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Procedure - Immunity of Non-resident Witness from Service of Civil Process

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PROCEDURE—IMMUNITY OF NON-RESIDENT WITNESS FROM SERVICE OF CIVIL PROCESS

The Acting Commonwealth's Attorney of Chesterfield County, Virginia, subpoenaed Clyde E. Hackney, a resident of Tennessee, to appear as a witness in a criminal proceeding. The subpoena, which was mailed to him at his Tennessee address, was neither issued nor served according to the manner prescribed in the Uniform Act pertaining to out-of-state witnesses.[1] Hackney accepted the subpoena, appeared and testified. While he was in the act of returning to Tennessee immediately upon his departure from court, he was served with summons in a civil action and his automobile attached. The trial court found that the defendant was privileged from service and his car could not be attached. On appeal, *held,* affirmed. The Uniform Act[2] was passed in furtherance of the common law rule and did not supplant it. Even though the statutory requirements had not been met, under the circumstances a non-resident witness was immune from service of process. *Davis* v. *Hackney,* 196 Va. 651, 85 S.E. 2d 245 (1955).

The doctrine granting non-resident witnesses immunity from service of civil process and arrest while going to, attending, and returning from, court is an English common law rule.[3] Lord Mansfield summarized the doctrine as to privilege from arrest:

> . . . in order to encourage witnesses to come forward voluntarily they are privileged from arrest. The privilege protects them in coming, in staying, and in returning provided they act bonâ fide, and without delay, which is a question of reasonableness.[4]

In the same opinion he extended this immunity, which had previously been applicable only to residents, to include non-resi-

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[1] Va. Code §19-242 through §19-252 (1950, Supp. 1954), Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings.

[2] *Ibid.*

[3] Lightfoot v. Cameron, 2 Black.W. 1113, 96 Eng.Rep. 658 (K.B. 1776); Walpole v. Alexander, 3 Doug. 45, 46, 99 Eng.Rep. 530, 531 (K.B. 1782); Poole v. Gould, 1 H.& N. 99, 99, 156 Eng.Rep. 1133, 1134 (1896).

[4] Walpole v. Alexander, 3 Doug. 45, 46, 99 Eng.Rep. 530, 531 (K.B. 1782). Note that in the instant statement by Lord Mansfield the term "arrest" is used, but the rule was not restricted to immunity from arrest; it was extended also to immunity from service of civil process. *Cf.* Poole v. Gould, 1 H.& N. 99, 99, 156 Eng.Rep. 1133, 1134 (1856).

dents.[5] Thereafter the courts generally applied the same principles to all persons in attendance upon a court, whether compelled by process or not.[6]

The great weight of authority[7] in the United States concurs in protecting non-resident suitors, both plaintiff and defendant, and witnesses from civil process, as well as from civil arrest, while in attendance upon court,[8] although two states, Rhode Island and Illinois, appear to have rejected this rule in part.[9]

In *Baldwin* v. *Emerson*,[10] a case decided by the Rhode Island Supreme Court, it was stated:

> The general rule relating to protection from the service of process is that all persons who have any relation to a cause which calls for their attendance in court are protected from arrest while going to and attending court and returning. This protection, however, is not wholly, nor chiefly, the privilege of the person, but is granted in the interest of the public, that the courts may not be embarrassed or impeded in the conduct of their business. Hence, it has generally been held that the protection is limited to exemption *from arrest and does not extend to the service of process*, which does not interfere with or prevent the attendance of the person upon court.[11] (Emphasis added)

The Court, however, continues with a brief survey of the cases from other jurisdictions and concludes:

> While we concede the force of the reasons advanced for protecting *non-resident witnesses* from service of a summons against them for the commencement of a suit, *eundo, morando, et redeundo*, we are not convinced of the sufficiency of the reasons assigned for the exemption of *non-resident suitors* from such process.[12] (Emphasis added)

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[5] Walpole v. Alexander, 3 Doug. 45, 46, 99 Eng.Rep. 530, 531 (K.B. 1782).
[6] Meekins v. Smith, 1 Black.H. 636, 637, 126 Eng.Rep. 363, 363 (C.P. 1791; *Ex parte* Jackson, 15 Ves.Jr. 117, 33 Eng.Rep. 699 (Ch. 1808). See 3 Bl.Comm. *289, 290.
[7] 42 Am.Jur., Process §142 (1942).
[8] Paul v. Stuckey, 176 Ark. 389, 189 S.W. 676 (1918); Chittenden v. Charter, 82 Conn. 585, 74 A. 884 (1909); Wilson v. Donaldson, 117 Ind. 356, 20 N.E. 250 (1889); Northwestern Casualty and Security Co. v. Conoway, 225 Iowa 112, 230 N.W. 548 (1930); Bolgiano v. Gilbert Lock Co., 73 Md. 132, 20 A. 788 (1890); Cooke v. Cooke, 67 Utah 371, 248 P. 83 (1926); Lamb v. Schmitt, 285 U.S. 222 (1932).
[9] Keefe and Roscia, *Immunity and Sentimentality*, 32 Cornell L.Q. 471, 481, 488 (1947).
[10] 16 R.I. 304, 15 A. 83 (1888).
[11] 16 R.I. 304, ..., 15 A. 83, 83.
[12] 16 R.I. 304, ..., 15 A. 83, 84.

Thus the court expressly limits its restriction of the application of this doctrine to suitors but at least by dictum grants such immunity both from arrest and service of process to non-resident witnesses while in attendance upon court.[13]

Likewise, in *Greer* v. *Young*, an Illinois case, the court did not limit its statement of the law in question to the immunity of suitors in a proceeding. It asserted, "The parties to a suit and their witnesses are, for the sake of public justice, protected from *arrest* . . ."[14] (Emphasis added) The same court in another case,[15] following the rule laid down in the *Greer* case, stated:

> Notwithstanding the authorities in some other states support the doctrine that a party, under the facts set forth in this case (the non-resident, a defendant in a previous case, was in the jurisdiction in connection with the taking of depositions when he was personally served with civil process) is exempt from service of civil process, *the rule is different in this State.*"[16] (Emphasis added)

Apparently, Rhode Island restricts its application of the generally accepted doctrine granting immunity to both suitors and witnesses, but it has, by dictum, allowed non-resident witnesses full use of the immunity and is thereby brought, to that extent, into accord with the majority rule. Illinois, then, is the only jurisdiction which unequivocally rejects all arguments for granting non-resident witnesses freedom from service of civil process.

The early Virginia cases, unlike the Illinois treatment of this doctrine, followed closely the English rule, excusing officers of the court, as well as witnesses and suitors from civil process and arrest. Chancellor Wythe expounded the law in question, "No law is necessary to be made. This privilege is part of the Common Law of England, which we have adopted . . ."[17] In 1823 this rule was extended by the Virginia courts to allow such reasonable time as necessary, *eundo, morando, et redeundo.*[18] As

[13] Ellis v. De Garmo, 17 R.I. 715, 24 A. 579 (1892), decided by the same court, followed the rule as set forth in Baldwin v. Emerson, *supra* notes 11 & 12.
[14] 120 Ill. 184, ..., 11 N.E. 167, 169 (1887).
[15] Cassem v. Galvin, 158 Ill. 30, 41 N.E. 1087 (1895).
[16] 158 Ill. 30, ..., 41 N.E. 1087, 1088.
[17] Commonwealth v. Ronald, 4 Call (8 Va.) 97, 98 (1786).
[18] Richards v. Goodson, 2 Va.Cas. 381, 382 (1828).

late as 1931 the law as set forth by Chancellor Wythe was followed.[19]

The reasons given for protecting a non-resident witness are almost universally the same. It is a matter of public policy to give such a privilege for protection of the court in the administration of justice.[20] This rule is necessary for the maintenance of the court's authority and dignity—the benefit to the individual is merely incidental.[21] In *Stewart* v. *Ramsey*[22] in a well-considered opinion, Mr. Justice Pitney adhered to the above reasoning and continued:

> Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a law suit for displeasing parties by their testimony . . .[23]

The reasons in support of this doctrine speak for themselves. Such a principle, so embedded in American jurisprudence, is not likely to be modified by the courts. However, as in the *Hackney* case, the immunity in question is often the subject of controversy in cases involving the interpretation of statutes dealing therewith.

In a case[24] arising under a North Carolina Statute,[25] it was stated that the immunity from service of process in civil actions is ". . . a settled rule based upon high consideration of public policy not upon statutory law . . . The exemption, being long and universally recognized, and not being statutory, could only be repealed by an express statute, which no state has passed."[26]

In *Mallory* v. *Brewer*[27] which, although not directly in point with the *Hackney* case because of the statute under con-

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[19] Wheeler v. Flintoff, 156 Va. 923, 159 S.E. 112 (1931).
[20] Murrey v. Murrey, 216 Cal. 707, 16 P.2d 741 (1932), *cert. denied*, 289 U.S. 740 (1933); Kelly v. Pennington, 78 Colo. 482, 242 P. 681 (1926); Cowperthwait v. Lamb, 373 Pa. 204, 95 A.2d 510 (1953); Wheeler v. Flintoff, 156 Va. 923, 159 S.E. 112 (1931).
[21] Cotten v. Frazier, 170 Tenn. 301, ..., 95 S.W.2d 45, 49 (1936); Wheeler v. Flintoff, 156 Va. 923, 159 S.E. 112 (1931).
[22] 242 U.S. 128 (1916). See the citations in this case in reference to the immunity of witnesses from service of process while attending court voluntarily as well as under subpoena.
[23] *Id.* at 130.
[24] Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).
[25] ". . . (Code, §§1367, 1735) . . . statutes prohibiting the arrest in civil actions of parties attending court as witnesses . . ." 122 N.C. 784, ..., 29 S.E. 947, 948.
[26] 122 N.C. 784, ..., 29 S.E. 947, 947, 948.
[27] 7 S.D. 587, 64 N.W. 1120 (1895).

sideration,[28] stresses the strength of the common law rule and the reluctance with which the courts tend to modify it, it was said that immunity of witnesses from foreign jurisdictions "is not based upon statute but upon public policy."[29] The tenacity with which the courts hold to a rule of the common law is again evidenced by a per curiam opinion from the Court of Appeals of Ohio.[30] A statute similar in text to that of Virginia[31] was under consideration.[32] The court stated, "There is a rule of interpretation that a statute will not be presumed to derrogate from or abrogate the Common Law. . . . [While the statute allows a method of exemption, it] evinces no intention to make such condition to exemption exclusive . . . [and] the underlying reason . . . applies in full force to a witness whether in the jurisdiction under subpoena or otherwise."[33]

If the individual is to be allowed personal immunity from arrest and service of process in order to better achieve the ends of justice, it would appear that such immunity should also extend to his property which would not be in the jurisdiction but for his attendance upon court as a witness. On this point Mr. Chief Justice Clark of the North Carolina Supreme Court stated:

> If the defendant was exempt, as is unquestioned, from the service of summons, then his books which were brought to be used as evidence in the case and his necessary personal effects, such as clothing and the like, were exempt from attachment, because it was necessary for him to have them in attending trial. If this were not so, then the privilege would be nugatory. It could not be expected that the defendant would come from his home . . . without the necessary underclothing and toilet articles for his use. If not entitled to this, then, in the language used by a member of Congress, as set out in the Congressional Record, which therefore must be of sufficient dignity to be used here, a witness or a suitor from another state would be forced to

[28] "Section 5274, Comp.Laws S.D. . . . 'A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons while going, returning, or attending in obedience to a subpoena.'" 7 S.D. 587, ..., 64 N.W. 1120, 1122.
[29] 7 S.D. 587, ..., 64 N.W. 1120, 1122.
[30] Rhoads v. Dennis, 115 N.E.2d 708 (Ohio App. 1951).
[31] See note 2 *supra*.
[32] "A witness shall not be liable to be sued, in a county in which he does not reside by being served with a summons in such county while going, returning, or attending in obedience to a subpoena." Section 11519 General Code of Ohio (presently Section 2317.29 R.C. of Ohio).
[33] Rhoads v. Dennis, 115 N.E.2d 708, 710 (Ohio App. 1951).

come in light marching order, for, as said in the above speech, he would be—

> "Like the poor benighted Hindoo
> Who does the best he kin do,
> And for clothes he makes his skin do."[34]

Based upon the reasoning of Chief Justice Clark it would seem that all the arguments advanced by the courts for personal exemption from service of process should be properly extended to include such "necessaries" as would facilitate the attendance of a witness. Today, although the witness could make a train do, it would seem that an automobile as a convenient mode of transportation should be included in what Clark terms "necessaries."

It is submitted that the Supreme Court of Appeals of Virginia could have reached no other conclusion than it did in the case under comment. The common law rule granting immunity to non-resident witnesses from service of civil process is founded both upon the principles of natural justice and upon the authority, dignity, and impartiality associated with all courts of justice. The courts in protecting such principles expressly voice their abhorrence of personal suits which would, if not limited to the proper forum and time, overthrow the very bases upon which justice and equality at the bar are established.

Had there been no need of Hackney's presence in Virginia, Davis would have been free to journey to Tennessee and there institute a suit in the proper court of that state. He is still entitled to do so. Permit him to take advantage of the privileges and immunities granted to the citizens of the several states by the Federal Constitution, but do not allow him to obstruct the judicial process of the Commonwealth of Virginia.

It is also submitted that the General Assembly of Virginia could have prevented the question in issue from ever arising by a more precise enactment which would not have infringed upon the essential uniform nature of the Act, thereby lessening the

[34] Winder v. Penniman, 181 N.C. 7, ..., 105 S.E. 884, 886 (1921).

burden on the courts. Since the General Assembly did not do so, the authoritative sounding board for ambiguous legislation in Virginia has resolved the question most equitably according to its very best traditions.

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