

195-

196-1051

# Record No. 4358

In the  
Supreme Court of Appeals of Virginia  
at Richmond

**C. WILLARD NORWOOD, ADMR. &C.**

v.

**WALTER H. BUFFEY, M. D.**

FROM LAW AND EQUITY COURT OF CITY OF RICHMOND, PART TWO.

### RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

H. G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

196VA1051

**NOTICE TO COUNSEL**

This case probably will be called at the session of court to be held.

MAR 1955

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

H. G. Turner, Clerk.





IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND

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**Record No. 4358**

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 8th day of October, 1954.

C. WILLARD, NORWOOD, ADMR. &C., Plaintiff in Error,  
*against*

WALTER H. BUFFEY, M. D., Defendant in Error.

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From the Law and Equity Court of the City of Richmond,  
Part Two.

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Upon the petition of C. Willard Norwood, Administrator of the Estate of Rebecca Faye Dowdy, deceased, a writ of error is awarded him to a judgment rendered by the Law and Equity Court of the City of Richmond, Part Two, on the 19th day of May, 1954, in a certain notice of motion for judgment then therein depending wherein the said petitioner was plaintiff and Walter H. Buffey, M. D., was defendant; no bond being required.

RECORD

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page 4 }

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PLEA OF STATUTE OF LIMITATIONS AND MOTION FOR SUMMARY JUDGMENT.

This day comes the defendant, by his attorneys, and pleads that the Statute of Limitations has run in the above-styled action and moves the court for a summary judgment in favor of the defendant.

WALTER H. BUFFEY, M. D.  
By DAVID MEADE WHITE  
Counsel.

\* \* \* \* \*

(on back)

Received and filed Nov. 19, 1953.

Teste:

LUTHER LIBBY, JR., Clerk  
By ....., D. C.

\* \* \* \* \*

page 8 }

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REPLICATION.

The said plaintiff comes and says that, the plaintiff instituted his action against the said defendant, Walter H. Buffey, M. D., within one year of the time the cause of action accrued in this Court, to-wit, on the 15th day of May, 1953, that said action was dismissed on the motion of the plaintiff on the 5th day of November, 1953, that on the 5th day of November, 1953, the plaintiff instituted this action in manner and form as per-

mitted by statute; that the order dismissing the former action between the same parties in the same Court was entered by the Court in manner and form as follows:

“This day came the plaintiff and the defendant, by counsel, and the plaintiff failing to further prosecute his suit, on his motion, it is ordered that he be non-suited, paying to the defendant five dollars (\$5.00) damages according to law, together with his costs by him about his defense in this behalf expended.”

And this the said plaintiff is ready to verify.

ISRAEL STEINGOLD, p. q.  
1032 Mutual Building  
Richmond, Virginia.

Filed by Order May 13, 1954.

Teste:

....., Clerk  
By E. C. EARLE, JR., D. C.

page 9 }

May 14, 1954

Israel Steingold, Esq.,  
George B. White, Esq.,  
David Meade White, Esq.,  
Attorneys at Law  
Richmond, Virginia.

Re: *Norwood, Admr., etc. v. Buffey*—#7168.

Gentlemen:

I have examined to the best of my ability the statutes and authorities dealing with the point raised by the plea of the statute of limitations and the plaintiff’s replication thereto. It is my conclusion that the replication should be stricken out as legally insufficient and judgment entered on the plea of the statute of limitations.

I think the point involved in this case is an exceedingly close one. The language contained in Section 8-634 of the Code of Virginia, 1950, which covers this matter appears to have come into our law by an Act approved March 7, 1904, entitled “An Act to Amend and Reenact Sections 2903 and 2904 of the Code of Virginia of 1887. (Acts 1904, p. 110).” It may be that the

Legislature was dissatisfied with the holding of the Supreme Court of Appeals of Virginia in the case of *Manuel Admr. v. Norfolk & Western Ry. Co.*, 99 Va. 188, which was decided in January, 1901, and which held that where the plaintiff had suffered a non-suit upon his own motion the statute of limitations was a bar to another action for the same cause. The notes to Section 2903, Pollard's Virginia Code, 1904, tend to indicate this. It may also be that this amendment under consideration was prompted by the fact that in a large number of jurisdictions it was being held that statutes similar to our Section 8-34, Code of Virginia, 1950, were inapplicable to statutory causes of action where the statute creating the right also fixed the time within which it might be asserted. See 25 C. J. S., 1162.

Of course, the language in Section 8-634 to the effect that "if any such action is brought within such period of one year after such person's death, and for any cause abates or is dismissed without determining the merits of such action, the time such action is pending shall not be counted \* \* \*" is much broader than the language of Section 8-34, as pointed out by Mr. Justice Eggleston in the case of *Jones v. Morris Plan Bank*, 170 Va. 88, 93. The last cited case, however, is also authority for the generally accepted proposition, which I deem controlling here, that any exceptions to a statute of limitations must be clearly spelled out by the Legislature.

In the case of *Manuel v. Norfolk & Western Ry. Co.*, *supra*, Angell on Limitations was quoted with approval (See Angell on Limitations, 6th Ed. Section 328). On examination of the cited text I find the rule strongly announced to the effect that where a voluntary non-suit has been suffered statutes of the general type of our Section 8-34 are inapplicable and, of course, in the *Manuel Case* our Court of Appeals expressly said that our statute of that kind, namely, the then Section 2934, was inapplicable. This seems to be the general rule even in cases where the statute is in much broader language than our general provision, particularly where the non-suit or dismissal was the voluntary act of the plaintiff. See 37 C. J., 1089, 54 C. J. S., 357, 34 Am. Jur., 227, 132 A. L. R., 289, *Wood on Limitations*, 4th Ed., 1494 and 1541, *et seq.*

In other words, I think that the words "any cause" contained in the statute embrace causes "external to the plaintiff", as the expression usually is, and are not sufficiently broad, when construed in the light of the rules of construction applicable to exceptions to statutes of limitation as laid down by our Court of Appeals, to include the case of a voluntary non-suit. You will find an excellent discussion on the phrase "for any cause" by the Su-



preme Court of Appeals of West Virginia in the case of *Lawrence v. Winifrede Coal Co.*, 48 W. Va., 138, 35 S. E. 9255. See also *McClung v. Tieche*, 126 W. Va., 575, 29 S. E. (2d), 250, and *Kenner v. Reynolds Trans. Co.*, 134 W. Va., 712, 61 S. E. (2d), 629.

Yours very truly,

Judge.

RLY/e

page 12 }

\* \* \* \* \*

ORDER.

This day came again the parties by their attorneys, and thereupon the defendant moved the Court to strike out plaintiff's replication to his plea of the statute of limitations and enter judgment on the plea of the statute of limitations heretofore duly filed.

The motion having been fully heard and maturely considered, the Court is of the opinion that the said replication should be stricken out as legally insufficient and judgment entered on the plea of the statute of limitations, and it doth accordingly so adjudge and order. Whereupon, it is considered by the Court that the said plaintiff take nothing by his action herein and that the defendant go hence without day and recover against the plaintiff his costs about his defense in this behalf expended, to all of which the plaintiff, by counsel, excepted.

We ask for this.

GEORGE B. WHITE  
DAVID MEADE WHITE  
Attorneys for Defendant  
501-506 Richmond Federal Bldg.  
Richmond 19, Virginia.

We object to this.

ISRAEL STEINGOLD, p. q.

Enter May 19, 1954.

\* \* \* \* \*

R. L. Y.

page 13 }

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## NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Notice is given that C. Willard Norwood, Administrator of the Estate of Rebecca Faye Dowdy, Deceased, appeals from the final judgment entered in this action on the 19th day of May, 1954, and will apply for a writ of error.

## ASSIGNMENTS OF ERROR.

The following are the errors assigned:

The Law and Equity Court of The City of Richmond, Part II, erred:

1. In striking out the Replication of the plaintiff.
2. In sustaining the plea of the statute of limitations filed by the defendant.

C. WILLARD NORWOOD, Ad-  
 ministrator of the Estate of  
 REBECCA FAYE DOWDY,  
 Deceased  
 By STEINGOLD & STEINGOLD  
 His Attorneys.

\* \* \* \* \*

Received and filed Jun. 23, 1954.

Teste:

LUTHER LIBBY, JR., Clerk.

A Copy—Teste:

H. G. TURNER, Clerk.

## INDEX TO RECORD

	Page
Writ of Error Awarded . . . . .	1
Record . . . . .	2
Plea of Statute of Limitations and Motion for Summary Judgment . . . . .	2
Replication . . . . .	2
Letter—Opinion . . . . .	3
Judgment—Entered May 19, 1954 . . . . .	5
Notice of Appeal and Assignments of Error . . . . .	6