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Civil Procedure - Process - Immunity from Service of Nonresident Entering State to Discuss Settlement of a Dispute

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CIVIL PROCEDURE—PROCESS—IMMUNITY FROM SERVICE OF NONRESIDENT ENTERING STATE TO DISCUSS SETTLEMENT OF A DISPUTE—Defendant, a resident of Idaho, leased a service station in Idaho from plaintiff, a Utah corporation. Plaintiff's attorney travelled to Idaho to attempt settlement of difficulties which had arisen concerning the lease. When the Idaho negotiations failed, plaintiff invited defendant to make further attempts at settlement in Utah. Defendant accepted the proposal and, when the Utah negotiations proved unfruitful, defendant was served with process in Utah at plaintiff's request.[1] It was undisputed that defendant went to Utah solely to effect settlement, returning directly to Idaho after cessation of negotiations. On appeal from the trial court's denial of defendant's motion to quash service, *held,* reversed, one judge dissenting. Actual fraudulent intent in inducing a defendant to enter a state is not necessary to invalidate service of process on such defendant. When defendant was invited into the state to discuss settlement of a dispute and came for that sole purpose, he was not subject to service of civil process in the absence of notice by the party extending the invitation that he would be served with process if the attempted settlement failed. *Western States Refining Co. v. Berry,* (Utah 1957) 313 P. (2d) 480.

It is a well-established rule in American courts that nonresident witnesses who enter a state to testify at the trial of an action are immune from service of civil process while attending court and for a reasonable time before and after court attendance, while going to and returning from the place of trial.[2] The immunity has been granted almost uniformly to

[1] Although not mentioned in the opinion, it is probable that service was issued incident to the same dispute which had given rise to the settlement negotiations.

[2] Chittenden v. Carter, 82 Conn. 585, 74 A. 884 (1909).

nonresident suitors as well.[3] Although other arguments are given in support of the privilege,[4] the traditional explanation rests on the public policy that the proper administration of justice requires that the cause be presented without interference[5] and that the voluntary attendance of nonresident parties and witnesses be encouraged by granting them the immunity.[6] It is frequently repeated that the privilege, established to aid courts in the administration of justice and of benefit only incidentally to individuals, is to be extended or withheld only as judicial necessities require;[7] and being in derogation of every creditor's right to subject the debtor to suit wherever he is found, it should not be extended beyond the reason on which it is founded.[8] Despite a persuasive contrary current of opinion, many courts have included nonresident attorneys within the immunity.[9] The privilege has been further enlarged to embrace nonresidents attending any judicial proceeding, whether in or out of court, involving the examination of issues of fact.[10] Thus, the privilege has been granted to a nonresident party attending the taking of depositions,[11] a hearing before a commissioner in bankruptcy,[12] and a pretrial examination.[13] Application of the immunity to these proceedings may be justified in that it encourages the full rendition of the evidence by persons who in any event will be immune when the trial begins. However, in proceedings not involving issues of fact peculiarly within the parties' knowledge, where their presence cannot be considered necessary to the administration of justice, persons have been granted immunity on the theory that the privilege has become a substantive one of the individual, as well as one for the protection of the administration of justice.[14] Thus, nonresident

[3] Diamond v. Earle, 217 Mass. 499, 105 N.E. 363 (1914); Stewart v. Ramsay, 242 U.S. 128, 37 S. Ct. 44 (1916). Two jurisdictions do not grant the privilege to parties, even though they are also witnesses. Baldwin v. Emerson, 16 R.I. 304, 15 A. 83 (1888); Guynn v. McDaneld, 4 Idaho 606, 43 P. 74 (1895). In Connecticut defendants are immune but plaintiffs are not. Bishop v. Vose, 27 Conn. 1 (1858); Ryan v. Ebecke, 102 Conn. 12, 128 A. 14 (1925).

[4] Finucane v. Warner, 194 N.Y. 160, 86 N.E. 1118 (1909) (necessary to maintain the dignity of the court); Stewart v. Ramsay, note 3 supra (courts of justice ought to be open).

[5] Lamb v. Schmitt, 285 U.S. 222, 52 S. Ct. 317 (1932).

[6] Matthews v. Tufts, 87 N.Y. 568 (1882); Page Co. v. MacDonald, 261 U.S. 446, 43 S. Ct. 416 (1923). Keeffe and Roscia, "Immunity and Sentimentality," 32 CORN L. Q. 471 (1947).

[7] Brooks v. State ex rel. Richards, 26 Del. (3 Boyce) 1, 79 A. 790 (1911); Long v. Ansell, 293 U.S. 76 (1934).

[8] Hardie v. Bryson, (E.D. Mo. 1942) 44 F. Supp. 67.

[9] Williams v. Hatcher, 95 S.C. 49, 78 S.E. 615 (1913); Durst v. Tautges, Wilder & McDonald, (7th Cir. 1930) 44 F. (2d) 507. *Contra,* State ex rel. Johnson v. Tautges, Rerat & Welch, 146 Neb. 439, 20 N.W. (2d) 232 (1945).

[10] Durst v. Tautges, note 9 supra.

[11] Roschynialski v. Hale, (D.C. Neb. 1913) 201 F. 1017.

[12] Matthews v. Tufts, note 6 supra.

[13] New England Industries, Inc. v. Margiotti, 296 N.Y. 722, 70 N.E. (2d) 540 (1946).

[14] Murrey v. Murrey, 216 Cal. 707, 16 P. (2d) 741 (1932).

parties present to attend argument on demurrer[15] and to attend proceedings before an appellate court[16] have been held immune. There is authority that the rule may even be extended to apply to a nonresident entering a state to commence an action.[17] While even these decisions seem to extend the privilege beyond the reason on which it was founded, to hold, as in the principal case, that immunity embraces persons entering a state to settle matters which *might* become the subject of litigation lacks reason or authority.[18] In situations similar to that in the principal case the question of immunity shades off into whether service should be set aside as having been fraudulently procured by enticement of the nonresident into the state for the purpose of service of process.[19] It is frequently difficult to determine from the decisions whether immunity is being granted or fraudulently procured service of process set aside.[20] The court in the principal case, while citing a decision in which immunity was granted on the basis of the policy of encouraging settlement of disputes,[21] uses language[22] and cites other cases which suggest it is thinking in terms of fraud. The suggestion that the party extending the invitation has a duty to warn the nonresident that process will be served upon him should the negotiations fail is novel and questionable. Since no fraud was found by the trial court, the decision in the principal case stands for an unwarranted extension of the immunity rule.

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[15] Kinne v. Lant, (E.D. Mich. 1895) 68 F. 436.

[16] Chase National Bank v. Turner, 269 N.Y. 397, 199 N.E. 636 (1936).

[17] Franklin v. Superior Court, 98 Cal. App. (2d) 292, 220 P. (2d) 8 (1950) (privilege denied because controlling purpose in entering state was not to commence litigation).

[18] Vaughn v. Boyd, 142 Ga. 230, 82 S.E. 576 (1914); Lingo v. Reichenbach Land Co., 225 Iowa 112, 279 N.W. 121 (1938).

[19] Lingo v. Reichenbach Land Co., note 18 supra, at 117. See also annotation, 93 A.L.R. 872 (1934).

[20] Allen v. Wharton, 59 Hun (N.Y.) 622, 13 N.Y.S. 38 (1891); Olean Street R. Co. v. Fairmount Construction Co., 55 App. Div. 292, 67 N.Y.S. 165 (1900).

[21] State ex rel. Ellan v. District Court, 97 Mont. 160, 33 P. (2d) 526 (1934).

[22] Principal case at 481: "It is our opinion that . . . equity and good conscience will not permit plaintiff to take sharp advantage of defendant's presence. . . ."