IMMUNITY FROM SERVICE OF PROCESS IN CIVIL AND CRIMINAL CASES

INTRODUCTION

The question of immunity from service of process has been a recurrent problem in the United States, although its antecedents in English case law are relatively few.[1] In the United States, where a citizen of one state is a non-resident of every other state, practical considerations have stressed the importance of determining whether a non-resident engaged in a civil suit or other judicial proceeding can be served with process by a third party. A considerable body of American case law has developed on this question. Unfortunately, the cases have been conflicting and have presented no reliable guide to litigants. There are minority rules and majority rules and sufficient dicta to provide several intermediate ones.[2]

The claimed right to such immunity is based upon a long-existing rule, both in England and this country, that both witnesses and parties in civil cases were privileged from service of civil process while going to the trial, attending, and returning without unreasonable delay.[3] References to these immunity rules are found in the Year Books of England as early as the reign of Henry VI.[4] The basis of the privilege seems to have been primarily the prevention of delay or interruption of the case on trial.

The scope of this note will encompass only cases where non-residents are served with process. Service of process upon a resident of the county will not be considered, for no problem is presented by this situation. Nowhere has it ever been held or even intimated that the immunity exists in favor of a defendant in a civil action who is served with process in the county of his residence, in the absence of statute to that effect. The only case directly in point denies that immunity to residents of the county.[5]

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1. ALDERSON, JUDICIAL WRITS AND PROCESS §§ 116, 118 (1895); 33 HARV. L. REV. 721, 722 (1920).
2. Netograph Mfg. Co. v. Scrugham, 197 N.Y. 377, 90 N.E. 962 (1910).
3. Spence v. Bart, 3 East. 89 (K.B. 1802); Walpole v. Alexander, 3 Doug. (K.B. 1782).
4. Sofge v. Lowe, 131 Tenn. 626, 176 S.W. 106 (1915).
5. The case of Fisher v. Bouchelle, Judge, 61 S.E.2d 305 (W. Va., 1950) holds there is no immunity in such situation.

In reaching a determination as to whether the immunity should be applied, the courts consider various circumstances which are peculiar to certain factual situations. These factors, either individually or collectively, often prove to be the dominating influence in a court's decision. Among the factors to be considered in both civil and criminal cases are whether the non-resident is a witness or a party, plaintiff or defendant, and whether he is a resident of the state, but non-resident of the county.

For convenience of analytical discussion this subject has been divided into the following categories:

I. Civil suits
   A. Service of process upon a non-resident plaintiff.
   B. Service of process upon a non-resident defendant.
   C. Service of process upon a non-resident witness.
   D. Service of process upon a resident of the state, but a non-resident of the county.

II. Criminal cases
   A. Service of process upon a non-resident defendant.
   B. Service of process upon a non-resident witness.

I. Civil Suits

A. The Non-resident Plaintiff in a Civil Suit.

In the case of the non-resident plaintiff in a civil action against whom another suit is attempted, there is a difference of opinion as to immunity from service of civil process. It has been generally held that a non-resident plaintiff is entitled to immunity from service of process.[6] In support of this principle, a variety of arguments have been advanced. It has long been argued that courts ought everywhere to be open and to protect everyone who approaches them. Another classical argument is that immunity is founded upon the necessities of judicial administration which might be embarrassed and interrupted if a litigant were served with process.[7] A few tribunals have argued that the doctrine of immunity is necessary to maintain the dignity of the court,[8] or that the doctrine of immunity promotes the administration

6. Stewart v. Ramsey, 242 U.S. 128 (1916); Matthews v. Tufts, 87 N.Y. 568 (1882); Partridge v. Powell, 180 Pa. 22, 36 Atl. 419 (1897).

7. Long v. Ansell, 293 U.S. 76 (1934); Parker v. Hotchkiss, 18 Fed. Cas. 1137, No. 10,739 (C.C.E.D. Pa. 1849); Halsey v. Stewart, 4 N.J.L. 366 (1817).

8. Parker v. Marco, 136 N.Y. 585, 22 N.E. 989 (1893); Finucane v. Warner, 194 N.Y. 160, 86 N.E. 1118 (1893).

of justice by encouraging the attendance of necessary persons.[9] Generally, however, the immunity doctrine is said to be based upon sound public policy.[10]

Nevertheless, a few states refuse to recognize any privilege in favor of non-resident plaintiffs, on the ground that he enters the state voluntarily to invoke the aid of its courts for his own benefit.[11] These courts do not seem to consider that the basis of the privilege in favor of non-resident plaintiffs is mainly a notion of fairness, that non-residents should be able to enforce their own claims without being subjected to the danger and hazards of new litigation in a foreign jurisdiction. It is true that the non-resident comes into the state voluntarily, but only because his personal presence as a witness or otherwise is necessary to the proper prosecution of his suit. Therefore, it seems only just to allow the immunity in this situation in order to give non-residents a fair opportunity to prosecute their claims in foreign jurisdictions.

Even in these jurisdictions, however, the immunity from service of civil process is still recognized in favor of a non-resident defendant,[12] as will be shown below.

B. The Non-resident Defendant in a Civil Suit.

Only in an extremely small number of cases have the courts considered it necessary to make a distinction between non-resident plaintiffs and non-resident defendants for the purpose of immunity.[13] Accordingly, nearly all are in accord that a non-

9. Page Co. v. MacDonald, 261 U.S. 446 (1923); Stratton v. Hughes, 211 Fed. 557 (D.C. N.J. 1914); Martin v. Bacon, 76 Ark. 158, 88 S.W. 863 (1905); Chittenden v. Carter, 82 Conn. 585, 74 Atl. 884 (1909); Sherman v. Sundlach, 37 Minn. 118, 33 N.W. 549 (1887).

10. Rizo v. Burruel, 23 Ariz. 137, 202 Pac. 234 (1921); Wilson v. Donaldson, 117 Ind. 356, 20 N.E. 250 (1888); Powell v. Pangborn, 161 App. Div. 453, 145 N.Y. Supp. 1073 (2d Dept. 1914).

11. Bishop v. Vose, 27 Conn. 1 (1858); Guyen v. McDonald, 4 Idaho 605, 43 Pac. 74 (1895); Bailey v. Bailey, 113 Mo. 544, 21 S.W. 29 (1893); Tiedemann v. Tiedemann, 35 Nev. 259, 129 Pac. 313 (1912).

12. Baldwin v. Emerson, 16 R.I. 304, 15 Atl. 83 (1888); Camerson v. Roberts, 87 Wis. 291, 58 N.W. 376 (1894).

13. The distinction has been made in Connecticut. Wilson Sewing Machine Co. v. Wilson, 22 Fed. 803 (C.C.D. Conn. 1885) distinguished the defendant from the plaintiff and held that the defendant was privileged. These cases have considered and rejected the distinction: Hale v. Wharton, 73 Fed. 739 (C.C. W.D. Mo. 1896); Fish v. Westover, 4 S.D. 233, 55 N.W. 961 (1893).

resident defendant is privileged from service of civil process.[14] The arguments are precisely those that have been considered in connection with plaintiffs. However, there are certain considerations, which, even more strongly than in the case of the plaintiff, urge the granting of the privilege to non-resident defendants. The non-resident defendant who has been sued and properly served in a case returns to defend it voluntarily, since he is under no legal compulsion—perhaps an economic or moral compulsion. He does not invoke the jurisdiction of the court; it is invoked against him. If there were a possibility of other, more burdensome judgments being rendered against him, the non-resident may find it against his best interests to return. Thus, he may refrain from appearing at all if he fears other actions against him. Moreover, if neither personal nor constructive service is available against the non-resident, and he enters the jurisdiction voluntarily in order to submit to suit, there would seem to be an even stronger ground for granting the privilege.

C. The Non-resident Witness in a Civil Suit.

In the United States, the courts generally agree that a non-resident witness is privileged from service of summons as well as from arrest on civil process while attending judicial proceeding in which his testimony is needed.[15] The policy of the rule is obvious. Litigants frequently need the testimony of non-resident witnesses, who may not come if by so doing they will be subjected to the disadvantages and burdens of litigation in a foreign jurisdiction. Thus, in dealing with non-resident witnesses, the encouragement of voluntary attendance is the primary consideration in granting immunity.

D. The Resident of the State, But Non-resident of the County in a Civil Suit

On the question of the immunity of parties or witnesses from service of process or summons within the same state, but in counties other than their residence, the decisions are not entirely

14. Page Co. v. MacDonald, 261 U.S. 446 (1923); Matthews v. Tufts, 87 N.Y. 568 (1882); Halsey v. Stewart, 4 N.J.L. 366 (1817).

15. Dwelle v. Allen, 193 Fed. 546 (S.D. N.Y. 1912); Person v. Grier, 66 N.Y. 124 (1876).

harmonious, but most courts recognize the privilege.[16] According to these cases, it is clear that a non-resident (witness or party) of the county, in which he is required to appear in court, may not be served with process in a civil action in that county while in attendance on that court and for such reasonable time afterward as will allow him to return to the county where he resides. This principle is supported by the same reasons as apply to the non-resident of the state.

II. Criminal Cases

A. The Non-resident Defendant in a Criminal Case.

In regard to the doctrine of immunity, nowhere is there more confusion than in cases concerning non-resident defendants in criminal actions. It is perhaps a safe general rule in this field that persons whose presence is required but not able to be compelled should be privileged upon voluntary attendance. Sound public policy requires such an immunity. The difficulty arises as to how this rule may be expanded.

Immunity of non-resident defendants may arise in one of four possible situations:[17]

1. Where the defendant has been arrested in the state where the alleged offense was committed and was served with civil process either while in custody or immediately after his discharge before he could depart.

In such cases the privilege is generally denied,[18] contrary to the fears of some courts that the accused will be distracted and justice obstructed.[19]

2. Where the defendant has been extradited and is served with civil process while in custody or immediately after discharge.

In this situation, a few courts allow the immunity to prevent the fraudulent use of extradition to obtain civil jurisdiction.[20] However, since the fraudulent use of extradition is everywhere

16. Whited v. Phillips, 98 W. Va. 204, 126 S.E. 916 (1925); Long *et al* v. Shaw, Judge, 113 W. Va. 628, 169 S.E. 444 (1933); Morris v. Calhoun, Judge, 119 W. Va. 603, 195 S.E. 343 (1938).

17. 20 Ill. L. Rev. 172 (1925).

18. Nettograph Manufacturing Co. v. Scrugham, 197 N.Y. 377, 90 N.E. 962 (1910); Husby v. Emmons, 148 Wash. 333, 268 Pac. 886 (1928).

19. Silvey's Estate v. Koppel, 107 S.C. 106, 91 S.E. 975 (1917).

20. Willard v. Zehr, 215 Ill. 148, 74 N.E. 107 (1905); Byler v. Jones, 79 Mo. 261 (1883).

recognized as a ground for vacating process, the majority of courts deny the immunity in these cases, recognizing that there is this adequate safeguard against fraud.[21]

3. Where the non-resident defendant voluntarily returns to give bail or stand trial on a criminal charge, and he is served with civil process.

If the defendant did not return, extradition proceedings would be available against him. Nevertheless, if the non-resident defendant returns before extradition, the majority of courts grant an immunity from civil process.[22] It seems clear that in such a situation the defendant ought to have the same privilege as a defendant in a civil case, to whom the immunity is granted. Sound public policy favors the encouragement of voluntary returns so as to save the state the expense and trouble of extradition.

4. Where a non-resident defendant has given bail and returns to stand trial.

Here sound policy is in favor of the immunity since the defendant at large on bail is in fact free to return or not as he may see fit.[23] It must be noted that the criminal case cannot proceed in his absence. Actually, he is susceptible to extradition or to being surrendered up by his bondsmen when he forfeits the bond. However, it may be expeditious to forfeit the bond and to take a chance on extradition rather than to face serious and expensive civil litigation in a foreign jurisdiction. It seems proper, therefore, to allow this privilege that the defendant might be encouraged to return to meet the criminal charge. Thus, the expense and delay of extradition might be avoided.

From the aforementioned cases it may be seen that the determination of the immunity doctrine in criminal cases depends largely upon the view taken by any given court upon the extent and value of the analogy to rules prevailing in civil procedure.[24]

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21. Compton v. Wilder, 40 Ohio St. 130 (1883); Moletor v. Sinnen, 76 Wis. 308, 44 N.W. 1099 (1890).

22. Benesch v. Fosi, 31 F.2d 118 (E.D. Mass. 1929); Church v. Church, 270 Fed. 361 (App. D.C. 1921); Michaelson v. Goldfarb, 94 N.J.L. 352, 110 Atl. 710 (1920).

23. Martin v. Bacon, 76 Ark. 158, 88 S.W. 863 (1905); Murray v. Wilcox, 122 Iowa 188, 97 N.W. 108 (1904).

24. Ryan v. Ebecke, 102 Conn. 12, 128 Atl. 14 (1925).

B. The Non-resident Witness in a Criminal Case.

The rule of immunity for non-resident witnesses who appear voluntarily in a criminal proceeding is the same as for civil cases. No cases which grant immunity to non-resident witnesses make any distinction between civil and criminal actions where witnesses appear voluntarily.[25] It seems that the great necessity for obtaining fleeing witnesses in criminal cases makes desirable the granting of any inducement to insure their attendance. Moreover, statutes have been generally adopted granting the immunity even to subpoenaed non-resident witnesses.[26]

CONCLUSION

The proper application of the rules of immunity to service of process affords protection to the non-resident in that he is permitted to avoid service of process in a particular jurisdiction if he leaves within a reasonable time after he has ceased his attendance at court. Among the various factors considered by courts that influence their decision as to the proper application of the immunity doctrine are whether process is served upon a non-resident of the state or merely the county, whether such non-resident is a party plaintiff, defendant, or only a witness, and whether the litigation for which he appears is civil or criminal.

It is true that many courts have often been preoccupied with concepts of immunity that are anachronistic and sentimental; however, the majority of the courts today generally use the rules of immunity to enable them to arrive at more rational and liberal solutions. These tribunals realize that these immunity rules are based almost entirely upon public policy and a notion of fairness to non-residents; thus, they govern their decisions accordingly.

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25. Benesch v. Foss, 31 F.2d 118 (D.C. Mass. 1929); *In re* Hall, 296 Fed. 780 (S.D. N.Y. 1924).

26. Most states have adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings which provides exemption for a subpoenaed witness as to matters that arose before he was subpoenaed. 9 UNIFORM LAWS ANNOTATED § 4 (1942).