SMU | Dedman School of Law

SMU Law Review

Volume 23 | Issue 2 Article 11

January 1969

Procedure - Tolling Statute Held Operative When Absent Defendant Is Subject to Texas Jurisdiction under the Non-Resident Motorist Statute

Dan M. Cain

(4) A jury from which some persons, whose answers make it doubtful as to whether they would ever vote for the extreme penalty, were challenged for cause and others in the same category were included in the jury *might* result in a ruling of "harmless error."[26]

If *Witherspoon* is literally interpreted[27] it would be advisable that the Texas Code of Criminal Procedure[28] be revised to incorporate its requirements. This would result in giving the state power to challenge a juror for cause on the basis of his attitude toward the death penalty only when it is clear from the prospective juror's answers that he would automatically vote against capital punishment without regard to the evidence that might emerge at trial.

In *Pittman* prospective jurors apparently were challenged for cause simply on the basis of opposition and conscientious scruples to the death penalty. Thus, if the *Pittman* jury were impaneled by challenging for cause not only those who stated that they could never vote for the extreme penalty, but also all of those who expressed conscientious scruples and were doubtful as to whether or not they could ever vote for capital punishment,[29] the decision would be reversed if considered by the United States Supreme Court.

Glen A. Majure

Procedure — Tolling Statute Held Operative When Absent Defendant Is Subject to Texas Jurisdiction Under the Non-Resident Motorist Statute

Plaintiffs sustained injuries in an automobile accident with defendants while all parties were residents of Texas. A few months later defendants moved to Florida. Over two years after the accident plaintiffs filed suit in a Texas court to recover damages resulting from the accident. Jurisdic-

[26] The validity of this statement depends on whether or not the Supreme Court applies *Witherspoon* in future cases as suggested in note 15 *supra*. The fact that the decision in *Witherspoon* is based on constitutional rights would not prevent such a result. The United States Supreme Court has already held that there may be some constitutional errors which in the setting of a particular case are so unimportant that they may, consistent with the United States Constitution, be deemed harmless, not resulting in the automatic reversal of a case. *See* Chapman v. California, 386 U.S. 18, 21-22 (1967).

[27] An element of caution should be injected into an interpretation of the *Witherspoon* decision. If the decision is interpreted literally by the Supreme Court in its future application the results will be far reaching. *See* text accompanying notes 27-28 *infra*. However, it should be noted that this decision was handed down in a case where the facts revealed an extreme situation in which the state had stacked the cards against the defendant by impaneling a hanging jury. *See* 391 U.S. at 523. The decision in *Witherspoon* is broad enough that the Court could easily turn away from a literal application. *See* note 15 *supra* for a discussion of a practical future application of the decision.

[28] TEX. CODE CRIM. PROC. ANN. art. 35.16(b)1 (1965).

[29] Reliance is placed here upon the assertion by attorneys for Pittman who state that "The twelve jurors who were finally selected in the *Pittman* case in no way expressed any doubt as to their ability to vote for capital punishment." If this is true the final jury was composed of twelve persons who expressed no conscientious scruples to the death penalty while at least ten persons were challenged for cause either on the basis of simple conscientious scruples or answers which left doubt as to their view concerning capital punishment. *See* note 19 *supra*.

tion over defendants and service of process were obtained pursuant to the Texas non-resident motorist statute.[1] Defendants moved to dismiss on the ground that suit was barred by the two-year statute of limitations.[2] The motion was granted by the trial court, but the court of civil appeals reversed, holding that the statute of limitations was suspended during defendants' absence from the state by operation of the Texas tolling statute.[3] *Held, affirmed*: Limitations are tolled during defendant's absence from the state despite the fact that defendant could have been constructively served with process and sued under the non-resident motorist statute. *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968).

I. Interpretation of Tolling Statutes

In General. A binding state court judgment cannot be rendered against a person who is not present within the state and is not otherwise subject to the state's jurisdiction.[4] Thus it was at one time somewhat common for non-resident debtors to remain outside of a state until the statute of limitations on their debts had run. The debtors could then re-enter the state and do business with impunity.[5] To mitigate against this abuse of the statute of limitations most states enacted "tolling" statutes,[6] which provide that limitations are tolled when a person against whom there is a cause of action is absent from the state.

Unfortunately, most tolling statutes fail to specify whether they are operative when the potential defendant is physically absent from the state but is nevertheless amenable to some form of substituted service of process and suit because he owns land within the state,[7] is a domiciliary of the state,[8] has consented to the state's jurisdiction,[9] or has certain "minimum contacts" with the state.[10] The lack of statutory authority has pro-

[1] Tex. Rev. Civ. Stat. Ann. art. 2039a (1958) provides a statutory scheme for substituted service of process against a non-resident motorist by serving the Chairman of the State Highway Commission and forwarding notice to the non-resident defendant.

[2] *Id.* art. 5526 (1958) provides in part that all actions for injuries to the property or person of another "shall be commenced and prosecuted within two years after the cause of action shall have accrued."

[3] *Id.* art. 5537 (1958), which provides:

> 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 any time 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 person's absence shall not be accounted or taken as part of the time limited by any provision of this title.

[4] Pennoyer v. Neff, 95 U.S. 714 (1878).

[5] Wilson v. Daggett, 88 Tex. 375, 31 S.W. 618 (1895); Harris v. Columbia Broadcasting System, Inc., 405 S.W.2d 613 (Tex. Civ. App. 1966), *error ref. n.r.e.*

[6] These statutes originated in England and provided for the tolling of limitations while a defendant was "beyond the seas." H. Buswell, The Statute of Limitations and Adverse Possession § 16 (1889).

[7] Arndt v. Griggs, 134 U.S. 316 (1890) (upholding state statute authorizing service by publication in in rem action). It is recognized that adequate notice is an additional requirement regardless of the basis of judicial jurisdiction. This aspect is assumed throughout the discussion of this Note.

[8] Milliken v. Meyer, 311 U.S. 457 (1940).

[9] York v. Texas, 137 U.S. 15 (1890).

[10] Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

duced a division among the courts which have been called on to interpret the phrase "without the state" or its equivalent.[11]

A minority of courts have interpreted the phrase literally.[12] Thus defendant's absence from the state was regarded by them as sufficient to invoke the tolling statute, notwithstanding the fact that defendant was subject to the state's jurisdiction and could have been sued during his absence. These courts have reasoned that to reach the opposite result would constitute judicial legislation.[13] Further, some have argued that substituted service of process may be inconvenient and expensive to plaintiff, who may be required to locate defendant and ensure that he receives constitutionally adequate notice of the action.[14]

By contrast, the majority of courts have resolved the question of defendant's "absence" in terms of the state's jurisdiction over him.[15] Accordingly, they have held tolling statutes inoperable, despite defendant's absence from the state, in action in rem[16] and under a long-arm or nonresident motorist statute.[17] These courts have reasoned that since the potential defendant is subject to service of process and suit despite his absence, the purpose of the tolling statute would not be served by suspending limitations. Further, according to the majority, tolling the statute of limitations when the absent defendant is subject to suit would militate against the purpose of limitations by permitting the plaintiff to sue at his pleasure.

In Texas. Texas courts have been somewhat inconsistent in their application of the Texas tolling statute[18] to cases in which the potential defendant was absent but nevertheless was subject to Texas' jurisdiction. In two early cases[19] involving the effect of absence from the jurisdiction of an adverse claimant to Texas realty, the supreme court held that limitations were tolled during the claimant's absence although he could have

---

[11] Most tolling statutes typically refer to the defendant being "without the state" and do not indicate if this means physical absence or for purposes of jurisdiction. *E.g.*, CONN. GEN. STAT. ANN. § 52-590 (1958).

[12] Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957); Gotheiner v. Lenihan, 20 N.J. Misc. 119, 25 A.2d 430 (Sup. Ct. 1942); Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S.2d 749 (1938); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).

[13] *E.g.*, Parker v. Kelly, 61 Wis. 552, 21 N.W. 539, 541 (1884).

[14] *E.g.*, Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021, 1023 (1957); Haver v. Bassett, 287 S.W.2d 342, 345-46 (Mo. 1956); Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S.2d 749, 752 (1938).

[15] Peters v. Tuell Dairy Co., 250 Ala. App. 600, 35 So. 2d 344 (1948); Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17 (1938); Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711 (1952); Fuller v. Stuart, 3 Misc. 2d 456, 153 N.Y.S.2d 188 (Sup. Ct. 1956); Canaday v. Hayden, 80 Ohio App. 1, 74 N.E.2d 635 (1947); Busby v. Shafer, 75 S.D. 428, 66 N.W.2d 910 (1954); Arroweed v. McMinn County, 173 Tenn. App. 562, 121 S.W.2d 566 (1938); Reed v. Rosenfield, 51 A.2d 189 (Vt. 1947).

[16] Ridgeway v. Salrin, 41 Cal. App. 2d 50, 105 P.2d 1024 (1940); TEX. R. CIV. P. 811 provides that in in rem actions service may be made on non-residents by publication as provided by TEX. R. CIV. P. 114-116.

[17] Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957).

[18] *See* note 3 *supra.*

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

been served by publication and sued at any time during the period he was out of the state. In both cases the court voiced dissatisfaction with the application of the tolling statute to in rem actions but "felt constrained to hold"[20] it applicable in the absence of legislative modification. Conversely, the courts of civil appeals have held the tolling statute inapplicable in cases[21] in which an out-of-state corporation was subject to constructive service of process and suit under the Texas long-arm statute, article 2031b.[22] These courts have reasoned, like the majority of non-Texas courts, that since the only purpose of the tolling statute is to protect plaintiff's cause of action while defendant is beyond the reach of the courts, "whenever the person or corporation can be reached by personal service the reason for the rule ceases . . . ."[23]

Application of the tolling statute to an absent individual subject to in personam jurisdiction was not considered by the Texas courts prior to *Vaughn v. Deitz*. However, the Fifth Circuit considered this question in the 1947 case of *Gibson v. Nadel*.[24] The court predicted that Texas would hold that the tolling statute "should be applied as written without addition to or subtraction from it."[25] Thus defendant's absence from the state was held to prevent the running of limitations even though he could have been served with process constructively and sued during his absence.

II. VAUGHN v. DEITZ

The basic conflict in *Vaughn* was between the spirit and the letter of the law. The supreme court opted for the latter, concluding that the phrase "without the limits" refers to the physical presence of the defendant and not to his presence for jurisdictional purposes. The court noted that the precise point at issue had not been decided by Texas courts; however, the court saw no material distinction, for purposes of the tolling statute, between an in rem action and an in personam action against an individual under the non-resident motorist statute, since in either case the defendant may be served and sued despite his absence from the state. The prior civil appeals cases holding that limitations were not tolled against an out-of-state corporation which could have been sued pursuant to article 2031b were not mentioned.

The court dismissed the constitutional argument that the distinction between a resident and a non-resident with regard to the tolling statute denies a non-resident equal protection of the law.[26] Equal protection of the law is not denied if the same procedure is applied to all persons under similar circumstances.[27] The court held that absence from the state is not an unreasonable or arbitrary basis of classification, and emphasized the

[20] Wilson v. Daggett, 88 Tex. 375, 377, 31 S.W. 618, 619 (1895).
[21] Harris v. Columbia Broadcasting System, Inc., 405 S.W.2d 613 (Tex. Civ. App. 1966), *error ref. n.r.e.*; Thompson v. Texas Land & Cattle Co., 24 S.W. 856 (Tex. Civ. App. 1893).
[22] TEX. REV. CIV. STAT. ANN. art. 2031b (1964).
[23] Thompson v. Texas Land & Cattle Co., 24 S.W. 856, 857 (Tex. Civ. App. 1893).
[24] 164 F.2d 970 (5th Cir. 1947).
[25] *Id.* at 971.
[26] U.S. CONST. amend. XIV, § 1.
[27] Tinsley v. Anderson, 171 U.S. 101 (1898).

greater expense and difficulty in obtaining constructive service of process as compared to that incurred in obtaining personal service. This argument seems weak because the vehicle registration and tax records maintained by all states, as well as the Texas statute requiring that persons involved in an automobile accident give their names and addresses to the other vehicle operator,[28] afford sufficient opportunity to obtain the information necessary to effect constructive service of process on the non-resident motorist. There is no greater difficulty incurred under this procedure than in the case where defendant lives outside the immediate area of plaintiff's residence but within the state.

In dissent, Justice Pope argued quite cogently that the phrase "without the limits" was intended to refer to presence for purposes of jurisdiction rather than physical presence. Thus limitations should not have been tolled, because the non-resident motorist statute fixed the "constructive presence" of defendants in Texas. Justice Pope felt that this interpretation of the tolling statute was more in accord with the spirit of both the tolling statute and the statute of limitations. He also noted that *Vaughn* was inconsistent with the previous civil appeals cases holding the tolling statute inapplicable to a corporation "without the state" but subject to constructive service of process and suit under article 2031b.

III. Conclusion

Vaughn is not surprising in light of the previous Texas supreme court decisions holding that limitations are tolled in in rem actions when defendant is out of state. Nevertheless, these decisions did not have to be followed, and it seems clear that the reason for the result in *Vaughn* is the supreme court's reluctance to engage in judicial legislation. Although such restraint is normally commendable, in this case it may have been inappropriate, for the responsibility for rectifying the inequitable result of *Vaughn* now lies with the Texas Legislature. The possibility that this body, which necessarily caters to Texans, will amend the tolling statute to benefit non-resident delinquent debtors is something less than a certainty.

Vaughn raises a question as to whether the previous civil appeals cases holding the tolling statute inapplicable to out-of-state corporations subject to Texas' jurisdiction are still good law. It seems probable that these cases are overruled and that limitations will now be tolled against such corporations, for there is no reasonable distinction between a corporation and an individual when in personam jurisdiction is available against each. If the civil appeals cases are not overruled, an inconsistency has crept into Texas law.

Dan M. Cain

[28] Tex. Rev. Civ. Stat. Ann. art. 6701d, § 40 (1960).