1925

Immunity of Non-Resident Defendants in Criminal Cases from Service of Civil Process

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raised the question as to whether the extension of the common law rule so as to allow a plaintiff to demand a bill of particulars before replication filed, and which extension was incorporated in sec. 102, Pr. Act, 1903, was repealed by sec. 34 of the Pr. Act, 1912. The Supreme Court held that Rule 18, appended to the statute of 1912, expressly reserved the practice as it had existed before the repeal, even though the Act of 1903 was in fact repealed.

In conclusion, it may be said:

1. That, with the exception of the extension of the common law as contained in the Revision of 1877,[13] all the statutory enactments have been declaratory of the common law.

2. That the net result of the Supreme Court rules and various provisions of the practice acts, which rules and provisions were designed to *clarify* the law, has been to present numerous problems of statutory construction, where the common law otherwise was clear and definite.

3. That the situation in New Jersey could be clarified by a repeal of Rule 18, Pr. Act, 1912, known as Supreme Court Rule 32, and the re-enactment of the extension contained in the Revision of 1877. This would leave the use of the bill of particulars to be determined according to the rules of the common law, subject to the single, simple modification in favor of a plaintiff who demands a bill before filing his replication.

4. That to all intents and purposes Supreme Court Rule 32, providing that "Bills of particulars may be ordered as heretofore," means that they may be ordered as at common law, subject to the single exception noted above, and hence it follows that the court properly granted the motion to vacate the order allowing the defendant a more specific bill of particulars. It should be noted at this point that the legislation concerning bills of particulars, herein discussed, referred only to cases on contracts. But as bills of particulars in tort cases were allowed at common law, it is submitted that under a proper construction of the phrase "as heretofore" contained in Supreme Court Rule 32, they may be granted on proper application.[14]

ALISON REPPY.

PROCESS—IMMUNITY OF NON-RESIDENT DEFENDANTS IN CRIMINAL CASES FROM SERVICE OF CIVIL PROCESS.—[Connecticut] A resident of New Jersey, arrested in Connecticut on a misdemeanor charge, gave bail for his appearance, and went back to his home state. He returned to Connecticut to attend his trial, and, while the

13. Ibid.

14. See *Watkins* v. *Cope* 84 N. J. L. 143, at 147, where the court declared: "It is true that Sec. 102 of the Practice act of 1903 provides only for a demand of particulars in contract cases; but I do not understand that this in any way abrogated the common law practice of directing a bill of particulars to be furnished by either party in a proper case, whether of contract or of tort. Sec. 102 was repealed by the act of 1912, but rule 18 appended to the latter act says that 'bills of particulars may be ordered as heretofore.' The rule at common law was well settled that in a proper case particulars would be ordered in all classes of legal actions."

same was in progress, was served with a summons in a civil action.

His plea in abatement, in the latter case, setting up the foregoing facts, was sustained by the trial court, and the action dismissed. On appeal, the Supreme Court of Errors reversed the judgment abating the action on the ground that a defendant in a *criminal* case under these conditions had no immunity from service of civil process.[1]

Few questions have produced so much conflict of opinion as the immunity of non-residents from service of civil process while attending judicial proceedings in various capacities.

The English cases are quite clear on the point that both witnesses and parties in civil cases were privileged from arrest on civil process while going to the trial, attending and returning without unreasonable delay.[2] The basis of the privilege seems to have been primarily to prevent the delay or interruption of the case on trial.

In a case where a non-resident witness had come from France and had been arrested on civil process while awaiting the trial, his discharge was ordered without filing common bail.[3]

"Although a party may have the benefit of the evidence of a witness who has been arrested, by means of a habeas corpus ad testificandum, yet, in order to encourage witnesses to come forward voluntarily, they are privileged from arrest."[4]

The service of a summons on either a witness or a party to a civil case while attending the trial might be a contempt of court,[5] but that fact apparently did not furnish a resident witness or party any ground for vacating the service.[6] A defendant in a criminal case, who had been arrested on criminal process and detained in custody, had no privilege from arrest on civil process immediately after acquittal and before he could leave the place of trial, even where the service amounted to a contempt.[7]

But a defendant in a criminal case who had given bail was privileged from arrest on civil process while returning immediately after a continuance of the case.[8]

1. *Ryan* v. *Ebecke* (Conn. 1925) 128 Atl. 14.
2. *Walpole* v. *Alexander* (1782) 3 Doug. 45; *Spence* v. *Bart* (1802) 3 East 89.
3. The discharge without common bail apparently operated as a complete discharge from appearance: Per curium in *Sanford* v. *Chase* (1824) 3 Cowen 381: "The only question is, whether the defendant is to be discharged on filing common bail, or absolutely from the suit. In *Norris* v. *Beach* (2 John. Rep. 294) this court discharged the defendant from the arrest, entirely and absolutely. In a subsequent case (*Bours* v. *Tuckerman* 6 John. 538), he was discharged on filing common bail. We adopt the first case. The privilege of a witness should be absolute. An arrest should not be valid even for the purpose of giving jurisdiction to the court out of which the process issues; more especially where the witness is attending from a foreign state."
4. *Walpole* v. *Alexander* supra.
5. *Cole* v. *Hawkins* (1729) 2 Strange 1094.
6. *Poole* v. *Gould* (1856) 1 H. & N. 99.
7. *Goodwin* v. *Lordon* (1834) 1 Ad. & E. 376; *Hare* v. *Hyde* (1851) 16 Q. B. (N. S.) 394.
8. *Gilpin* v. *Cohen* (1869) L. R. 4 Exch. Cas. 131.

The English courts do not appear to have made any distinction between resident parties and witnesses in civil cases. Both had the same privilege from arrest on civil process, and neither seem to have been privileged from summons. The defendant in a criminal case who had given bail seems to have had the same privilege as a party to a civil case. The non-resident witness was more favored, though whether his privilege extended to mere summons is left in doubt.

In the United States the courts generally agree that a non-resident witness is privileged from service of summons[9] as well as from arrest on civil process while attending judicial proceedings in which his testimony is needed. The policy of the rule is clear. Litigants frequently need the testimony of non-resident witnesses who will not come, if by so doing they may be subjected to the disadvantages and burdens of litigation in another state.

In the case of non-resident parties to civil cases there is more difference of opinion.

A few states refuse to recognize any privilege in favor of non-resident plaintiffs,[10] on the ground that a non-resident plaintiff comes into the state voluntarily to invoke the aid of its courts for his own benefit, and therefore is in no position to object when the power of such courts is invoked against him by a resident plaintiff. This view is more plausible than sound where a privilege is recognized in favor of a non-resident defendant.

The non-resident defendant, who has been sued and properly served in a case where there is no privilege returns to defend it voluntarily, in the sense that he is under no legal compulsion. There is no process by which he can be brought back. He returns because the protection of his interests requires his personal attendance at the trial.

The non-resident plaintiff comes into the state for a similar reason. He must sue his debtor where he can find him, and his personal presence as a witness or otherwise is necessary to the proper prosecution of his suit.

Accordingly, it is held by a majority of the courts, that a non-resident plaintiff[11] is entitled to the same protection as the non-resident defendant. Nearly all of the courts are in accord that a non-resident defendant is privileged from service of civil process.[12]

9. *Person* v. *Grier* (1876) 66 N. Y. 124; *Chittenden* v. *Carter* (1909) 82 Conn. 585; *Kaufman* v. *Kennedy* (1885) 25 Fed. 786; *Dwelle* v. *Allen* (1912) 193 Fed. 546; *Sherman* v. *Gundlach* (1887) 37 Minn. 118; *Bunce* v. *Humphrey* (1915) 214 N. Y. 21; *Bolgiano* v. *Gilbert* (1890) 73 Md. 132.

10. *Bishop* v. *Vose* (1858) 27 Conn. 1; *Baldwin* v. *Emerson* (1888) 16 R. I. 304; *Baisley* v. *Baisley* (1892) 113 Mo. 544.

11. In re *Healey* (1881) 53 Vt. 694; *Matthews* v. *Tufts* (1882) 87 N. Y. 568; *Diamond* v. *Earle* (1914) 217 Mass. 499; *Stewart* v. *Ramsay* (1916) 242 U. S. 128; *Page Co.* v. *Macdonald* (1923) 261 U. S. 446.

12. *Halsey* v. *Stewart* (1817) 4 N. J. L. 426; *Wilson Machine Co.* v. *Wilson* (1884) 61 Conn. 595; *Palmer* v. *Rowan* (1887) 21 Neb. 462; *First Nat'l. Bank* v. *Ames* (1888) 39 Minn. 179; *Long* v. *Hawken* (1911) 114 Md. 234, 42 L. R. A. (N. S.) 1101, annotated, in which a number of the cases are collected.

The basis of the privilege in favor of both plaintiffs and defendants is mainly a notion of fairness, that non-residents should be able to enforce their own claims or defend those made against them without being subjected to the danger and hazards of fresh litigation in a foreign jurisdiction.

The privilege of parties to civil cases, while not necessarily decisive on the question of the privilege of a non-resident defendant in a criminal case, may throw some light on its proper solution.

Claims of privilege in favor of non-resident defendants in criminal cases fall into four groups.

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

In such cases the privilege is generally denied.[13]

The reasons for the contrary view[14] are sentimental rather than substantial. The ground assigned is the hardship on the defendant to be distracted with civil matters when he is occupied with his defense to a criminal charge.

2. Where the defendant has been brought back by extradition proceedings, and is served with civil process while in custody or immediately after his discharge.

In this situation a few courts allow the claim of privilege from service of civil process.[15] The basis of these rulings is not so much to favor the defendant as to prevent the abuse of extradition, and to prevent refusals to honor a demand for extradition because of the possibility of its fraudulent use to obtain civil jurisdiction. As the abuse of criminal process to bring the party within reach of civil process is everywhere recognized as a ground for setting aside the service thus obtained,[16] it would seem that there is an adequate safeguard against fraudulent extradition.

Accordingly, a majority of the courts deny any privilege to the defendant in custody under extradition proceedings.[17]

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

Here it seems clear that the defendant ought to have the same privilege as a defendant in a civil case. It is true that if he did not return he might be extradited. But sound policy would seem to

13. *Nettograph Mfg. Co.* v. *Scrugham* (1910) 197 N. Y. 377.

14. *Feister* v. *Hulic* (1916) 228 Fed. 821; *Silvey* v. *Koppell* (1917) 107 S. C. 106.

15. *Campton* v. *Weilder* (1883) 40 Ohio St. 130; *Moletor* v. *Sinnen* (1890) 76 Wis. 308; *Weale* v. *The Judge* (1909) 158 Mich. 563. In these cases the defendant was arrested on civil process immediately after discharge. The reason of the rule would seem to apply equally to service of a summons.

16. *Byle* v. *Jones* (1883) 79 Mo. 261; *Willard* v. *Zehr* (1905) 215 Ill. 148; *Smith* v. *Canal Zone* (1917) 249 Fed. 273.

17. *Williams* v. *Bacon* (1834) 10 Wendel 636; *Reid* v. *Ham* (1893) 54 Minn. 305; In re *Walker* (1901) 61 Neb. 803; *Willard* v. *Zehr* (1905) 215 Ill. 148; *Rutledge* v. *Draus* (1906) 73 N. J. L. 397.

favor the encouragement of voluntary returns so as to avoid the delay and expense of extradition.

"If the appellant had appeared voluntarily in a civil action, it is conceded that he would be entitled to the privilege. We are unable to perceive any reason for according the immunity to a civil litigant while denying it to one who comes to defend himself against a charge of crime. Unless he was before the court the criminal action could not proceed. By coming voluntarily the defendant removes an obstacle to the administration of justice, and saves the expense and trouble of extradition. Is it not in the interest of a sound public policy that this should be encouraged?"[18]

4. Where, as in the principal case, a non-resident defendant has given bail and returns to stand trial.

Here sound policy is in favor of the privilege.[19]

The defendant at large on bail is in fact free to return or not as he may see fit.

If he does not return the criminal case cannot proceed in his absence. He will, of course, forfeit his bond, and his bondsmen may surrender him, or the state might extradite him. But it is readily conceivable that a defendant who has given a small bail bond to answer a misdemeanor charge might prefer to forfeit the bond and take the chance of possible extradition, rather than subject himself to serious and expensive civil litigation away from his home state.

The main difference between his position and that of a defendant in a civil case is the possibility of extradition. His position is radically different from the defendant in actual custody who has no choice but to remain. In allowing privilege from arrest on civil process to a defendant who had given bail for his appearance in a criminal case, Baron Cleasby pointed out the practical difference between a defendant in custody and a defendant on bail:

"Now, there is an obvious distinction between the case of a person apprehended under a charge of felony, and tried, and then discharged, and the case of one who, being under recognizances to be tried, goes up to take his trial in pursuance of those recognizances, and where, therefore, it is a matter of his own will and action whether he will go or not."[20]

The same distinction was pointed out in *Michaelson* v. *Goldfarb*, supra, as the reason for allowing the privilege, to encourage the defendant to return to meet the criminal charge and thus avoid the expense and delay of extradition. If fairness to a defendant in a civil case calls for a privilege, why should a non-resident in a criminal case be put in a worse position merely because the state may be able at some *future* time to enforce his presence?

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18. *Church* v. *Church* (1921) 270 Fed. 361.

19. *Martin* v. *Bacon* (1905) 76 Ark. 158; *Murray* v. *Wilcox* (1904) 122 Ia. 188; *Kaufman* v. *Garner* (1909) 173 Fed. 550; *Michaelson* v. *Goldfarb* (1920) 94 N. J. L. 352; *Prescott* v. *Prescott* (N. J. Ch. 1923) 122 Atl. 611.

20. *Gilpin* v. *Cohen* (1860) L. R. 4 Exch. 131.

The contrary view in the principal case seems to be based on a recent case[21] in New York, in which the matter is disposed of on the following reasoning:

A non-resident defendant *in custody* under criminal process has no privilege because not within the reason of the rule allowing privilege to parties in civil cases. A defendant admitted to bail in a criminal case is in *constructive custody*. Hence such a defendant is not entitled to privilege. This extremely technical reasoning makes fictions take the place of facts, and loses sight of the policy on which the privilege is based in other cases.

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21. *Nettograph Mfg. Co.* v. *Scrugham* (1910) 197 N. Y. 377. To the same affect, Ex parte *Henderson* (1914) 27 N. D. 155.