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IMMUNITY OF NON-RESIDENT PARTICIPANTS IN A JUDICIAL PROCEEDING FROM SERVICE OF PROCESS—A PROPOSAL FOR RENOVATION

One of the anachronisms of present "procedural" law is the favoritism, quite singular in Anglo-American jurisprudence, with which a non-resident who enters a state to participate in a judicial proceeding is clothed. Whether he comes as a witness,¹ a party plaintiff, or a party defendant,² he may not be served with civil process while going to, is present in, and returning from the foreign forum.³ Observation of the mechanical manner in which this rule has been applied⁴ warrants skepticism as to the basis upon which the privilege rests.

Reference to the Year Books of England, as early as Henry VI, reveals that the immunity rule has had a long history.⁵ First conferred upon residents,⁶ it was later extended to non-residents,⁷ and finally limited to the latter group.⁸ The privilege, originally described as that of the court,⁹ is now regarded as inuring to the benefit of the participants, as well.¹⁰ Historically, the rule was limited to exemption from *arrest*.¹¹ By evolutionary development, it has been enlarged to encompass *all* forms of civil process.¹²

1. *Murrey v. Murrey*, 216 Cal. 707, 16 P.2d 741 (1932), *cert. denied*, 289 U.S. 740 (1933); *Lingo v. Reichenbach Land Co.*, 225 Iowa 112, 279 N.W. 121 (1938); *Davies v. Lutz*, 110 Kan. 657, 205 Pac. 637 (1922); *Wheeler v. Flintock*, 156 Va. 923, 159 S.E. 112 (1931). Apparently the only case refusing to grant the immunity to a non-resident witness is that of *Baskerville v. Kofsky*, 18 N.J. Misc. 325, 14 A.2d 562 (1940). There the witness' actions had been fraudulent and collusive in that he tricked the injured party into suing an innocent third person while he himself was the actual tortfeasor. For an excellent note on that case see 74 N.Y.L. REV. 363 (1940).

2. Most courts make no distinction whether the non-resident is plaintiff or defendant. *Lamb v. Schmitt*, 285 U.S. 222 (1932); *Stewart v. Ramsey*, 242 U.S. 128 (1916); *Wilson v. Donaldson*, 117 Ind. 356, 20 N.E. 250 (1888); *Minnich v. Packard*, 42 Ind. App. 371, 85 N.E. 787 (1908); *Diamond v. Earle*, 217 Mass. 499, 105 N.E. 363 (1914); *Whited v. Phillips*, 98 W. Va. 204, 126 S.E. 916 (1925). *But cf.* cases cited note 39 *infra*.

3. A reasonable time is allowed for entering and leaving the jurisdiction. See cases cited notes 1 and 2 *supra*.

4. The immunity has been extended to participants in proceedings, other than trials, which are judicial in nature. *Roschynialski v. Hale*, 201 Fed. 1017 (D.C. Neb. 1913) (deposition before a notary); *Parker v. Marco*, 136 N.Y. 585, 32 N.E. 989 (1893) (pre-trial examination); *Matthews v. Tufts*, 87 N.Y. 568 (1882) (creditors meeting with register in bankruptcy). The arguments for and against immunity discussed in the body apply to these proceedings.

5. *Netograph Mfg. Co. v. Scrugham*, 197 N.Y. 377, 90 N.E. 962 (1910); *Whited v. Phillips*, 98 W. Va. 204, 126 S.E. 916 (1925).

6. See *Hatch v. Blissett*, 13 Ann. Gilb. Cas. K.B. 308, 93 Eng. Rep. 338 (1760).

7. *Walpole v. Alexander*, 3 Dougl. 45, 99 Eng. Rep. 530 (1782).

8. The recent case of *Fisher v. Bouchelle*, 61 S.E.2d 305 (W. Va. 1950), reaffirmed the position that the immunity is not available to residents.

9. ALDERSON, JUDICIAL WRITS AND PROCESS § 122 (1895).

10. *Whited v. Phillips*, 98 W. Va. 204, 126 S.E. 916 (1925).

11. See 3 BL. COMM. *282.

12. There is a split of authority as to whether a non-resident defendant in a criminal action is immune from service of process. Some courts, on the theory that it is unnecessary to offer inducements to such persons since they can be compelled to attend by extradition,

The argument most frequently invoked in support of the rule—that it prevents disruption of judicial administration¹³—has lost all persuasive power. Physical arrest is no longer made in civil cases;¹⁴ and the court always has the power to cite for contempt if there is actual interference by an attempt to serve process.¹⁵ Residents are amenable to process but it is nowhere contended that the judicial process is thereby disrupted. Subjection to process can hardly be more disruptive because the person happens to reside in a different state.¹⁶

Another reason advanced in support of the rule is that courts of justice ought everywhere to be open and accessible to all who approach them.¹⁷ If non-residents are subject to process while attending a foreign court, the argument goes, they will be reluctant to approach those courts. Therefore, the courts, in effect, are not open to them. This "open door" argument is valid only when it works both ways.¹⁸ When courts of a state cloak a non-resident with immunity, they have thereby effectively closed their doors to any other person who has a cause of action against the non-resident.

The strongest argument in favor of the rule is that the immunity is granted to encourage the attendance of necessary participants.¹⁹ As applied to non-resident witnesses, the beneficial feature of the rule is obvious. Personal

have denied the immunity. *Ryan v. Ebecke*, 102 Conn. 12, 128 Atl. 14 (1925); *Ex parte Henderson*, 27 N.D. 155, 145 N.W. 574 (1914); *Netograph Mfg. Co. v. Scrugham*, 197 N.Y. 377, 90 N.E. 962 (1910); *Husby v. Emmons*, 148 Wash. 333, 268 Pac. 886 (1928). Other cases, on the theory that immunity may be extended to induce voluntary attendance and thus save the state the expense of extradition, confer the gratuity. *Murray v. Wilcox*, 122 IOWA 188, 97 N.W. 1087 (1904); *Lingemann v. Dehnke*, 247 Mich. 597, 226 N.W. 259 (1929). Note, 43 HARV. L. REV. 802 (1930). The controversy has been rendered somewhat academic by the adoption in most states of the Uniform Criminal Extradition Act which provides immunity from service of process for criminal defendants "in civil actions arising out of the same facts as the criminal proceeding." See, e.g., IND. ANN. STAT. § 9-443 (Burns Repl. 1942). If the civil action arises out of unrelated facts, presumably the case law controls.

13. *Long v. Ansell*, 293 U.S. 76 (1934); *Stewart v. Ramsey*, 242 U.S. 128 (1916); *Diamond v. Earle*, 217 Mass. 499, 105 N.E. 363 (1914); *Person v. Grier*, 66 N.Y. 124 (1876).

14. *Mertens v. McMahon*, 334 Mo. 175, 185, 66 S.E.2d 127, 131 (1933): "Since physical arrest of the person is no longer made in civil cases, the ancient reason for the rule that suitors and witnesses shall not be *arrested* while attending court as tending to interfere with the due administration of justice no longer exists. Service of summons in another case on a party attending court does not seriously interfere with the business or procedure of court. . . ."

15. In England service without arrest was merely a contempt of court and the writ did not abate. *Cole v. Hawkins*, 2 Str. 1094, 93 Eng. Rep. 1054 (1738); *Poole v. Gould*, 1 H. & N. 99, 156 Eng. Rep. 1133 (1856).

16. See Keeffe and Roscia, *Immunity and Sentimentality*, 32 CORNELL L.Q. 471, 475 (1947).

17. *Stewart v. Ramsey*, 242 U.S. 128 (1916); *Minnich v. Packard*, 42 Ind. App. 371, 85 N.E. 787 (1908).

18. Note, 33 HARV. L. REV. 721 (1920).

19. If out of state witnesses fear further litigation away from home, they will be deterred from leaving their home state. *Page Co. v. MacDonald*, 261 U.S. 446 (1923); *Martin v. Bacon*, 76 Ark. 158, 88 S.W. 863 (1905); *Chittenden v. Carter*, 82 Conn. 585, 74 Atl. 884 (1909); *Sherman v. Gundlach*, 37 Minn. 118, 33 N.W. 549 (1887); *Matthews v. Tufts*, 87 N.Y. 568 (1882); and see cases cited note 1 *supra*.

attendance of witnesses may not be compelled across state lines.²⁰ The privilege may validly be extended as a necessary inducement to witnesses to attend the proceeding and thereby give the court full advantage of all pertinent evidence. Because the rule has merit as applied to non-resident witnesses, many courts have gratuitously assumed propriety likewise demands its application to non-resident plaintiffs and defendants.²¹ When the non-resident's own interests cause him to enter the jurisdiction in order to bring suit, it seems absurd to offer special favors to induce him to stay and prosecute his case to completion. Courts should not be in competition with each other, hence should not extend privileges to non-residents in order to get their business.²²

All of the above arguments are evidently referred to when the courts reiterate that "sound public policy" demands that non-residents be immune from process while attending judicial proceedings.²³ "Sound public policy" can be argued in favor of almost any rule, since the phrase, in itself, is practically meaningless. As applied to the immunity cases, this trite jingle is devoid of all substance. The non-resident is immune when he enters the jurisdiction for the sole purpose of attending the proceedings—if he unwittingly engages in other business while there, the immunity suddenly vanishes.²⁴ If sound public policy demands immunity in the one case, does it somehow become "unsound" public policy to grant it in the other?²⁵

That an exemption from service of process derogates from the right which every creditor has to collect his debt by subjecting his debtor to suit in any jurisdiction where he may be found is sufficient reason why immunity should not be extended beyond the necessities of efficient judicial administration.²⁶

20. 8 WIGMORE, EVIDENCE § 2195a (3d ed. 1940). This common law rule, as applied to criminal cases, has been modified in Indiana and most other states by adoption of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, which provides immunity from process for a subpoenaed witness "in connection with matters which arose before his entrance into this state under the subpoena." IND. ANN. STAT. § 9-1626 (Burns Repl. 1942). For a note on legislative attempts to cope with this problem, see 43 HARV. L. REV. 121 (1929).

21. Keefe and Roscia, *supra* note 16, at 478.

22. For a hint that immunity may occasionally have been granted as an inducement to lure non-resident plaintiffs away from the federal courts, see *Wilson v. Donaldson*, 117 Ind. 356, 20 N.E. 250 (1888).

23. *Wilson v. Donaldson*, 117 Ind. 356, 20 N.E. 250 (1888); *Powell v. Pangborn*, 161 App. Div. 453, 145 N.Y. Supp. 1073 (2d Dep't 1914).

24. The theory evidently is that if participation in the judicial proceeding is not the sole incentive for entering the jurisdiction, the non-resident would enter anyway, and thus be subject to process. *Connelly v. Wayne Circuit Judge*, 227 Mich. 139, 198 N.W. 585 (1924); *State ex rel. American Laundry Machinery Co. v. District Court*, 98 Mont. 278, 41 P.2d 26 (1934); *Roos v. H.Y. Roos Co.*, 64 Ohio App. 464, 28 N.E.2d 1008 (1940); *Sofge v. Lowe*, 131 Tenn. 626, 176 S.E. 106 (1915).

25. Keefe and Roscia, *supra* note 16, at 479.

26. *Murrey v. Murrey*, 216 Cal. 707, 16 P.2d 741 (1932), *cert. denied*, 289 U.S. 740 (1933); *Netograph Mfg. Co. v. Scrugham*, 197 N.Y. 377, 380, 90 N.E. 962, 963 (1910): "[Immunity from process] is not only not a natural right but it is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him."

The usual arguments advanced in support of a protective barrier around non-residents, although desirable as applied to witnesses, are fanciful rather than substantial when applied to plaintiffs and defendants. The ends of justice could better be served by approaching the problem with the enlightened view taken by the federal, and a few of the state, courts in their application of the doctrine of *forum non conveniens*.²⁷ Courts should have a discretionary power to hear, or refuse to hear, transitory causes of action whenever trial in the forum would be appropriate, or inappropriate.²⁸ But *forum non conveniens* has had a cool reception in the state courts.²⁹ It is said that the right of access to the courts of a state is one of the privileges protected by the privileges and immunities clause³⁰ of the United States Constitution.³¹ Notwithstanding the fact that the United States Supreme Court has discountenanced the supposed constitutional objection to *forum non conveniens*,³² most of the state courts still entertain scruples against its application on an interstate basis.³³ However, there is to be found no objection on constitutional

27. *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). For a discussion of these two cases see Note, *Forum Non Conveniens in the Federal Courts*, 23 IND. L.J. 82 (1947). The Judicial Code of 1948, 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Thus there is a clear recognition that *forum non conveniens* is firmly established in federal jurisdiction. See MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 200 (1949).

28. For a complete discussion and analysis of *forum non conveniens* see Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947). See also 60 YALE L.J. 183 (1951).

29. Only six states appear to recognize and apply the doctrine. *Hagen v. Viney*, 124 Fla. 747, 169 So. 391 (1936); *Union City Transfer v. Fields*, 199 So. 206 (La. App. 1940); *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 184 N.E. 152 (1933); *Jackson & Sons v. Lumbermen's Mutual Casualty Co.*, 86 N.H. 341, 168 Atl. 895 (1933); *Quigley Co. v. Asbestos Ltd.*, 134 N.J. Eq. 312, 35 A.2d 432 (Ch. 1944); *Murnan v. Wabash Ry.*, 246 N.Y. 244, 158 N.E. 508 (1927).

30. U.S. CONST. Art. IV § 2. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

31. In *Corfield v. Coryell*, 6 Fed. Cas. 546, 552, No. 3,320 (E.D. Pa. 1822), the court concluded that only those privileges and immunities of state citizenship which are "in their nature fundamental" were protected by the Constitution. The "right to institute and maintain actions of any kind in the courts of the state" was included in the "fundamental" category. *Brower v. Watson*, 146 Tenn. 626, 244 S.W. 362 (1922); *Deatricks' Adm'r. v. State Life Ins. Co.*, 107 Va. 602, 59 S.E. 489 (1907); *State v. Fowler*, 196 Wis. 451, 220 N.W. 534 (1928).

32. *Douglas v. New Haven Ry.*, 279 U.S. 377 (1929). The case is commented on in Notes, 39 YALE L.J. 388 (1930); 30 MICH. L. REV. 610 (1932).

33. The courts are clearly wrong in assuming that the privileges and immunities clause forbids application of the doctrine. The key to that clause is "citizenship" which plays no part in the *forum non conveniens* theory. A refusal of jurisdiction to hear a case is based upon inconvenience and not citizenship, hence a state may decline jurisdiction over a suit instituted by one of its own citizens. Thus in *Universal Adjustment Corp. v. Midland Bank*, 281 Mass. 303, 184 N.E. 152 (1933) it was said, ". . . domestic residence of parties is not decisive in requiring courts to assume jurisdiction of a cause, but . . . the basis of inquiry will be whether justice can be as well done here as in another jurisdiction to which parties may have access."

grounds to granting or withholding immunity from service of process to non-residents.³⁴ Those courts, therefore, who desire to apply *forum non conveniens* but who are hesitant because of Article IV of the Constitution, or for other reasons,³⁵ could reach the same result in cases involving non-residents, by a discriminating use of the immunity rule.

Consider the situation where a resident of state B goes to state A to defend an action by a resident of the latter state. A third person, also a resident of state A, has a claim against the non-resident. If the non-resident is immune from process while in state A, the result is that the third person must go to state B to assert his cause of action. Assuming both claims are valid, the non-resident will suffer two adverse judgments, whether the immunity is granted or not. The effect of granting the immunity has been merely to shift the burden of traveling to a foreign jurisdiction from the non-resident to the third person. This imposition in many cases is substantial, but it should be left where it falls unless a valid reason can be shown for shifting it. Assume further that the event giving rise to the cause of action occurred in state A and all the witnesses reside therein. To tell the third party that he must go to state B to sue³⁶ means not only that he has the burden of transporting all his witnesses to a foreign state, but that the supposed beneficiary of the rule, the non-resident, has an identical burden.³⁷ In such a case as this, the rule works

34. The common law privilege from process was in effect long before the adoption of the Federal Constitution. Further, the common law rules prevail unless inconsistent with the constitution, statutes, or institutions of state. *Northern Pac. Ry. v. Herbert*, 116 U.S. 642 (1885); *Horace Waters & Co. v. Gerard*, 189 N.Y. 302, 82 N.E. 143 (1907).

35. It has been argued that a court having jurisdiction is under an absolute duty to exercise it, notwithstanding that its exercise may be onerous. *Second Employers' Liability Cases*, 223 U.S. 1 (1912) (state courts could not refuse to hear cases brought under the F.E.L.A. because of the inconvenience of applying different standards in cases arising under the federal and state statutes). This argument was exploded by *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130-131 (1933): "While the court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power . . . Jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case." See *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949).

36. If state A grants immunity, suit must be brought in state B, or some other state where the non-resident may be served. If the case involves a statute of limitations problem, the question as to whether the claim is barred will generally be treated as a matter of procedure to be governed by the statute of the forum. GOODRICH, *CONFLICT OF LAWS* § 85 (1949). (The undesirability of this rule from the Conflict of Laws point of view will not be discussed here.) Thus, if under the law of state B the action is barred, recovery will be denied, even though recovery could be had under the statute of limitations of state A, the forum where the action *should* have been tried. Such a result as this should not depend upon whether the party being sued is already engaged in litigation.

37. If the action grew out of a tort, and state B followed the rule that the *lex loci delicti* governs, state B would then attempt to apply the law of state A. GOODRICH, *op. cit. supra* note 36, at § 92. The doubtful results achieved in many conflict of laws cases seems to be a very strong reason for trying the action where it arose.

as a detriment to all parties concerned.³⁸ On the other hand, if the cause of action arose in state B, and all the witnesses reside there, it would be entirely proper for the courts of state A to refuse to allow the third party to sue the non-resident in their courts. The real reason should not be that the non-resident is already engaged in litigation in state A, but because justice could be better served by trying the action where it arose. What has been said in respect to non-resident defendants applies with equal vigor to non-resident plaintiffs.³⁹

Those courts which refuse to apply *forum non conveniens* directly, but which desire to achieve the same results by application of the immunity rule, must be convinced that they are exercising their age-old prerogative of granting or withholding immunity and not applying what they consider to be prohibited by the constitution. Such a procedure can be rationalized in terms of immunity by using the old arguments, although largely specious as presently applied, in a new and different way not heretofore envisioned. Thus the argument that courts of justice should be open to all who approach them should be defined to mean that courts should be open when they are the appropriate forum to hear the case; but if justice would be impaired because of inconvenience to both the court and the parties concerned, then certainly jurisdiction should be declined by granting immunity to the non-resident. The argument that immunity is granted to induce the attendance of necessary witnesses, although sound, can hardly achieve its purpose. If a trial is held in a forum far removed from a witness' residence, weighty considerations other than the fear of being sued will probably be sufficient in themselves to prevent the non-resident witness from attending the proceeding. If the court actually desires to induce witnesses to come forward with whatever evidence they may have, this objective can more effectively be achieved by making certain that the trial is held where it is convenient for those witnesses. If they all reside within the state, this purpose will be frustrated by granting immunity to the non-resident party. If they all reside in the same state as the non-resident, immunity given the latter will further this purpose, by compelling the third person to go to that state to assert his cause of action. "Sound public policy" can be

38. Query: why would the non-resident seek to invoke the immunity rule if this would be the result? Any answer is speculative, but some individuals will try innumerable tactics in order to harrass their adversaries. Then again, it may be a matter of a calculated risk—if the claim is small, the third person may be unwilling to assume the increased expense of traveling to the foreign jurisdiction. If so, the non-resident will escape all liability.

39. When a non-resident approaches a court asking the enforcement of a right, it would seem to be an affront to that court's dignity to say it has no jurisdiction to enforce a liability against him. Once he invokes the jurisdiction of a court in order to sue, it is illogical to hold that he may not be sued within the same jurisdiction. Keffe and Roscia, *supra* note 16, at 477. That there is some merit to this position is evidenced by the well-reasoned cases which hold that a non-resident plaintiff is amenable to process. Bishop v. Bose, 27 Conn. 1 (1858); Cassem v. Galvin, 158 Ill. 30, 41 N.E. 1087 (1895); Mertens v. McMahon, 334 Mo. 175, 66 S.W.2d 127 (1933); Livengood v. Ball, 63 Okla. 93, 162 Pac. 768 (1917); Ellis v. DeGarmo, 17 R.I. 715, 24 Atl. 579 (1892).

argued in favor of trying the case at the most suitable location for all parties concerned.

Thus, the old epithets advanced in support of the immunity of non-residents acquire a new meaning when trial convenience is made the basis of the privilege. Such a modification of the historical approach to the problem seems justified.⁴⁰ In some cases the non-resident should be immune from service of process—in others he should not. Efficient judicial administration demands that immunity be extended or withheld according to the particular facts of each case. The cardinal consideration should be the convenience of the participants.⁴¹

TORT LIABILITY OF PARENT TO MINOR CHILD

In *Mahnke v. Moore*, 77 A.2d 923 (Md. 1951), a four year old child was allowed to recover damages from her father's estate for the infliction by the parent of a willful and malicious injury.¹ Although this result may not be inconsistent with either justice or the early common law,² it directly conflicts

40. That an indiscriminate application of immunity is capable of producing absurd results is made evident by *Petrova v. Roberts*, 216 App. Div. 814, 216 N.Y. Supp. 897 (2d Dep't. 1926). There it was held that the non-resident was immune from process in an independent action instituted by the defendant where the Civil Practice Act in effect at the time forbade a counterclaim of this nature. Had the counterclaim not been prohibited by statute, the defendant would have been given an opportunity to have his claim against the non-resident plaintiff adjudicated. It would seem inconsistent to say judicial administration will be disrupted by a non-resident's subjection to suits based on an independent cause of action but not by subjection to suits on facts more closely related and ordinarily ascertainable as a counterclaim.

41. As a criterion for guiding the courts in determining whether immunity should be granted, the language of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), is pertinent: "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial. . . . Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."

1. The father murdered the mother and then committed suicide, all in the presence of the child.

2. "The ancient common law did not, it appears, expressly deny to a child a right of action against a parent for personal injury. . . ." *Villaret v. Villaret*, 169 F.2d 677 (D.C. Cir. 1948). "There has never been a common law rule that a child could not sue its parent." *Dunlap v. Dunlap*, 84 N.H. 352, 354, 150 Atl. 905, 906 (1930). *Briggs v. City of Philadelphia*, 112 Pa. Super. 50, 170 Atl. 871 (1934), discusses the same point; and at 43 HARV. L. REV. 1082 (1930), it is said: ". . . the few clear decisions we have go back no further than 1891."