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The Tolling of the Statute of Limitations When A Case Has Been Previously Dismissed for Lack of Jurisdiction or for Improper Venue

COMMENTS

THE TOLLING OF THE STATUTE OF LIMITATIONS WHEN A CASE HAS BEEN PREVIOUSLY DISMISSED FOR LACK OF JURISDICTION OR FOR IMPROPER VENUE

When an action is initially brought in a state or federal court and is dismissed for lack of proper venue or jurisdiction, it frequently becomes necessary to determine whether the applicable statute of limitations has been tolled during the pendency of the action. If a second action is instituted after the statute has run, the action will be considered time-barred in the absence of a tolling doctrine.

It is a general rule of law in the various states that, in the absence of a statute, the reinstitution of a suit or action during the pendency of which the applicable statute of limitations has run is not permitted but is considered time-barred.[1] Most states have passed statutes that, under certain circumstances, purport to give a plaintiff additional time to bring a second action.[2] These so-called "saving" statutes vary in language and court interpretation, but a majority of states have held such statutes applicable when the first action has been dismissed for lack of venue, personal jurisdiction, or subject matter jurisdiction.[3] Some of the statutes simply provide additional time in all cases where a decision has not been reached on the merits in the first action.[4]

I. The Virginia Law

Virginia's "saving" statute, Code § 8-34,[5] gives a plaintiff an extra year in which to bring a second action when the first action abates for any of four specified reasons,[6] but makes no mention of actions or suits dismissed for lack of proper venue or jurisdiction. § 8-34 was judicially construed by the Virginia Supreme Court in *Jones v. Morris Plan Bank*,[7] where the plain-

[1] *See generally* Annot., 6 A.L.R.3d 1043, 1046 (1966); 54 C.J.S. *Limitations of Actions* § 287 (1948).

[2] Burnett v. New York Cent. R.R., 380 U.S. 424, 431-32 n.9 (1965) (this case lists a number of such state statutes); Annot., 6 A.L.R.3d 1043, 1046 (1966).

[3] *See generally* Annot., 6 A.L.R.3d 1043, 1047-49, 1053, 1062-68 (1966).

[4] *Id.* at 1062-68.

[5] Va. Code Ann. § 8-34 (1957).

[6] The statute provides that an additional year will be given if the action or suit abates (1) by the return of no inhabitant or (2) by the death or marriage of either party or (3) if a judgement or decree for the plaintiff is arrested or reversed upon a ground that does not preclude a new action or suit for the same cause or (4) if there be reason to bring a new suit or action by reason of the loss or destruction of any of the papers or records in a former suit. Va. Code Ann. § 8-34 (1957).

[7] 170 Va. 88, 195 S.E. 525 (1938).

tiff, his first action dismissed for improper venue, reinstituted his action in a court of proper venue after the statute of limitations had run. The court first enunciated the general rule that there is no tolling of a statute during the pendency of a case in the absence of a statute.[8] Soundly relying on legislative history[9] and, by analogy, on the Death By Wrongful Act section,[10] the court strictly construed[11] § 8-34, holding it inapplicable to the present situation.

> There is no saving provision where a suit, such as that of the plaintiff here, was brought in the wrong forum or was dismissed otherwise than upon the merits.[12]

While *Jones* specifically dealt with improper venue and not jurisdiction, the court's reasoning clearly demonstrates that § 8-34 does not apply in either case. Furthermore, an earlier Virginia case held that the statute of limitations is not tolled when jurisdiction is lacking.[13]

Since *Jones*, relatively few Virginia cases have dealt with the general problem of tolling and the construction of § 8-34. These cases do reflect a more liberal attitude on behalf of the court with respect to tolling statutes of limitation,[14] although at no time has the court altered the essential hold-

[8] *Id.* at 91, 195 S.E. at 526. *See* Manuel, v. Norfolk & W. Ry., 99 Va. 188, 37 S.E. 957 (1901); Dawes v. New York Phila. & Norf. R.R., 96 Va. 733, 32 S.E. 778 (1899).

[9] The court noted that the forerunner of § 8-34 had used language that specifically tolled the statute of limitations in a case where the plaintiff proceeded in the wrong forum. The revisors of the Code of 1919 eliminated this provision, deeming it unwise. 170 Va. at 93-94, 195 S.E. at 527.

[10] VA. CODE ANN. § 8-634 (Supp. 1972) provides that in actions for wrongful death the two year statute of limitations will be tolled during the pendency of the action if the action abates or is dismissed for *any* cause without a determination of the merits. Under this section, it is clear that a dismissal for lack of proper venue or jurisdiction would toll the statute, because there would have been no determination on the merits. The court properly felt that the legislature would have used similar language in § 8-34 if it had intended such a result. Jones v. Morris Plan Bank, 170 Va. 88, 93, 195 S.E. 525, 527 (1938).

[11] The court held that a statute of limitations would be tolled *only* for one of the four reasons specified in the statute (*see* note 6 *supra*). *Id.* at 92, 195 S.E. at 526.

[12] *Id.* at 93, 195 S.E. at 527.

[13] Callis v. Waddy, 16 Va. (2 Munf.) 511 (1811).

[14] *See generally* Woodson v. Commonwealth Util., Inc., 209 Va. 72, 161 S.E.2d 669 (1968) (a decree declaring a confessed judgement void was held to bring plaintiff within that provision of § 8-34 dealing with a judgement arrested or reversed on a ground not precluding a new action; the court said that § 8-34 was remedial and should be liberally construed); Norwood v. Buffey, 196 Va. 1051, 86 S.E.2d 809 (1955) (the court gave a liberal interpretation to § 8-634, dealing with wrongful death); Street v. Consumers Mining Corp., 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946) (the court said that the purpose of a statute of limitations is to prevent fraudulent and stale claims from being

ing of *Jones*—that § 8-34 applies only to cases that fall within one of the four enumerated provisions of the section.[15]

One case, *Weinstein v. Glen Falls Insurance Co.*,[16] deserves special mention. Plaintiff's initial action at law on an insurance contract was dismissed because the contract needed reformation. Before dismissal, and after the contractual limitation had run, plaintiff filed a suit in equity in the same court to accomplish this purpose. The court treated the equity suit as a *continuation* of the law action and held that the contractual limitation did not bar the suit.[17] At least one federal case has suggested that *Jones* may no longer be good law in light of *Weinstein*,[18] although *Weinstein* mentioned neither *Jones* nor § 8-34 in reaching its decision. It would seem that the holding of the later case would thus be limited to the special facts involved: 1) the law and equity sides of the same case, and 2) a case in which the second suit is brought *before* dismissal of the first and in the *same* court.[19]

It must therefore be concluded that § 8-34 does not apply to suits or actions dismissed for improper venue or lack of jurisdiction. A plaintiff in such a case, who files his second suit or action after the applicable statute of limitations has run, will be vulnerable to such a defense.

II. The Federal Law

In many cases the second action will be brought in a federal court, and it will have to decide whether the statute of limitations was tolled during the pendency of the action in the first case, which may have been in either a state or federal court. The question is complicated by the fact that the federal court must first determine *whether* to apply federal law, as opposed to state law, and then decide *what* the federal tolling law is. Of course, if the court decides to apply Virginia law, the results will be the same as noted above.

A. Federal Question Cases

The leading case regarding a federal question and federal statute of limitations, with respect to tolling, is *Burnett v. New York Central Railroad Co.*[20] This case involved an action under the Federal Employers' Liability

asserted after a great lapse of time; to allow tolling in the venue and jurisdiction cases would not appear inconsistent with this purpose).

[15] *See* note 6 *supra*.

[16] 202 Va. 722, 119 S.E.2d 497 (1961).

[17] *Id.* at 729-30, 119 S.E.2d at 503.

[18] Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 531 (4th Cir. 1970), *cert. denied* 402 U.S. 932 (1971).

[19] Even the *Atkins* court recognized the factual distinctions that set apart *Weinstein* from cases such as *Jones*. 435 F.2d 527, at 535.

[20] 380 U.S. 424 (1965).

Act that has its own three year statute of limitations.[21] Plaintiff's case was originally brought in the state court of Ohio and dismissed for improper venue. After the statute had run, plaintiff reinstituted his action in the federal court. The Supreme Court had little difficulty in applying federal tolling law because of the presence of a federal question and federal statute of limitations. The Court held that plaintiff's state court action had tolled the federal limitation provision; therefore, his present action was timely.[22]

The Court's reasoning was essentially threefold: 1) the purpose of the statute of limitations was not violated by allowing plaintiff's claim because he had not "slept on his rights" and his claim was not stale;[23] 2) under the law of most states, when improper venue exists, the court may transfer the case to the state court of proper venue, thus eliminating the tolling problem;[24] 3) under federal law, an action brought in the wrong venue in a federal court may be transferred to the proper court,[25] and will be transferred if the statute of limitations would otherwise bar the action.[26] Therefore, the Court concluded that the legislative intent of Congress was that the statute of limitations should not bar an action dismissed for improper venue in a state court.[27] Thus, it may be concluded from *Burnett* that federal tolling

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[21] 45 U.S.C. § 56 *et seq.* (1970).

[22] Burnett v. New York Cent. R.R., 380 U.S. 424, 426 (1965).

[23] *Id.* at 428. The Court said that the purpose of statutes of limitations is to

> promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. *Id.*

The Court also noted that railroads had previously waived venue objections to allow suits to proceed in state courts.

[24] *Id.* at 431 n.8. The Court lists thirty-one states that have transfer-of-venue statutes. When venue is transferred pursuant to such a statute, there is no need for a tolling doctrine because the statute of limitations ceases to run from the moment the action is properly commenced.

The Court lists VA. CODE ANN. § 8-157 (Supp. 1972) as a statute that permits a transfer when there is improper venue. However, it has been held by the Virginia Supreme Court that dismissal, not transfer, is the correct procedure in a case of improper venue. *See* Woodhouse v. Burke & Herbert Bank & Trust Co., 166 Va. 706, 185 S.E. 876 (1936). There are no cases to the contrary.

Burnett also cited § 8-34 as applying to cases in which there was a dismissal for improper venue. Thus the Supreme Court misconstrued Virginia law on both points.

[25] 28 U.S.C. § 1406 (a) (1970) which reads:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

[26] *See generally* Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955); Gold v. Griffith, 190 F. Supp. 482 (N.D. Ind. 1960); Dennis v. Galvanek, 171 F. Supp. 115 (M.D. Pa. 1959); Schultz v. McAfee, 160 F. Supp. 210 (D.Maine 1958). In these cases the courts have held that "the interest of justice" requires that the case be transferred.

[27] Burnett v. New York Cent. R.R., 380 U.S. 424, 432 (1965).

law will apply when a federal question and federal statute of limitations are involved, and that the federal law will toll the statute during the pendency of a state court action subsequently dismissed for improper venue.

Neither *Burnett* nor other Supreme Court cases present the issue of whether federal tolling law would apply to a case raising a federal question but controlled by a state statute of limitations. However, the issue was presented to the Fifth Circuit in *Mizell v. North Broward Hospital District*.[28] The court held that in cases arising under the laws or Constitution of the United States, a federal rule on tolling a state statute of limitations should be observed, if the rule clearly carries out the intent of Congress or of the constitutional principle at stake.[29] Thus, the door has been opened to apply federal tolling law in all federal question cases when to do so appears equitable.

While the federal tolling law with respect to venue dismissals is now clearly established, the law with respect to dismissals for lack of jurisdiction is in need of clarification. There are no Supreme Court cases directly on point; however, the *Burnett* Court was always careful to point out that plaintiff's action had been brought in a state court of competent jurisdiction, and that service of process on defendants had been proper.[30] This language suggests that tolling might not be appropriate under federal law when a prior case has been dismissed on jurisdictional grounds.

Two federal cases have dealt with this question since the *Burnett* opinion. In *Chambliss v. Coca-Cola Bottling Corp.*,[31] the district court held that the applicable statute of limitations would not be tolled during the pendency of a prior action that failed for lack of personal jurisdiction over the defendant. The court felt that the *Burnett* holding should be restricted to narrow grounds.[32] However, the impact of this decision is somewhat lessened by the fact that the court stressed certain other factors in reaching its conclusion.[33]

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28 427 F.2d 468 (5th Cir. 1970).

29 *Id.* at 474. This case involved a suit by plaintiff under the Civil Rights Act, 42 U.S.C. § 1981-83 (1970). The court felt that the purpose of the act was to encourage the utilization of state procedures before requiring a plaintiff to bring his federal suit. Therefore, the court felt that federal tolling should govern.

30 Burnett v. New York Cent. R. Co., 380 U.S. 424, 429, 434-35 (1965). The Court's conclusion was stated in these terms:

> [w]hen a plaintiff begins a timely FELA action in a state court having jurisdiction, and serves the defendant with process and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit. *Id.* at 434-45.

31 274 F. Supp. 401 (E.D. Tenn. 1967), *aff'd*, 414 F.2d 256 (6th Cir. 1969).

32 274 F. Supp. at 411.

33 Plaintiff's action was brought from fifteen to thirty-nine months after the applicable statutes had run. The court also noted that the plaintiff at any time could have sued the defendant in his home district and obtained personal jurisdiction over him.

In *Berry v. Pacific Sportfishing, Inc.*,[34] the Ninth Circuit held that a prior action in a state court did toll the statute of limitations although the state court lacked subject matter jurisdiction. The court noted the limiting language of *Burnett* but avoided its impact by emphasizing two factors: (1) defendant had never challenged the lack of subject matter jurisdiction in the state court, where the action was still pending,[35] and (2) the state court had "general" jurisdiction over the matter until such an assertion by the defendant.[36] This language indicates that the court might have ruled differently had the first action been previously dismissed for lack of subject matter jurisdiction.

With no other cases on point, the only safe conclusion is that the question is still open in the federal courts. While *Burnett* suggests that there will be no tolling in jurisdictional cases, strong policy arguments can be advanced for treating jurisdiction and venue dismissals alike for the purpose of tolling.[37]

B. *Diversity of Citizenship Cases*

Since *Erie Railroad Co. v. Tompkins*[38] and *Guaranty Trust Co. v. York*,[39] it has been well established that a state statute of limitations will be controlling in federal courts when jurisdiction is based solely on diversity of citizenship.[40] Until the Fourth Circuit decided *Atkins v. Schmutz Manufacturing Co.*,[41] all federal courts had applied state tolling law in such cases.[42]

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[34] 372 F.2d 213 (9th Cir. 1967).

[35] *Id.* at 214-15.

[36] *Id.* The court also pointed out that the state court had personal jurisdiction over the defendant. Whether such a result was necessary to the court's decision is a matter of speculation.

[37] It is probable that in most cases in which an action is dismissed for lack of proper jurisdiction, the plaintiff has not slept on his rights or allowed his claim to grow stale. *See* note 23 *supra* and accompanying text. Furthermore, in such cases the defendant is never surprised by the action; he is put on notice that he may have to defend when the initial action is filed and before the statute has run. Thus, it can be reasonably argued that statute of limitations should be tolled in both venue and jurisdiction cases.

[38] 304 U.S. 64 (1938). The Court held that in diversity cases the federal courts must apply the substantive law of the forum state rather than a federal common or general law.

[39] 326 U.S. 99 (1945). *Guaranty Trust* held that in diversity cases a state statute of limitations must be applied by the court, because such a statute is substantive and will affect the outcome of the case in question. This "outcome determination" test has since undergone some erosion. *See* Hanna v. Plumer, 380 U.S. 460 (1965); Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958); Szantay v. Beach Aircraft Corp., 349 F.2d 60 (4th Cir. 1965).

[40] Guaranty Trust Co. v. York, 326 U.S. 99 (1945). No court in a diversity case has ever failed to apply the applicable state statute of limitations.

[41] 435 F.2d 527 (4th Cir. 1970), *cert. denied* 402 U.S. 932 (1971).

[42] *See* Note, 71 COLUM. L. REV. 865, 874-75 (1971).

However, the *Atkins* court was faced with 1) an unusual factual situation that clearly cried out for tolling,[43] and 2) Virginia law that would not permit such a holding.[44] *Atkins* held that under the law of *Guaranty Trust Co.* the state limitation must be applied,[45] but the court refused to go further and follow state tolling law. The court concluded:

> that the tolling effect of the pendency of an identical suit in *another federal court* is to be determined as a matter of federal, rather than state law ... (emphasis added).[46]

The constitutional justification for such a holding can be questioned,[47] but *Atkins* does represent the current law in the Fourth Circuit.

Atkins' chief significance lies in connection with an initial federal court action dismissed for lack of jurisdiction. In the Fourth Circuit federal tolling law will apply, and it is at least possible that the court would consider the statute of limitations to be tolled during the pendency of the first action.[48] Without *Atkins*, Virginia law would be controlling, and unquestionably the statute would not be tolled.[49]

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[43] Plaintiff Atkins initially brought his action in the federal courts of Kentucky for personal injuries sustained in Virginia. (At that time Virginia had no long-arm statute.) The action was brought within the Virginia two year statute of limitations but after the expiration of Kentucky's one year statute. While the case was pending, the Kentucky Court of Appeals reversed its previous position and held that in such cases Kentucky's statute would apply rather than the statute of the place of the wrong. *See* Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. App. 1965). The district court then dismissed the action as time-barred, and plaintiff, before the Sixth Circuit affirmed this decision in Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1967), filed his action in a federal court in Virginia. Virginia's two year statute had now run and the district court dismissed the action, relying on Virginia tolling law. The Fourth Circuit affirmed before deciding to rehear the case. *See* Atkins v. Schmutz Mfg. Co., 268 F. Supp. 406 (W.D. Va. 1967), *aff'd*, 401 F.2d 731 (4th Cir. 1968). The court in the present case rather obviously felt that Atkins had been a victim of circumstance.

[44] The factual situation in *Atkins* does not fall within any of the provisions of § 8-34 as interpreted by *Jones*. *See* Atkins v. Schmutz Mfg. Co., 268 F. Supp. 406 (W.D. Va. 1967), *aff'd*, 401 F.2d 731 (4th Cir. 1968).

[45] Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 538 n.48 (4th Cir. 1970), *cert. denied* 402 U.S. 932 (1971).

[46] *Id.* at 527. *Atkins* considered tolling to be a procedural matter. *Id.* at 536.

[47] For an excellent analysis of the constitutional justification for *Atkins*, *see* Note, 71 COLUM. L. REV. 865 (1971); Comment, 6 U. RICH. L. REV. 360 (1972). Judge Winter concurred with the majority holding in *Atkins* because he felt that the particular factual situation was controlled by *Weinstein* (*see* text page 321 *supra*). However, Judge Winter questioned the reasoning of the majority with respect to applying federal tolling law to a state statute of limitations in diversity cases. *See* Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 538-39 (4th Cir. 1970), *cert. denied* 402 U.S. 932 (1971).

[48] *See* text accompanying notes 30-37 *supra*.

[49] Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970), *cert. denied* 402 U.S. 932 (1971).

It is, of course, possible that the first action might have been brought in the state court, and upon dismissal, reinstituted in a federal court for reasons of diversity. Such a factual situation is not within the scope of *Atkins*, which applied federal law when the original action had been brought in "another federal court." [50] It seems doubtful that the reasons given by *Atkins* would support such an extension;[51] thus, state law would probably apply in this type of case.

III. Conclusion

The Virginia tolling law is less liberal than the federal law and the laws of most other states. Since the *Jones* decision is judicially sound, it is the task of the Virginia General Assembly to re-examine the purposes of statutes of limitation, and to determine whether a change in the tolling law would be desirable. Unless a change is made, a Virginia plaintiff must be careful to obtain proper venue and jurisdiction in his case if he wishes to avoid the possibility of a second action being barred by the applicable statute of limitations.

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[50] The *Atkins* decision was based on federal institutional and policy considerations favoring a unitary federal court system and the expeditious adjudication of cases on their merits. *Id.* at 537. But whether these interests are sufficient to override the state's interest in having its tolling law apply to actions initially brought in its courts is questionable. The state's interest in having its tolling law apply is stronger in this type of factual situation than it was in *Atkins*.

[51] *See* notes 9 and 10 *supra*.