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RENEWAL OF PROCESS AND THE STATUTE OF LIMITATIONS

Neel v. Webb Fly Screen Mfg. Co.[1]

Plaintiff-appellant sued defendant-appellee in the Superior Court of Baltimore City on September 10, 1941, two days before the expiration of the three-year statute of limitations. The suit was one of more than three thousand brought in Baltimore city by the statutory liquidator of Keystone Indemnity Exchange against local policyholders for the collection of an assessment which had been decreed by a Pennsylvania court. A writ of summons was issued and returned "non est" to the October rule day. After automatic renewals by the clerk to the November and December rule days, the writ was renewed upon application of the plaintiff to the January 1942 rule day. Each time it was returned *"non est."* The suit then lay dormant for more than three years until, in May 1945, upon application of the plaintiff for renewal of the writ, it was issued and served. Defendant's fifth plea stated that the final renewal was more than three years after the original cause of action arose and also more than three years after the return *"non est"* of the last previous renewal of summons. The plaintiff's demurrer to this plea was overruled, the parties entered into an agreed statement of the facts, and the lower court entered judgment for the defendant. On appeal, the judgment was reversed and a judgment was entered for the plaintiff.

The question presented by the case is whether a writ of process twice returned *non est* may lie dormant indefinitely until renewed upon request of the plaintiff, in view of the provisions of Section 305 of Article 4 of Flack's Code of Public Local Laws of Maryland of 1930. This law, which became effective in Baltimore City[2] April 3, 1864 reads as follows:

> "On the return of an original writ, not executed in either of said courts, the same may be renewed, returnable to the next return day thereafter, and after two returns of any original writ not executed at the two succeeding return days after the writ is first issued, the same shall be permitted to lie dormant, re-

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[1] 48 A. 2d 331 (Md. 1946).

[2] Char. and Pub. Loc. L. of Baltimore City (1938) Sec. 397.

newable only on the written order of the Plaintiff or his attorney of record to such future return day as the said plaintiff or his attorney may elect, and upon a further return if not executed, said writ shall be again permitted to lie, renewable only as aforesaid, the said plaintiff or his attorney having the right to renew said writ to as many subsequent return days, under the same mode of procedure as may be deemed proper, until the same is executed."

In overruling the plaintiff's demurrer to defendant's plea of limitations, the lower court held it necessary that a writ of summons be kept active by renewals to successive return days in order that the commencement of a suit may relate back to the impetration of the original writ. It reasoned that if a writ of summons be allowed to become dormant or inactive through failure to renew to successive return days, a request for subsequent renewal is equivalent to the commencement of a new suit and, therefore, opens the way for a defendant to plead limitations.

The Court of Appeals ruled to the contrary. It found that the statute, when considered in the light of common law precedents as well as contemporaneous and long continued construction, permitted a plaintiff to let his suit remain on the records indefinitely without regular renewal of the writ. It further held that the legislature had not intended to change the common law rule to the effect that the first asking of the writ tolls the statute of limitations, and it adopted the view that the purpose of the provision in question had been merely to relieve both the clerk and the plaintiff of the burden of constant renewals, while saving the effect upon the statute of limitations of the original commencement of the suit. The appellee had contended that such a construction would operate to keep alive stale demands—in fact, would permit a case to continue forever—and hence was contrary to the familiar doctrine that there should be an end to litigation. Although recognizing some persuasion in this argument, the Court of Appeals felt that the effect and apparent intent of the statute could not be avoided by judicial construction at this late date.

This case serves to point up the fact that, under the identical language of the several Maryland statutes which govern service of process, it is possible to evade both the spirit and the letter of the statute of limitations in cases where circumstances permit long delay before finally ef-

fecting service of process. From 1894 to 1914, the procedure in question applied only to Baltimore City. In 1914 the same provisions were made applicable to the circuit courts of all counties of Maryland and these provisions are now codified as Section 154 of Article 75 of the Code.

Under previous practice at common law, as described in *Logan v. State*,[3] it was necessary that writs of summons be regularly and uninterruptedly renewed from term to term until the defendant was served in order that the impetration of the original writ could be deemed the commencement of the suit. The earlier case of *Hazlehurst v. Morris et al.*,[4] had established that omission so to renew the writ would operate as a discontinuance. Accordingly, the *Logan* case held that if the defense of limitations had not accrued at the time of the impetration of the first writ, continued renewals at each succeeding term would serve to prevent the running of the statute of limitations. Statutory enactments in 1864, 1886, and 1888 did not change the common law in this respect; they merely established more frequent— and finally monthly—"return days" in lieu of the thrice yearly "term days." Therefore, until the Act of 1894 there was no option for a plaintiff to skip a renewal day without suffering a discontinuance and opening the way for limitations to again run. As already set out above, this act placed upon the Clerk of the Court the obligation to issue two renewals as a matter of course and provided that thereafter the writ should be permitted to lie dormant until renewed by the plaintiff.

In arriving at its interpretation of the statute in the case under review, the Court of Appeals felt impelled to recognize that the plain import of the word "dormant" is a "condition of sleeping and not of death." The Court also placed considerable weight on the almost contemporaneous construction placed on this Act by the most eminent authority in the State on pleading and practice. Mr. Poe, as early as 1897 had remarked concerning the Act of 1894: "The object of this act was to save the costs of constant renewal, without losing the legal effect upon the statute of limitations of the original suit."[5]

The appellee, in commenting on the interpretation to be placed upon Mr. Poe's suggestion, contended that the legislature could not possibly have intended to grant the plaintiff the perpetual right to keep his action alive. He

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[3] 39 Md. 177, 190 (1874).

[4] 28 Md. 67 (1867).

[5] 2 POE, PLEADING AND PRACTICE (1925) Sec. 67.

argued that if appellant's view of his rights were correct this section of the act would in effect permanently arrest the operation of the statute of limitations with respect to cases of this type and that only plain and unambiguous language should permit a statutory construction in derogation of a common law right. In meeting this objection the Court of Appeals pointed out that under the common law it was likewise possible to keep a demand alive forever by renewing the writ each term. The Court could also have noted that under English and American common law practice it was generally not necessary to issue successive writs between the original and final writ, but these might be connected by continuances, that is, entries of the award of fictitious writs. However, in Maryland this practice was not fully applicable, since a docket entry was required for every writ.[6]

Today, in most American jurisdictions other than Maryland, there are procedures which serve by one means or another to place a limitation upon the time within which service of process must be made or which require, at the least that plaintiffs take action periodically to prevent a discontinuance as to defendants not served. While the Federal Rules of Civil Procedure[7] provide no limitation, as such, on the time during which process may issue, it has been suggested that service must be made within a reasonable time after filing of the complaint, otherwise a delay may operate as a cause for a discontinuance or dismissal.[8] Some District Courts have adopted local rules providing for an actual limitation on time for service.[9]

In most states, a timely writ which serves to toll limitations may be kept alive through the use of *alias* and *pluries* writs. In general, process must be continuous and failure to renew it from time to time until service is finally made results in a discontinuance.[10] Still other states provide a limit upon the time within which service or substituted service must be finally effected. In some states an *alias*

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[6] *Cf.*, EVANS, MARYLAND COMMON LAW PRACTICE (1839) 104.

[7] Fed. Rules of Civ. Proc. 3, 4 and 41(b).

[8] See, Final Report of the Advisory Committee on Rules for Civ. Proc., Nov. 1937. See also, Schram v. Roppin, E. D. Mich. (1940) 3 FRS 3.2 Case 1; and Schram v. Costello, E. D. Mich. (1940) 4 FRS 3.2 Case 1.

[9] E. D. NY. Civil Rule 1 (1938), 1 F. R. S. (Rules); S. D. NY. Civil Rule 1 (1938), 1 F. R. S. (Rules); N. D. NY. Civil Rule 1 (1940), 2 F. R. S. (Rules); N. C. Rule 1 (all districts) (1939) 2 F. R. S. (Rules); E. D. Va. Civil Rule 2 (1938), 1 F. R. S. (Rules); Kansas, Rule 17 (19—), 5 F. R. S. (Rules).

[10] 27 C. J. S. DISMISSAL AND NONSUIT, sec. 75; 1 C. J. S. ACTIONS, sec. 129(c); 37 C. J. LIMITATION OF ACTIONS, sec. 488; 50 C. J. PROCESS, secs. 49, 50.

writ is grantable only by leave of court for good cause shown, which places upon plaintiff the burden of showing due diligence in attempting to effect service. Present English practice is also to require leave of the court to effect periodic renewals after the expiration of the twelve-months period for which an original writ of summons may remain in force.[11]

In summary, it appears that in no other state might a plaintiff go so far as in Maryland today, where under Article 75, Section 154 and the several identical or similar local laws, plaintiff is permitted to let a timely writ of process twice returned *"non est"* lie dormant indefinitely until he again choses to request a renewal. The real objection to this result is that plaintiff is not subjected to any requirement of due diligence in making service. In effect, the objectives of the statute of limitations can be defeated if a plaintiff in some opportune case should find it to his advantage to wait for years before finally bringing a defendant into court.

Of course, the likelihood of such a situation arising is small. Moreover, plaintiffs are generally anxious to get service promptly. That the question arose only after fifty years of practice under the statute may be some indication that there is no pressing need for changing the rule. Also, it may be said in favor of the present practice that it saves both time and fees in effecting service of process. It probably further serves as a safeguard against defendants who successfully avoid service of process over substantial periods of time.

It is suggested that service of process might be more easily had if a form of substituted service were provided, such as by private process servers or by registered mail,[12] for all cases where it is known that the defendant is within the jurisdiction of the Court but can not be reached through ordinary channels. Although no constitutional question is presented, there is no form of substituted ser-

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[11] 20 HALSBURYS, LAWS OF ENGLAND (2d ed. 1937), Limitation of Actions, Part IX, sec. 1086; 26 HALSBURYS, LAWS OF ENGLAND (2d ed. 1937), Practice and Procedure, Part I, sec. 35; THE ENGLISH AND EMPIRE DIGEST (1932), Pleading, Practice and Procedure, Part X; Rules of the Supreme Court, Ord. VIII, R. 1, 2, 3.

[12] See, Code of Public Local Laws of Maryland (1938), Art. 4, Sec. 716 (as amended by Ch. 137, Acts of 1939), providing for service of summons, issued from the Peoples Court of Baltimore City, by registered mail with return receipt.

House Bill No. 652 was introduced on March 10, 1947, to provide for service of process upon defendants or respondents by registered mail, but it failed to pass.

vice[13] in any court of record in the State of Maryland except on non-resident motorists[14] for causes of action arising in this State and corporations doing business in the State.[15]

[13] Equity rule 10A permits notice by registered mail to defendants in divorce cases (see, Md. Code (1939) Art. 16, Sec. 167) as does the recently enacted rule of the Court of Appeals upon makers of confessed judgment notes (Baltimore Daily Record, Nov. 20, 1947). These two instances, however, can be distinguished by the very nature of the case, as the Court has in rem or in personam jurisdiction and the service by registered mail is merely a form of notice that action is being taken.

[14] Md. Code Supp. (1943) Art. 66½, Sec. 106.

[15] Md. Code (1939) Art. 23, Sec. 111.