision for substitute service of process.[14]

The Supreme Court's interpretation of the relationship among these Texas statutes[15] presents a case of first impression. There have been

11 Bergman v. Turpin, 145 S.E.2d 135, 138 (Sup. Ct. of App. Va. 1965); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566, 568 (1938); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17, 19 (1938).

12 Smith v. Forty Million, Inc., 64 Wash. 2d 912, 395 P.2d 201 (1964); Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964); Cal-Farm Ins. Co. v. Oliver, 78 Nev. 479, 375 P.2d 857 (1962); Hammell v. Bettison, 362 Mich. 396, 107 N.W.2d 887 (1961); Hurwitch v. Adams, 52 Del. 247, 155 A.2d 591 (1959); Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958); Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711 (1952); Peters v. Tuell Dairy Co., 250 Ala. 600, 35 So. 2d 344 (1948); Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189 (1947); Pomeroy v. National City Co., 209 Minn. 155, 296 N.W. 513 (1941); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17 (1938); Whittington v. Davis, 221 Or. 209, 350 P.2d 913 (1960); Walker v. L.E. Meyers Const. Co., 175 Okl. 548, 53 P.2d 547 (1935); Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933).

13 N.Y. Civil Practice Law and Rules-207 (McKinny 1943); Maryland Casualty Company v. Draney, 155 N.Y.S.2d 845 (Sup. Ct. Monroe County 1956)—Prior to the 1943 enactment involuntary appointment by statute of an agent for service of process did not prevent the suspension of a statute of limitations, Maguire v. Yellow Taxi Corporation, 1 N.Y.S.2d 749 (Sup. Ct. App. Div. 1938, Aff'd); Cal. Vehicle Code Secs. 17459, 17460 and 17463 (Derring 1959).

14 Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1943); Gotheiner v. Lenihan, 20 N.J. Misc. 119, 25 A.2d 430 (1942).

15 Particular statutes applicable to the principal case:

a. TEX. REV. CIV. STAT. ANN. art. 5526—Actions to be Commenced in Two Years
There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
1. Actions of trespass for injury done to the estate or property of another. . . .
6. Actions for injury done to the person of another. . . . (1841)

b. TEX. REV. CIV. STAT. ANN. art. 5537—Temporary Absence
If any person against whom there shall be cause of action shall be without the limits of this State at the time of the accruing of such action, or at anytime during which the same might have been maintained, the person entitled to such action shall be at liberty to bring the same against such person after his return to the State and the time of such persons absence shall not be accounted or taken as a part of the time limited by any provision of this title. (1841)

c. TEX. REV. CIV. STAT. ANN. art. 2039a—Citation of nonresident motor vehicle operators by serving chairman of State Highway Commission; forwarding notice to defendant.
Section 1. The acceptance by a nonresident of this State or by a person who was a resident of this State at the time of the accrual of a cause of action but who subsequently removes therefrom, . . . of the rights, privileges and benefits extended by law to such persons of operating a motor vehicle . . . within the State of Texas shall be deemed equivalent to an appointment by such nonresident . . . , of the Chairman of the State Highway Commission of this State, . . . to be his true and lawful attorney and agent upon whom may be served all lawful process in any civil action or proceeding . . . hereafter instituted against said nonresident, . . . growing out of any accident or

decisions indicating that the Texas suspension statute will be strictly construed and will operate although substitute service was available.[16] Other cases have indicated the opposite view.[17]

The correlation among the limitation statute,[18] the substitute service[19] and the suspension statute[20] is now established. The availability of substitute service of process will not prevent the suspension of the statute of limitation when the defendant is absent from this State.

Vaughn v. Deitz aligns Texas with the minority of jurisdictions.[21] As the basis of the decision, the majority of the Supreme Court held: The view expressed in Texas cases on related problems[22] indicating that absence would toll a statute of limitations, although the plaintiff was not deprived of his opportunity to litigate, is correct. The decisions of *Gibson v. Nadel*[23] and *Cellura v. Cellura*[24] citing these cases as controlling are approved, and a strict construction of a suspension statute in the absence of a legislative directive to the contrary[25] is adopted. Any exceptions to the application of the suspension statute must come from the state legislature.

A minority of the Supreme Court would follow the rule announced in the majority of states.[26] They contend that suspension of the statute of limitations when substitute service is available will defeat the objectives of the limitation and substitute service statutes.[27] The motorist who becomes subject to the substitute service statute[28] should be in the same position as the corporation that becomes subject to a substitute service statute.[29] It has been held that a statute of limitations will

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collision in which said nonresident, . . . may be involved while operating a motor vehicle . . . within this State . . . and said acceptance or operation shall be signification of the agreement of said nonresident, . . . that any such process against him . . . , served upon said Chairman of the State Highway Commission . . . , shall be of the same legal force and validity as if served personally. . . . (1929)

16 Huff v. Crawford, 88 Tex. 368, 30 S.W. 546, 31 S.W. 614 (1895); Wilson v. Daggett, 88 Tex. 375, 31 S.W. 618 (1895); Gibson v. Nadel, 164 F.2d 970 (5th Cir. 1947); Cellura v. Cellura, 24 A.D.2d 59, 263 N.Y.S.2d 843 (1965).

17 Harris v. Columbia Broadcasting System Inc., 405 S.W.2d 613 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.); Thompson v. Texas Land and Cattle Company, 24 S.W. 856 (Tex. Civ. App. 1893, no writ); Ally v. Bessemer Gas Engine Company, 262 F. 94 (5th Cir. 1919).

18 Tex. Rev. Civ. Stat. Ann. art. 5526.

19 Tex. Rev. Civ. Stat. Ann. art. 2039a.

20 Tex. Rev. Civ. Stat. Ann. art. 5537.

21 Cases cited note 14 *supra*.

22 Huff v. Crawford, 88 Tex. 368, 30 S.W. 546, 31 S.W. 614 (1895); Wilson v. Daggett, 88 Tex. 375, 31 S.W. 618 (1895); These cases dealt with the obtaining of limitation title by one who is absent from the state and is occupying the land through an agent or tenant.

23 164 F.2d 970 (5th Cir. 1947).

24 24 A.D.2d 59, 263 N.Y.S.2d 843 (1965).

25 Cellura v. Cellura, 24 A.D.2d 59, 263 N.Y.S.2d 843, 846 (1965); Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021, 1023 (1957); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139, 141 (1950).

26 Cases cited note 12 *supra*.

27 Cases cited notes 4, 11 *supra*.

28 Tex. Rev. Civ. Stat. Ann. art. 2039a.

29 Tex. Rev. Civ. Stat. Ann. art. 2031b (1935), providing that a corporation that commits

not be suspended when substitute service upon a corporation is available.[30] The minority of the Court would adopt the view which constructively places a defendant within the state when there may be substitute service of process.[31] Since a suspension statute is activated only when a defendant is "without the limits of the state,"[32] it should have no application when a substitute service statute places a defendant "within" the state for purposes of service of citation.

The majority of the Court felt the decision is only a formalized statement of the rule indicated by the earlier decisions.[33] *Huff v. Crawford*[34] and *Wilson v. Daggett*,[35] Texas cases relied on, however, were rendered prior to the enactment of any substitute service statutes. The decisions in *Gibson v. Nadel*[36] and *Cellura v. Cellura*,[37] though in point, were interpretations of how the Texas courts would hold when the problem was squarely presented. Justification for these holdings[38] was predicated upon the decisions of the two earlier Texas cases.[39]

The majority of the Court would require affirmative action by the legislature to prevent the operation of a suspension statute. No recognition is given the theory followed by many jurisdictions that a state legislature, by providing for the availability of substitute service of process, intends an exception to any suspension of limitations statute.[40]

The establishment of a relationship whereby a suspension statute will operate although substitute service is available could create undesirable inconsistencies. Now a person could find himself "within" and "without" the state at the same time. Substitute service statutes will place the defendant "within" the state through a statutory agent.[41]

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a tort in this state, is deemed to be doing business within this state and therefore subject to substitute service of process.

30 Cases cited note 17 *supra.*

31 Ally v. Bessemer Gas Engine Company, 262 F. 94, 96 (5th Cir. 1947); Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915, 916 (1964); Hurwitch v. Adams, 52 Del. 247, 155 A.2d 591, 594 (1959); Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156, 158 (1958); Kokenge v. Holthaus 243 Iowa 571, 52 N.W.2d 711, 712 (1952); Pomeroy v. National City Co., 209 Minn. 155, 296 N.W. 513, 515 (1941); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566, 569 (1938).

32 Tex. Rev. Civ. Stat. Ann. art 5537.

33 Cases cited note 16 *supra.*

34 88 Tex. 368, 30 S.W. 546, 31 S.W. 614 (1895).

35 88 Tex. 375, 31 S.W. 618 (1895).

36 164 F.2d 970 (5th Cir. 1947).

37 24 A.D.2d 59, 263 N.Y.S.2d 843.

38 Gibson v. Nadel, 164 F.2d 970 (5th Cir. 1947); Cellura v. Cellura, 24 A.D.2d 59, 263 N.Y.S.2d 843.

39 Huff v. Crawford, 88 Tex. 368, 30 S.W. 546, 31 S.W. 614 (1895); Wilson v. Daggett, 88 Tex. 375, 31 S.W. 618 (1895).

40 Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915, 916 (1964); Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156, 158 (1958); Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189, 190 (1947) Pomeroy v. National City Co., 209 Minn. 155, 296 N.W. 513, 515 (1941); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17, 19 (1938); Coombs v. Darling, 116 Conn. 643, 166 A. 70, 71 (1933).

41 Tex. Rev. Civ. Stat. Ann. art. 2039a.

Yet it is now determined that the same individual is "without" the state by application of the suspension statute.[42] Defendants may thus be subjected simultaneously to the rules applying to "present" and "absent" defendants.

To protect the rights of defendants, due diligence on the part of the plaintiff is required when service of citation is involved. Evidence of this is the existence of and purpose for limitations statutes.[43] Due diligence also appears in the requirements for obtaining service other than by delivery to the defendant[44] and by publication.[45] It would seem that an anomaly is created: though a plaintiff knows where the absent defendant is and there is statutory agent for service available within this state, he may serve citation at his leisure.

A variance in the rules is further justified on the basis that a resident plaintiff must go to extra trouble and expense to locate and serve an out-of-state defendant. Possibly with the availability of low cost communication, records, and an agent for service, the distinction between in-state and out-of-state defendants is no longer so obvious.

It is asserted that the inconsistencies and variances in the rules applicable to present defendants and absent defendants with statutory agent for service are not in violation of due process.[46] Considering the foregoing, it is increasingly difficult to maintain this position.

The rule of this case applied to other statutes[47] establishing an agent for service of process may cause unfortunate consequences. Reliance on the correctness of decisions providing for continuous running of limitations when substitute service of process on a corporation is available[48] is questionable. Non-resident successor corporations may now find themselves defending claims about which they had no knowledge, nor any connection. Non-resident insurance companies may be sued on ancient claims because of the appointment of a statutory agent

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42 Tex. Rev. Civ. Stat. Ann. art. 5537.

43 Cases cited note 4 *supra*—Statements within cases to the effect that statutes of limitation exist to prevent the litigation of stale claims and the loss of evidence and witnesses due to the lapse of time.

44 Tex. R. Civ. P. 106—Service of citation; Sgitcovich v. Sgitcovich, 150 Tex. 398, 241 S.W.2d 142, 148 referring back to 147 (1951)—exercise of reasonable diligence in obtaining personal service as a prerequisite to the use of another form of service.; Nichols v. Wheeler, 304 S.W.2d 229 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).

45 Tex. R. Civ. P. 109—Citation by Publication; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 Sup. Ct. 652, 659, 94 L. Ed. 865, 873 (1950)—stating that statutory publication notice is sufficient where the defendants' whereabouts can not be ascertained through due diligence.

46 Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).

47 Tex. Prob. Code Ann. § 78(d) (1955); Tex. Prob. Code Ann. § 105a (1961); Tex. Ins. Code Ann. art. 3.65 (1951); Tex. Rev. Civ. Stat. Ann. art. 581 §§ 8 and 16 (1957); Tex. Rev. Civ. Stat. Ann. art. 118(b) § 3 (1939 amended 1963); Tex. Penal Code Ann. art. 1648(a) (1961); Tex. Rev. Civ. Stat. Ann. art. 2031(b) (1935); Tex. Rev. Civ. Stat. Ann. art. 2033(b) (1935).

48 Cases cited note 17 *supra*.

for service of process.[49] A non-resident, to qualify as an executor or administrator, must appoint an agent for service of citation.[50] It would appear that compliance with this statute will result in the loss of the defense of limitations to such non-residents.

The purpose of a statute of limitation[51] and substitute service of process statutes[52] is neutralized as to defendants without the state. The rights of a plaintiff are expanded although provision is made for service of process. There is a reduction of the rights of the out-of-state defendant. The plaintiff may perfect his claim despite a failure to promptly exercise the rights afforded by the substitute service of process statutes.[53] Physical presence within this state is necessary to protect a defense of limitations. The problems created by such a requirement will be magnified when it is applied to one who, though never a resident, is subject to the agent for service statutes.[54]

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[49] Tex. Ins. Code Ann. art. 3.65 (1951).
[50] Tex. Prob. Code Ann. § 78(d) (1955).
[51] Cases cited note 4 *supra.*
[52] Cases cited note 11 *supra.*
[53] Tex. Rev. Civ. Stat. Ann. arts. 2039a, 581 §§ 8 and 16, 118(b) § 3, 2031(b) and 2033(b); Tex. Ins. Code Ann. art. 3.65 (1951); Tex. Prob. Code Ann. §§ 78(d) and 105a (1961); Tex. Penal Code Ann. art. 1648(a) (1961).
[54] Cases cited note 7 *supra.*