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Immunity from Service of Nonresident Criminal Defendants

IMMUNITY FROM SERVICE OF NONRESIDENT CRIMINAL DEFENDANTS

Protection[1] from all forms of process is generally accorded non-resident civil litigants[2] while going to, attending, and returning from court.[3] There is considerable dispute,[4] however, as to whether this protection extends to nonresidents required to appear in criminal cases.[5]

The recent case of *Greene v. Weatherington*[6] presented this question of whether a nonresident defendant is immune from service of process when appearing pursuant to the conditions of a bond, to answer criminal charges against him.[7] Weatherington, a resident of

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[1]The protection is of ancient origin, and can be traced to the yearbooks of Henry IV. Viner, Abridgment, tit., Privilege, B, Pl. 1, 16.

[2]Generally, protection is also extended to judges, attorneys and witnesses:

(a) Judges: Lyell v. Goodwin, 15 Fed. Cas. 1126 (No. 8616) (C.C. Mich. 1845); Commonwealth v. Ronald, 8 Va. (4 Call) 97 (1786).

(b) Attorneys: Durst v. Tautges, Wilder and McDonald, 44 F.2d 507 (7th Cir. 1930); Central Trust Co. v. Milwaukee St. Ry., 74 Fed. 442 (C.C.E.D. Wis. 1896); Reed v. Neff, 207 Fed. 890 (D.S.D. Iowa 1913); but see Nelson v. McNulty, 135 Minn. 317, 160 N.W. 795 (1917).

(c) Witnesses: Davis v. Hackney, 196 Va. 651, 85 S.E.2d 245 (1955); Pitman v. Cunningham, 100 N.H. 49, 118 A.2d 884 (1955); Rorick v. Chancey, 130 Fla. 442, 178 So. 112 (1937).

[3]Sofge v. Lowe, 131 Tenn. 626, 176 S.W. 106 (1915); Cowperthwait v. Lamb, 373 Pa. 204, 95 A.2d 510 (1953); Margos v. Moroudas, 184 Md. 362, 40 A.2d 816 (1945); Jett v. Jett, 155 Tenn. 467, 295 S.W. 65 (1927); Mosely v. Ricks, 223 Iowa 1038, 274 N.W. 23 (1937); Heyers v. Barlock, 281 Mich. 629, 275 N.W. 656 (1937).

[4]"Volumes of opinions have been written in which one can find all sorts of conflicting decisions and almost any dictum that one may be looking for." Netograph Mfg. Co. v .Scrugham, 197 N.Y. 377, 90 N.E. 962 (1910), per Werner, J., discussing immunity of a nonresident criminal defendant from service of civil process. Immunity was denied.

[5]See generally, Annot., 20 A.L.R.2d 163 (1951); Keefe and Roscia, Immunity and Sentimentality, 32 Cornell L.Q. 471 (1947).

[6]301 F.2d 565 (D.C. Cir. 1962). See Recent Decision, 48 Va. L. Rev. 1163 (1962), discussing case with regard to federal law on the subject of immunity of nonresident criminal defendants.

[7]This question does not seem to have been decided in Virginia. In Commonwealth v. Ronald, 8 Va. (4 Call) 97, 98 (1786), Chancellor Wythe said:

"No law is necessary to be made. The privilege [immunity from service of process] is part of the common law of England, which we have adopted, and extends not only to judges, but to attornies [sic] witnesses, and the parties themselves." However, this case did not involve service upon a criminal defendant. In Wheeler v. Flintoff, 156 Va. 923, 159 S.E. 112 (1931), the Supreme Court of Appeals of Virginia, in granting immunity from process to a witness who is also a criminal defendant, specifically refused to decide whether a nonresident appearing pursuant to a bail bond would be exempt, since the facts did not require it. No specific provision is made in the Virginia Code for nonresident criminal defendants, although immunity is granted to "suitors." Va. Code Ann. § 8-4.1 (Repl. Vol. 1957).

Maryland, was arrested within the District of Columbia for the alleged shooting of William Greene, a minor. He was charged with assault with a dangerous weapon and carrying a dangerous weapon. After posting bond he was released pending a preliminary hearing. He appeared at the hearing in accordance with the bond, and at the conclusion thereof was held for the action of the grand jury. While awaiting the processing of a further bond, he was remanded to custody, and while being detained was served with a summons in a tort action brought by Greene's parents to recover damages resulting from the shooting. Weatherington moved to quash the service on the ground he was entitled to immunity from such service. The court hearing the motion quashed the service, and Greene's parents appealed.

The United States Court of Appeals for the District of Columbia, reversing the lower court, held that Weatherington was not immune from service of process.[8] The court ruled that immunity from service should depend on whether defendant's appearance is voluntary or involuntary, immunity being denied if the appearance is involuntary.[9] Finding that Weatherington's appearance was involuntary,[10] the court held he was not entitled to immunity.

There are numerous precedents distinguishing between voluntary and involuntary appearances in determining whether a person is immune from service.[11] The voluntary-involuntary test has been em-

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[8]Federal courts follow their own views, since the question of immunity from service of process may properly be regarded as one of judicial administration and thus procedural in nature. For this reason Erie R.R. v. Tompkins, 304 U.S. 64 (1938) does not make state law controlling.

[9]The voluntary-involuntary test has been adopted by the District of Columbia Circuit as a result of three cases:

(a) Church v. Church, 270 Fed. 361 (D.C. Cir. 1921) held that a nonresident criminal defendant was immune from service of process regardless of whether his appearance was construed to be voluntary or involuntary.

(b) Dominican Republic v. Roach, 280 F.2d 59 (D.C. Cir. 1960), cert denied 364 U.S. 878 (1960), however, specifically limited the Church holding, allowing immunity to a defendant who appeared voluntarily, but refusing to express an opinion as to whether a defendant appearing involuntarily would be granted immunity.

(c) The principal case, Greene v. Weatherington, supra note 6, refuses immunity to a nonresident criminal defendant appearing involuntarily.

[10]The courts which have found it necessary to determine whether a defendant appearing pursuant to a bond does so voluntarily or involuntarily have usually held such appearance to be involuntary. Stuart v. Wayne Circuit Judge, 252 Mich. 522, 233 N.W. 402 (1930); Matthews v. Matthews, 30 Misc. 2d 681, 222 N.Y.S.2d 31 (Sup. Ct. 1961); Broaddus v. Patrick, 177 Tenn. 335, 149 S.W.2d 71 (1941). But see Michaelson v. Goldfarb, 94 N.J.L. 352, 110 Atl. 710 (1920); Lang v. Shaw, 113 W. Va. 628, 169 S.E. 444 (1933).

[11]See cases cited supra note 9. Also, United States v. Vannata, 290 Fed. 212 (E.D.N.Y. 1923); Reid v. Ham, 54 Minn. 305, 56 N.W. 35 (1893); Casino Fabrics v. Alpren, 43 N.Y.S.2d 260 (N.Y. City Ct. 1943).

ployed in New York since the leading case of *Netograph Mfg. Co. v. Scrugham*,[12] and while the question of immunity has proved a source of confusion, the voluntary-involuntary test seems to be the majority rule. Under this rule, if the appearance is construed to be voluntary, a defendant is granted immunity on the theory that the administration of justice is facilitated by his appearance. Consequently, the granting of immunity from further service of process is indulged in so as to encourage such an appearance.[13] If the appearance is compulsory, however, the above reason for granting immunity is not present. It is not necessary to encourage the defendant to appear because he may be compelled to appear.

Two pertinent criticisms can be made of the voluntary-involuntary test as a basis for determining a nonresident criminal defendant's immunity from service of civil process.

First, the test looks only to the needs of judicial administration.[14] If the court does not need to grant immunity in order to induce the defendant to appear, immunity will not be granted.[15] The effect of

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[12]197 N.Y. 377, 90 N.E. 962 (1910).

[13]This is the usual reason given for granting immunity to parties in civil cases. See cases supra, note 3. However, under the doctrine of International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), and its progeny of cases, see Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950), states are constitutionally authorized to expand the in personam jurisdiction of their courts, provided the state has sufficient "minimum contacts" with the transaction. This concept has ben expanded so as to permit the exercise of personal jurisdiction on the basis of a tortious act committed within the state. In view of this. it would be illogical to grant immunity to a nonresident defendant, civil or criminal, when the state can obtain personal jurisdiction over him, even though he does not enter the state so as to be amenable to personal service within the state. This fact is recognized in Chauvin v. Dayon, 14 App. Div. 2d 146, 217 N.Y.S.2d 795 (1961) (nonresident motor vehicle statute providing for substituted service). The commission of a tortious act satisfies the "minimum contact" requirement, as evidenced by the continued recognition of nonresident motorist statutes. Chauvin v. Dayon, supra; Hess v. Pawloski, 274 U.S. 352 (1927).

The question of immunity therefore, at least as it pertains to nonresident defendants being sued for damages arising out of acts committed within the state or jurisdiction, may become an academic one if more states follow the example of Illinois and Vermont, which have passed far-reaching service of process statutes. Ill. Ann. Stat., ch 110, § 17(1)(b) (1956); Vt. Rev. Stat., § 1562 (1947). See Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Johns v. Bay State Abrasive Prod. Co., 89 F. Supp. 654 (D. Md. 1050).

[14]It is well settled that immunity from service of process is not a right, nor even a privilege of the party. Rather, it is the privilege of the court. Parker v. Hotchkiss, 18 Fed. Cas. 1137 (No. 10739) (C.C.E.D. Pa. 1849).

[15]"It follows that the privilege should not be enlarged beyond the reason upon which is is founded, and that it should be extended or withheld only as judicial necessities require." Lamb v. Schmitt, 285 U.S. 22, 225 (1932).

service upon a defendant appearing involuntarily, who is presumed innocent, and who may in fact be innocent, is disregarded.

Second, the test is in reality not a test at all. Virtually all appearances by criminal defendants are compulsory; the defendant may be extradited upon failure to appear. There are few exceptions, as where the offense is not an extraditable one,[16] but they are rare. The test is in reality a *reason* for denying immunity, not a *criterion* for determining whether it should be granted. Criminal defendants are denied immunity *because* they appear involuntarily, rather than *if* they appear voluntarily.

A minority of courts have taken a different view of the immunity question. *Feuster v. Redshaw*[17] held that a nonresident criminal defendant was immune regardless of whether his appearance was voluntary or involuntary.[18] Other courts have granted immunity without considering whether the appearance was voluntary or involuntary,[19] basing their decisions on the broad ground of public policy.[20] The argument for granting immunity to the nonresident criminal defendant is not based on any explicit rule of law, but is the result of a feeling on the part of the courts that it is not just to coerce the appearance of a presumably innocent defendant and thereby subject him to service of process, from which, but for his response to the criminal action, he would have been immune.[21]

This view, that the nonresident criminal defendant is entitled to blanket immunity as a matter of course, seems likewise open to criticism. A basic, traditional rule of law is that a debtor may be sued

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[16]Whited v. Phillips, 98 W. Va. 204, 126 S.E. 916 (1925); Dominican Republic v. Roach, 280 F.2d 59 (D.C. Cir. 1960).

[17]157 Md. 302, 145 Atl. 560 (1929).

[18]Bramwell v. Owen, 276 F. 36 (D. Ore. 1921); Morris v. Calhoun, 119 W. Va. 603, 195 S.E. 341 (1938); Gist v. Romney, 321 Mich. 357, 32 N.W.2d 481 (1948); Cummins v. Scherer, 231 Ky. 518, 21 S.W.2d 836 (1929). See also dissenting opinion in the principal case, 301 F.2d 565 at 568.

[19]Barnes v. Moore, 217 Ark. 231, 229 S.W.2d 492 (1950); Younger v. Younger, 5 N.J. Super. 371, 69 A.2d 219 (1949); Murray v. Wilcox, 122 Iowa 188, 97 N.W. 1087 (1904); Palmer v. Rowan, 21 Neb. 452, 32 N.W. 210 (1887); Feister v. Hulick, 228 Fed. 821 (D. Pa. 1916); Caldwell v. Dodge, 179 Ark. 235, 15 S.W.2d 318 (1929).

[20]"The reason is that the exemption from the service of civil process... is a proctection granted to the party of [or] witness by the court as a matter of public policy." Barnes v. Moore, supra note 19, 229 S.W.2d at 494.

[21]"The reason given in support of this view [that defendant is not immune from service of process] may smack somewhat of the old notion that a criminal always deserves harsh treatment; but even that idea, if ever justifiable, can only be so after a conviction, and not while the presumption of innocence must be indulged." Kaufman v. Garner, 173 Fed. 550, 554 (C.C. Ky. 1909).

wherever he can be found.[22] Any rule making a defendant immune from service of process is in derogation of this right, and ought not to be extended unreasonably.[23] The granting of immunity as a matter of course seems too great an incursion on the plaintiff's right to sue defendant wherever he can be found. Where the voluntary-involuntary test works a harsh result on the defendant, the granting of immunity as a matter of course works a harsh result on the plaintiff.

Thus it appears that a rule compromising the extreme positions outlined above would be advantageous; one which would do equal justice to the plaintiff, the defendant, and the court. It is submitted that the rule herewith proposed does provide such a balance of interests.

If the appearance of the nonresident criminal defendant is genuinely voluntary, immunity should be allowed. This would protect the jurisdiction of the court, and aid in the disposition of litigation, by encouraging the defendant to appear and have the cause adjudicated. If the appearance is compulsory, however, whether defendant is granted immunity should depend on whether the civil action and criminal action have a common origin; that is, whether they arose out of the same transaction or occurrence. If they did grow out of the same occurrence, service upon the defendant would be allowed;[24]

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[22]Stewart v. Baltimore & O.R.R., 168 U.S. 445 (1897).

[23]Netograph Mfg. Co. v. Scrugham, supra note 12, at 963.

[24]Many courts, in civil cases, recognize an exception to the rule of immunity where the subject matter of the two actions is closely related or arises out of the same transaction. Kirtley v. Chamberlin, 250 Iowa 136, 93 N.W.2d 80 (1958); State ex rel. Ivey v. Circuit Court, 51 So. 2d 792 (Fla. 1951); Miller v. Miller, 153 Neb. 890, 46 N.W.2d 618 (1951); Sanders v. Smith, 197 Miss. 304, 20 So. 2d 663 (1945); Rizo v. Burruel, 23 Ariz. 137, 202 Pac. 234 (1921). See generally Annot.,84 A.L.R.2d 421 (1962).

This factor, however, may have the opposite effect where the action to which the nonresident defendant responds is criminal in nature, if he is extradited or waives extradition. The Uniform Criminal Extradition Act, § 25, 9 U.L.A. 263, 349 (1957), in effect in most states, provides that a person brought into the state by extradition based on a criminal charge shall not be subject to service of process in civil actions arising from the same facts upon which the criminal charge is based until such person is convicted, or, if acquitted, until he has had ample opportunity to return to the state from which he was extradited.

The purpose of the statutory provision is to discourage the use of criminal proceedings solely for the purpose of bringing defendants into the jurisdiction, thereby subjecting them to service of civil process. The statute is not applicable to the facts of the Greene case, however, since neither extradition nor waiver of extradition was involved. Hare v. Hare, 228 N.C. 740, 46 S.E.2d 840 (1948); White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948); Thermoid Co. v. Fabel, 4 N.Y.2d 194, 151 N.E.2d 883 (1958). Furthermore, the reason for the statute fails on the facts in the Greene case, since the District of Columbia is not using criminal proceedings as a ruse to bring the defendant into the jurisdiction; Weatherington