Volume 10 | Issue 3 Article 7

1965

Nonresidents and Jurisdiction: A Modern Dilemma in Civil and Criminal Procedure

Malcolm J. Gross

Robert M. Schwartz

V.

CONCLUSION

The recent amendment to the Foreign Assistance Act is subject to criticism in two respects. If the amendment was intended to give the President the power to bind the court it is constitutionally unsound; if it was not so meant, then it would seem to be useless since the decision of when to apply the act of state doctrine still lies in the hands of the courts. However, it is submitted that the importance of the amendment is not in its binding or non-binding effect on the court, but, rather on its advisory effect on the court. The amendment advises the courts that they need no longer consider embarrassment to the Executive unless he specifically requests it. Since this was the main concern of the Supreme Court in *Sabbatino*, its absence now from judicial consideration means the absence of the reason for that decision and of the holding in *Sabbatino* by the Court itself and positive application of international law to acts of foreign states in the future. Hopefully this will result in a reversal by the Court of its holding in *Sabbatino* and judicial application of international law to acts of foreign states in the future.

Dolores B. Sesso

NONRESIDENTS AND JURISDICTION: A MODERN DILEMMA IN CIVIL AND CRIMINAL PROCEDURE

I.

INTRODUCTION

The nonresident is a curious and troublesome figure in our American legal system. In a federal union such as ours, the problems inherent in acquiring and maintaining jurisdiction by one state, over the resident of another state, are immense. Indeed, in today's highly mobile society, it appears a virtual certainty that the number of cases involving nonresidents will sharply increase.

The purpose of this comment is to examine some of the difficulties confronting the nonresident as a result of his new found mobility. The discussion is divided into an investigation of the civil and criminal areas separately since it is apparent that the practices of the states in these two categories require different treatment. The authors do not purport to present an exhaustive survey of all problems faced by the nonresident. Rather their intention is to highlight and analyze the more significant obstacles he is likely to encounter.

II.

CIVIL JURISDICTION

In the area of civil litigation there are, at least, three situations in which process upon the nonresident who is physically present within a state is void or voidable.[1] Simply stated these are: (1) when service is obtained by force, (2) when service is obtained by fraud or (3) when the nonresident is cloaked with some form of immunity giving him a privilege against service. The first two situations (force or fraud) present few theoretical differences among the states; however, the third (immunity) is causing considerable problems as it becomes increasingly more apparent that the ancient and diverse rules of immunity are too inflexible to meet modern situations.

Before examining the difficulties arising from immunity, however, it is necessary to look to process obtained through force or fraud. A view of the three combined should provide some insights into the problems of jurisdiction generally.

A. *Force and Fraud*

Jurisdiction in a civil case which is obtained through the use of force to bring a nonresident into a state should be, and is, void.[2] American courts have held uniformly on this point for a considerable time. Thus the nonresident who is dragged into a state for the purpose of securing local jurisdiction over him is not bound by a civil litigation.

In our highly civilized society, the number of cases involving the use of brute force to gain jurisdiction in the civil area is, of course, minimal. Men have not, however, shown themselves adverse to employing the state's police and extradition power to obtain jurisdiction of a person against whom they have a claim.

In *Klaiber v. Frank*,[3] the Supreme Court of New Jersey termed the use of Florida's extradition power a fraud and refused to enforce a judgment procured by such state force because of the lack of Florida court's jurisdiction in the case. In Tennessee, however, the burden of one hoping to void process in such a case is a difficult one. Thus in *Broaddus v. Partrick*,[4] the court held that there clearly must be bad faith on the part of the local resident bringing the criminal charge. The *Klaiber* case, although obviously considering the element of bad faith (the local creditor's attorney was also district attorney), does not appear to require more than a showing of probability of bad faith by the resident local claimant. The

1. Space does not permit the discussion of the subtle but often important distinctions between process which is void per se and process which the nonresident merely has a power to void. Also, the question whether either type of process is subject to collateral attack in an unrelated action is beyond the scope of this comment.
2. Williams v. Reed, 29 N.J.L. 385 (1862).
3. 9 N.J. 1, 86 A.2d 679 (1952).
4. 177 Tenn. 335, 149 S.W.2d 71 (1941).

entire problem of the use of the state to bring pressure to bear upon the nonresident is an unusual one. This is true because it is a rare claimant, indeed, who possesses the availability of a concurrent criminal action and the ability to use his state's extradition power as a lever against the nonresident.

The use of fraud to entrap the unwary nonresident in a civil action is a much more common device. Perhaps as a response to this tendency the courts have found it necessary to expand the concept of what constitutes fraud in obtaining service.

Tickle v. Barton[5] is an example of this expansion. There the court held that when a nonresident is lured into the jurisdiction by an agent of the resident claimant the service upon the nonresident is void. The case is significant because the agent, an attorney, was acting against the express instructions of the resident claimant. The benefit which would have inured to the resident claimant was apparently sufficient to void service despite his clean hands.

A more extreme extension of the fraudulent service requirement came in *Western States Refining Company v. Berry*[6] which virtually destroyed the necessity for actual fraud. The *Western* case set up a new test, that of fairness. According to the new fairness rule, if the resident claimant invites the nonresident into the jurisdiction the latter cannot be served for a reasonable time while he is there. The element of fraudulent intent is thus discarded completely and replaced with a rule attempting to prevent advantage being taken of the nonresident.

The holdings in these cases lead one to believe that the old concept of fraud is about to be modified or even discarded.[7] The courts now appear to be looking toward the effect upon the nonresident rather than the intent of the resident claimant. The rule still remains, however, requiring directness between the cause and effect relationship of the parties. Thus if the resident claimant does some indirect act which ultimately results in the nonresident's entrance into the jurisdiction, the nonresident may still be validly served so long as no direct inducement or trick was involved.[8] Whether the direct–indirect distinction will continue to be applied in the face of the concern expressed for the nonresident is an open question. It would seem that the effect on the nonresident should be the only criteria if the *Western* and *Tickle* cases are to be logically extended. However, logic has not been a particularly determinative factor in the area of civil service on the nonresident.

---

5. 95 S.E.2d 427 (W.Va. 1956). However, if there is a lack of privity between the local claimant and the inducing party, it has been held as not sufficient to void an otherwise valid service. *Ex parte* Taylor, 29 R.I. 129, 69 Atl. 553 (1908).

6. The local claimant had invited the nonresident to enter the state to discuss a settlement and then had served him when the discussions failed to reach an agreement.

7. It should be noted, however, that the majority of modern courts still adhere to a strict construction of what constitutes fraud in obtaining service. Zenker v. Zenker, 161 Neb. 200, 72 N.W.2d 809 (1955).

8. Suhay v. Whiting, 43 Ohio Op. 206, 96 N.E.2d 609 (1950). The subtle distinctions of fact between inducement and the indirect cause and effect relationship are often difficult to comprehend.

There is a danger if the fraud test is abandoned, that the nonresident will be tempted to assert inducement or invitation by the resident claimant in virtually every case. Indeed the law in this field generally seems to be moving dangerously along a course which disregards the interests of the resident claimant and of local courts.

B. *Privilege*

Far more difficult than the force or fraud problem is that of immunity of the nonresident from process. In the privilege area the nonresident is able to void an otherwise valid service of process because the policy of the jurisdiction is to protect the nonresident for some reason, regardless of the merit of the resident claimant's action. There are many grants of immunity which will not be considered here because of their narrow and infrequent application.[9] One immensely important and incredibly confused form of privilege will be considered however: the nonresident's immunity from process while participating in judicial proceedings.[10]

In order to look with some clarity at the problems of immunity it is necessary to consider separately the parties and issues involved. After this has been done the various ways in which immunity may be lost will be considered.

1. Nonresident Plaintiffs

Of all nonresidents claiming immunity none has come under more fire than the plaintiff. The state of New Jersey has led the attack. In *Grober v. Kahn*[11] that state denied immunity to the nonresident plaintiff. The court reasoned that the nonresident plaintiff, by attempting to take advantage of the state's judicial facilities, had subjected himself to the claims of residents. To understand the basis of the *Grober* decision it is necessary to examine the historic basis of immunity for nonresidents.

The original purpose of immunity was to protect residents in seventeenth century England from harassment during civil trials. The privilege was necessary because the common procedure for bringing an action in those days was by civil arrest.[12] Thus if one had a claim against a person involved in a civil litigation that person could be civilly arrested during the trial with the result of interrupting the action. To avoid such a situation an immunity from process was developed for any resident involved in a civil action.[13] Later this privilege was extended to protect nonresidents as

9. *E.g.*, Harrell v. Black, 38 So. 2d 310 (Fla. 1949). A nonresident sheriff was granted immunity from civil process because he was on judicial business.

10. It should be noted at the outset that there is apparently no constitutional immunity vested in the nonresident at a judicial proceeding. Waterfront Commission of New York Harbor, 39 N.J. Super. 33, 120 A.2d 504 (1956).

11. 76 N.J. Super. 252, 184 A.2d 161 (1962).

12. Mertins v. McMahon, 334 Mo. 175, 66 S.E.2d 127 (1933).

13. See note, 36 TEMP. L.Q. 346 (1963).

well as residents.[14] Finally, the privilege was dropped as to residents and retained only for nonresidents.[15] This is the situation at the present time.[16]

The history of immunity has also followed a curious course on the question of whether it is a personal privilege or a privilege of the court. English history leaves little doubt that the immunity was a purely discretionary matter with the court. The idea that there was an individual right to the privilege was not even considered in the early English cases.[17]

Likewise, in this country, at first the privilege was regarded as a court, rather than an individual, power.[18] However, the American courts later developed the idea that the immunity was a personal as well as a court privilege. Cases such as *Whited v. Phillips*[19] reasoned that the nonresident should be spared the expense and danger of a trial far from his home state. These cases even expressed a distrust of their own local juries in determining the claims and liabilities of nonresidents.

The rule reached its fartherest extension in *Sofge v. Lowe*.[20] The nonresident in that case had traveled from his state to another jurisdiction in order to participate in a legal action. On his return home he passed through the forum state and was there served by the resident claimant. The forum court, apparently as a matter of comity and on the ground that the privilege from service cloaked the nonresident personally, dismissed the action. The days of such blind jurisprudence were numbered, however, and courts soon began to examine the basis of the immunity rule when applied to plaintiffs.

At least one early American decision had already denied immunity to nonresident plaintiffs and its dicta seemed to indicate that nonresident defendants as well would not be entitled to the privilege.[21] Although later state court decisions refused to go this far, they have drawn a sharp distinction between nonresident plaintiffs and other nonresidents.[22] These newer cases argue that the purposes for protecting nonresident plaintiffs have disappeared. The older cases enunciating reasons for the rule speak of preventing disruption of court proceedings[23] and protecting the court's dignity.[24] Both of these bases for the rule show it to be a court rather than personal right and are premised on the danger of civil arrest. Thus, with the disappearance of civil arrest, the danger of affronting the dignity

14. Walpole v. Alexander, 3 Dougl. 45, 99 Eng. Rep. 530 (1782).
15. Fisher v. Bouchelle, 61 S.E.2d 305 (W.Va. 1950).
16. However, many states also grant immunity to the resident of another county. This seems to be a regression toward the original rule. *E.g.*, Cowperthwait v. Lamb, 373 Pa. 204, 95 A.2d 510 (1953).
17. Walpole v. Alexander, 3 Dougl. 45, 99 Eng. Rep. 530 (1782).
18. ALDERSON, JUDICIAL WRITS AND PROCESS § 122 (1895). Mathews v. Puffer, 10 Fed. 606 (C.C.S.D.N.Y. 1882), went so far as to say that immunity could be denied at will by the courts.
19. 98 W.Va. 204, 126 S.E. 916 (1925).
20. 131 Tenn. 626, 176 S.W. 106 (1915). *Contra*, Cronk v. Wheaton, 15 Pa. Dist. Rep. 721 (1906).
21. Bishop v. Vose, 27 Conn. 1 (1858).
22. Cannata v. White Owl Express, 339 Ill. App. 79, 89 N.E.2d 56 (1949).
23. Person v. Grier, 66 N.Y. 124 (1876).
24. Parker v. Marco, 136 N.Y. 585, 32 N.E. 989 (1893).

of the court and the fear of an action being interrupted vanish. Further, since the privilege is one of the court and not of the individual the court can abolish it at will.

There are, however, many jurisdictions which still apply the rule in its blanket form. These cases accept a modern rationale for the privilege from service, that is, that the rule's purpose is to encourage necessary participants in an action to enter the jurisdiction voluntarily and thus promote a fair trial.[25]

There seems little justification for the cases upholding the rule as to nonresident plaintiffs. The courts most likely are unwilling to encourage more litigation in their jurisdictions and this would seem to be the only remaining valid reason for applying the immunity to plaintiffs.

2. Nonresident Witnesses and Defendants

Nonresident witnesses and defendants have fared far better than nonresident plaintiffs in our courts. The states have generally held the witness to be immune on the ground that he is necessary for a fair civil trial and that immunity encourages his presence since he cannot ordinarily be compelled to attend in a foreign jurisdiction.

A number of writers, however, have found fault with granting immunity even to witnesses.[26] The argument of these authorities is that the resident claimant has a vital interest which the courts have ignored too long. Seldom have the courts worried in the slightest about the forgotten local creditor. However, in restricting immunity severely by denying it in criminal cases one court stated that:

> It (immunity) is not only not a natural right but it is in derogation of the common law right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him.[27]

Other writers have suggested that the courts use a balancing test to determine immunity in each individual case.[28] The interests to be considered would be those of the state, the nonresident, the resident claimant and the parties to the action already in progress. This approach has much merit. However, there are difficulties, the most obvious of which is that the balancing test looks at the problem after, rather than before, it arises. Nonresident witnesses are unlikely to enter a jurisdiction where immunity is not guaranteed beforehand but instead will be determined after entrance. This means that the main purpose of immunity today (encouraging necessary nonresidents) will be destroyed.

There is, of course, much to be said for the balancing of interests approach. The use of the individual case method is what is really objec-

25. Martin v. Bacon, 76 Ark. 158, 88 S.W. 863 (1905).
26. Keefe & Roscia, *Immunity And Sentimentality*, 32 CORNELL L.Q. 471 (1947).
27. Netograph Mfg. Co. v. Scrugham, 197 N.Y. 377, 90 N.E. 962 (1910).
28. See Comment, 11 CATHOLIC U.L. REV. 42 (1962).

tionable. Instead interests should be balanced in the separate categories of plaintiffs and witnesses. This would produce no immunity for nonresident plaintiffs who have taken advantage of the state's courts and thus should have their need outbalanced by the need of the resident claimant. On the other hand, the nonresident witness (or defendant for that matter) is so essential to a fair and orderly state proceeding that he should be immune from suit brought by the resident claimant.

Finally, the doctrine of forum non-conveniens has been suggested as an answer to the immunity problem.[29] Such a solution would abolish the immunity rule completely or, at the very least, with respect to nonresident plaintiffs. In place of immunity the doctrine of forum non-conveniens would be liberally applied. The difficulty with such an idea is that forum non-conveniens is a discretionary doctrine.[30] The nonresident, therefore, can hardly be expected to enter a jurisdiction, where he is a necessary participant in an action, if he faces service from a resident claimant and must rely on the discretion of the court to refuse jurisdiction.

3. Scope of Immunity

The confusion between plaintiffs and witnesses in granting immunity is further complicated by the numerous ways in which the nonresident may lose his privilege from service. One of these ways stems from the nonresident's purpose in entering the jurisdiction.

A number of states have set up the "primary intent" test for determining loss of immunity. Thus cases such as *Gerard v. Superior Court for Los Angeles County*[31] have held that as long as the nonresident's purpose is *primarily* to participate in a judicial proceeding he may have other secondary intents for entering the state.

Contrasted with the "primary intent" rule is the "sole occasion" test of other jurisdictions. This test demands that the nonresident enter the state *solely* to attend the judicial proceeding.[32] Once within the jurisdiction, however, incidental business by the nonresident does not destroy the immunity. The "sole occasion" test looks only to intent of the nonresident before he entered the state. Thus *Connelly v. Lamb*[33] held that:

> The sole occasion relates to the moving cause of his coming. We do not say that one so coming may not lose immunity by subsequent acts within the jurisdiction. . . . The party served with process must establish his immunity by a showing of the sole incentive moving him to come within reach of the process served.[34]

It may be argued that because both tests allow other than judicial activity once the nonresident is within the state, there is no practical

29. See note, 26 IND. L.J. 459 (1951).
30. Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952).
31. 91 Cal. App. 2d 549, 205 P.2d 109 (1949).
32. Roos v. H. W. Roos Co., 64 Ohio App. 464, 28 N.E.2d 1008 (1940).
33. 227 Mich. 139, 198 N.W. 585 (1924).
34. *Id.* at 141, 98 N.W. at 586.

difference between them. Things are not always what they seem, however, since in determining what was the subjective intent of the nonresident before he entered the state, both tests must look to the nonresident's objective manifestations while he is within the jurisdiction. It will, therefore, require far less non-judicial activity by the nonresident in the "sole occasion" jurisdictions to determine that the nonresident had other intentions than attending a judicial function, than it will require objective manifestations in the "primary intent" jurisdictions to determine that he came mainly for the judicial proceeding.

Another difficulty facing the nonresident is the exact definition of what constitutes a "judicial proceeding." Clearly trials and pretrial hearings are judicial proceedings. However, from this point on the lines become extremely hazy. Judicial commissions are apparently important enough to the states to grant immunity to those testifying.[35] Unfortunately, police investigations are not important enough, even in those states which grant immunity in criminal trials.[36] To make matters worse, nonresidents entering in order to discuss a settlement are not immune from service.[37]

Since the modern purpose of the immunity rule is to encourage nonresidents to enter a foreign state, it is submitted that the present distinctions are meaningless. Is it not just as important to state policy for nonresidents to settle suits as to testify in them?

One of the other ways in which the nonresident may fail to qualify for immunity is if he commits a tort while attending the judicial proceeding. Unfortunately, case law on the point is almost exclusively dicta.[38] Typical of this difficulty is *First Nat'l Bank v. Di Martino & M. Contracting Company*[39] which clearly states by way of dicta that a tortfeasor could be served, but then holds that the facts of the case do not bring it within the rule. The exception remains, however, and would still seem to be applicable in the proper fact situation.

A far more important exception to immunity is the rule that if the resident claimant's action arose out of the same transaction as that in which the nonresident is participating, the latter may be served.[40] Just what constitutes the same transaction is a serious problem. A recent case, *Kendrick v. Thompson*,[41] held that, where the resident claimant was an attorney and was owed fees by the nonresident for work on the case in which the nonresident was participating, the transactions were not sufficiently related for the attorney to serve the nonresident. Apparently the court and many others like it regard the same transaction exception as

35. Mulhearn v. Press Pub. Co., 53 N.J.L. 153, 21 Atl. 186 (1890). Apparently testimony before a legislative committee would also qualify but this point is still unclear.

36. Meyers v. Barlock, 281 Mich. 629, 275 N.W. 656 (1937).

37. Lingo v. Reichenbach, 225 Iowa 112, 279 N.W. 121 (1938).

38. Mullen v. Sanborn, 79 Md. 364, 29 Atl. 522 (1894). It should be noted, however, that the tort (abuse of process) arose out of the same transaction.

39. 180 App. Div. 750, 168 N.Y. Supp. 310 (1917).

40. Eberlin v. Penna. R. Co., 402 Pa. 520, 167 A.2d 155 (1961).

41. 205 A.2d 606 (D.C. App. 1964).

applying only to counterclaims by local residents. This would tend to indicate that the exception is aimed primarily at weakening the protection given to nonresident plaintiffs. There is, of course, the possibility that the nonresident witness could be served if the resident claimant's action arose directly out of the case in which the nonresident was testifying.

Finally, the nonresident faces the possibility of loss of immunity for abusing his privilege by remaining more than a reasonable time within the jurisdiction. It may be added that this applies as well to one brought in by force or fraud. Here again a problem of semantics arises over what is meant by "reasonable." The courts have often been extremely liberal in construing just what is a reasonable time for the nonresident to remain. Thus, one case went so far as to allow a nonresident to remain five days while a proceeding was in recess because of the extreme inconvenience he otherwise would have suffered.[42] In determining reasonableness the courts look to the individual nonresident. One factor they consider is the nonresident's health and ability to travel. *Russell v. Landau*[43] stated that:

> Whether the nonresident comes too soon or remains too long depends upon all the circumstances of his coming, and the reasonableness of the period of his visit must be determined by the court. . . . In considering the facts with reference to the duration of the sojourn, the court must regard the condition of the nonresident's health as a factor in causing his detention.[44]

On the whole, the reasonable time approach of the courts is a fair one. One can only marvel that in the jungle of confusion in which the nonresident treads some sanity still prevails.

4. The Criminal Defendant

The protections which surround the nonresident in a civil action often disappear once he is accused of a crime. In fact, the courts of many states refuse to grant any immunity from civil process to one who enters the jurisdiction to defend against a criminal charge. These courts draw a sharp distinction between the civil and criminal area. Typical of this view is *Ryan v. Ebecke*[45] which held that:

> In considering the case, we get no analogy with a plaintiff in a civil case; as regards witnesses, their immunity in criminal prosecutions stands upon the same broad ground of public policy as obtains in civil litigation. The analogy of the situation of a criminal defendant with a civil defendant . . . seems to us to fail altogether. . . .[46]

---

42. Durst v. Sautges Wilder and McDonald, 44 F.2d 507 (7th Cir. 1930).

43. 127 Cal. App. 2d 682, 274 P.2d 681 (1954).

44. *Id.* at 685, 274 P.2d at 683.

45. 102 Conn. 12, 128 Atl. 14 (1925).

46. *Id.* at 16, 128 Atl. at 17.

Other jurisdictions permit immunity from service if the nonresident enters voluntarily to plead to a criminal indictment.[47] The reasoning of such cases is, obviously, that the state has an interest in having its criminal docket cleared as quickly as possible.

Of the two views, the latter seems more sound from a policy standpoint. A nonresident (especially one facing a minor criminal charge) is hardly likely to enter a jurisdiction with civil litigation facing him as well. The court should, therefore, grant immunity to the criminal defendant who voluntarily enters to plead to an indictment. Naturally immunity should continue to apply to witnesses since their presence is deemed necessary to effect justice.

C. *The Civil Area Generally*

Until the courts adopt, or have forced upon them, a theory of nationwide service of process with a center of gravity approach like that which may be inferred from the famous *International Shoe*[48] case, there will be no peace or stability for the nonresident in foreign jurisdictions. Certainty and clarity are important, indeed vital, in the area since state lines are converging more and more in our modern world.

What is needed is an approach which gives a state with dominant contacts jurisdiction. Process from that state should then be binding nationwide.[49] The nonresident would, of course, be required to attend and the need for state encouragement would vanish. The fear of injustice would also be reduced greatly since the dominant contacts would almost always be in the forum state. Unfortunately, for the present, such a solution is merely the best of all possible worlds, not the one in which we live.

III.

CRIMINAL JURISDICTION

A. *History*

The right of a state to demand a fugitive from another state is found in the "extradition clause" of the United States Constitution.[50] However, a state law official has no legal authority to arrest offenders beyond the boundaries of his state.[51] Suppose, though, that an official of State *A*, instead of proceeding under the extradition clause, has the fugitive kidnapped or defrauded in State *B* and brought into State *A* to be tried

47. Church v. Church, 50 App. D.C. 239, 270 Fed. 361 (1921).
48. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
49. There is a possibility that some of the sweeping language of Hanson v. Denckla, 357 U.S. 235 (1958), will have to be revised before such a solution can be considered clearly constitutional.
50. U.S. CONST. art. IV, § 2, cl. 2.
51. Brittain v. United States Fidelity & Guar. Co., 219 Ky. 465, 293 S.W. 956 (1927); Martin v. Houck, 141 N.C. 317, 54 S.E. 291 (1906). At common law the power to hear and determine a criminal case is dependent upon the situs of the offense. PERKINS, CRIMINAL LAW 582 (1957).

for a crime allegedly committed in State *A*. Does State *A* lawfully have jurisdiction over the defendant? Will a conviction based on this jurisdiction be upheld? Can the governor of State *B* demand the prisoner's release? The purpose of this section of the comment is to explore the answers to these questions.

As a general rule, the jurisdiction of the court in which an indictment is found is not impaired by the manner in which the accused is brought before it.[52] This is true if the fugitive is in the state for any reason, even if the fugitive has been brought unlawfully from a foreign country or another state. The rule received its initial American impetus in the case of *Ker v. Illinois*.[53] There the defendant was charged with having committed a crime in Illinois. He sought by way of a plea in abatement to defeat the jurisdiction of the court. He based his plea upon the ground that he had been seized in Peru in violation of the law and had been forcibly brought against his will into the United States and delivered to the authorities of Illinois. The accused contended that these actions were in violation of both his right of due process of law, as guaranteed by the fourteenth amendment, and of a treaty of extradition between the United States and Peru. The Supreme Court of the United States found no constitutional violation since a state may proceed against a defendant for a crime without inquiring as to the particular methods employed in bringing him within the state. The Court reasoned that the method of obtaining jurisdiction was not the type of pre-trial proceeding by which the prisoner could invoke an irregularity which is proscribed by the Constitution. The Court stated that the defendant:

> . . . may be arrested for a very heinous offense by persons without any warrant, or without any previous complaint, and brought before a proper officer; and this may be, in some sense, said to be without due process of law. But it would hardly be claimed that, after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested without due process of law within the meaning of the constitutional provision.[54]

The Court also held that the abduction was not in violation of the Peruvian treaty since treaties of extradition to which the United States is a party do not guaranty a fugitive from justice of one of the countries an asylum in the other.

This ruling was expanded to apply to a case where the fugitive was kidnapped from a sister state rather than from a foreign country. In *Mahon v. Justice*,[55] the prisoner allegedly committed murder in Kentucky and had fled to West Virginia. He was arrested there without a warrant

52. See 18 A.L.R. 509 (1922); 165 A.L.R. 94 (1946).
53. 119 U.S. 436 (1886).
54. *Id.* at 440.
55. 127 U.S. 700 (1880).

or other legal process by a body of armed men from Kentucky and violently taken into the state of Kentucky. The governor of West Virginia demanded the defendant's release but was denied. The case was appealed to the Supreme Court of the United States where the denial was affirmed. The Court held that a state's ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish the abductors, since a fugitive has no right of asylum in a sister state. The Court also stated that the acts did not deprive the prisoner of due process, basing its arguments on the following reasons: that there is no analogy between civil and criminal jurisdiction, that the wrongdoers could be punished, and that the acts complained of did not tend to convict an innocent defendant. The decision was also based on the *Ker* case. There was a strong dissent by Mr. Justice Bradley,[56] who felt that since the constitution provided a peaceful remedy, by way of extradition, for procuring the surrender of persons charged with crime and fleeing into another state, that method should be used. He felt that this case could be distinguished from the *Ker* case which involved a foreign country. Bradley argued that there were strong mutual obligations between the states that differ from those between countries.

If jurisdiction based on kidnapping was upheld, it would appear that jurisdiction founded upon fraudulent means would also be valid. In *Pettibone v. Nichols*,[57] this problem and that concerning state authorization of the acts were resolved. In *Ker* and *Mahon*, the abductors apparently were not acting under state authority, although in *Mahon* the abductor was an agent of the governor. In *Pettibone*, however, executive officers of Idaho enticed into their jurisdiction the defendant who had fled to Colorado. They obtained jurisdiction over the defendant by connivance and fraud. The Supreme Court held that proper jurisdiction had been obtained over the defendant despite the fraud by the state officials. Mr. Justice McKenna dissented[58] in the case, distinguishing it from *Ker* and *Mahon* since the state was directly implicated.

In 1932, Congress, taking cognizance of the increasing danger to domestic tranquility, passed the Federal Anti-Kidnapping Act,[59] making kidnapping a federal crime. In February, 1942, Shirley Collins was arrested in Chicago, Illinois, beaten by Illinois and Michigan police, and kidnapped by the Michigan authorities in violation of the Anti-Kidnapping Act. He was brought into Michigan for crime alleged to have been committed there. Collins petitioned the United States District Court for a writ of habeas corpus, wherein the petitioner averred that he was illegally arrested. The district court denied this writ but the court of appeals reversed[60]

56. *Id.* at 715.

57. 203 U.S. 192 (1906).

58. *Id.* at 217.

59. 47 Stat. 326 (1932); 18 U.S.C. § 1201 (1952).

60. 189 F.2d 464 (6th Cir. 1951).

and remanded, holding that a state could not constitutionally try and convict a defendant after acquiring jurisdiction by force in violation of federal law. After granting certiorari, the Supreme Court in *Frisbie v. Collins*[61] reversed the court of appeals. The Court summarily dismissed petitioner's contention by stating that:

> This Court has never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.[62]

B. *Criminal Jurisdiction Today*

As the case law stands today, it is not a violation of due process for a defendant to be convicted even if the jurisdiction over the defendant was procured by fraudulent means or by kidnapping in violation of federal law. This is the law whether the unlawful acts were committed by state officials or any other third party.[63] It is questionable whether this would be the law were the Supreme Court, in line with its expanding concept of due process, to decide the issue today. This is especially true in light of *Mapp v. Ohio*,[64] since the basic reasons for the *Mapp* decision point towards a similar decision in the unlawful criminal jurisdiction area. *Mapp* held that, in order for a state to comply with the due process clause of the fourteenth amendment, all evidence obtained by unreasonable searches and seizures is inadmissible in a state court. The following will attempt to show the similarities to *Mapp* and other expansions of due process that exemplify a need for changing the unlawful criminal jurisdiction rule. It is submitted that all of the reasons behind the present rule have been undermined in some way by the Supreme Court's widening concept of due process.

In *Mapp* it was argued, as it could be argued in the instant situation, that the defendant's only remedies are to have the wrongdoer criminally prosecuted or to bring a civil action. However, these remedies were shown to be illusory. As stated by Mr. Justice Murphy in *Wolf v. Colorado*,[65]

---

61. 342 U.S. 519 (1952).

62. *Id.* at 522.

63. The following are all the United States Supreme Court cases discussing this issue: Frisbie v. Collins, 342 U.S. 519 (1952); Pettibone v. Nichols, 203 U.S. 192 (1906); Adams v. New York, 192 U.S. 585 (1904); *In re* Johnson, 167 U.S. 120 (1896); Lascelles v. Georgia, 148 U.S. 537 (1893); Cook v. Hart, 146 U.S. 183 (1892); Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436 (1886).

64. 367 U.S. 643 (1961).

65. 338 U.S. 25, 42 (1949).

"Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations. . . ." Murphy also expressed how nugatory a civil action would be. Similar reasoning was expressed by Mr. Justice Douglas[66] in his concurring opinion in *Mapp*.

Another argument for upholding the unlawful jurisdiction rule is that the illegal arrest does not tend to convict an innocent defendant. Furthermore, any other rule would merely protect criminals and would fail to protect society, since innocent prisoners would be released in any event and the guilty justly convicted. In an unlawful search and seizure, or in some coerced confession cases,[67] or in a wiretapping circumstance,[68] there are times when the evidence may be totally reliable and would not tend to convict the innocent. Notwithstanding, this has never been considered a valid reason for admissibility under these conditions. The uncivilized methods employed outside of the courtroom have led to convictions being vitiated. The very provisions of the Constitution contemplate that some criminals must go free so that the rights of all are protected. Our system does not validate the unlawful actions of law enforcers by subsequent findings against the defendant. There should be no constitutional difference between a trial which uses reliable evidence brutally obtained and a proceeding against a defendant violently obtained. The underlying illegality offends the concept of ordered liberty.

Whether brutality alone in a criminal procedure is enough to vitiate a conviction is debatable. The nearest the Supreme Court has come to answering this question was in the case of *Rochin v. California*,[69] wherein three city deputy sheriffs forced enemetic, by means of a tube, into the defendant's stomach in order to recover capsules of morphine which the defendant allegedly swallowed. The Supreme Court reversed the state conviction[70] because the evidence was obtained by methods that offend due process and "shock the conscience." Apparently the violence and physical brutality were the reasons for the reversal, since in the pre-*Mapp*

66. 367 U.S. 643, 667 (1961).

67. The Supreme Court has consistently held that evidence based on coerced confessions is not admissible. Escobedo v. Illinois, 378 U.S. 478 (1964), (violation of sixth amendment); Spano v. New York, 360 U.S. 315 (1959); Fikes v. Alabama, 352 U.S. 191 (1957); Stein v. New York, 360 U.S. 315 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

68. The Supreme Court has held that evidence based on an unlawful wiretap may not be admitted in a federal court. Benanti v. United States, 355 U.S. 96 (1957); Nardone v. United States, 302 U.S. 379 (1937). Although if done by a state official, it may be admitted into evidence in a state court. Schwartz v. Texas, 344 U.S. 199 (1952). The Schwartz decision is questionable in light of the Mapp decision since Schwartz was based to a great extent on Wolf v. Colorado, 338 U.S. 25 (1949), which was overruled by Mapp v. Ohio, 367 U.S. 643 (1961).

69. 342 U.S. 165 (1952). It must be noted that Rochin was decided a few months before Frisbie v. Collins, 342 U.S. 519 (1952). Rochin was decided in January, 1952; Frisbie was decided in March 1952.

70. 101 Cal. App. 2d 140, 225 P.2d 1 (1950).

era, other types of non-violent unlawfully seized evidence could have been admitted in a state court.

It is paradoxical for a state to flout constitutional rights and at the same time demand that its citizens observe the law. It is important to change the jurisdiction rule in order to restrain the law officials or there will be a tendency to destroy the whole system of restraints. In *Elkins v. United States*,[71] Mr. Justice Stewart stated that the purpose of excluding unreasonably seized evidence was to remove police incentive to disregard the constitutional guaranty. This is also a reason for not admitting involuntary confessions.[72] The Court in this situation must also remove the incentive to disregard use of lawful methods in obtaining jurisdiction over defendants. The individual's rights must be protected by voiding a conviction based on unlawful jurisdiction. This is necessary to deter police misconduct and to provide an indispensable device for the enforcement of defendant's rights.

In the preceding paragraphs, an attempt has been made to show that a conviction based on unlawful methods of obtaining jurisdiction over the defendant violates the due process clause. Another approach to reach this same result may be had by using a fourth amendment argument. The fourth amendment provides that, "The right of the people to be secure in their *persons*, house, papers, and effects, *against unreasonable* searches and *seizures*, shall not be violated. . . ."[73] (Emphasis added.) Literal reading of this language would indicate that unlawful seizures of a fugitive by a federal official would violate the fourth amendment. And likewise, using the rationale of *Mapp*, they would equally violate the fourteenth amendment when done by state officials.

This argument has not been made in any reported cases involving federal officers. The lower federal courts have continually held that there is jurisdiction over a defendant kidnapped by federal officers and imported from a foreign country.[74] The fourth amendment contention is not apparent in any of these cases, either because it was not made by counsel or because the court carefully avoided the problem. In the prior search and seizure cases, the Court has consistently protected the defendant's property.[75]

---

71. 364 U.S. 206 (1960). See Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., C. & P.S. 246, 251 (1961).

72. In Spano v. New York, 360 U.S. 315, 320 (1959), it was stated by Mr. Chief Justice Warren that, "The abhorrance of society to the use of involuntary confessions does not turn also on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

73. U.S. CONST. amend. IV.

74. Gillars v. United States, 182 F.2d 962 (Munic. Ct. App. D.C. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); United States v. Unverzagt, 5 F.2d 492 (9th Cir. 1925), *cert. denied*, 269 U.S. 566 (1925); United States v. Insull, 8 F. Supp. 311 (N.D. Ill. 1934); *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Texas 1934).

75. See Comment, 7 VILL. L. REV. 407 (1962).

Certainly, if the defendant's property is to be protected from unlawful seizures, his person must be equally protected. This position is patent in the fourth amendment. Whether the Supreme Court will agree with this reasoning can only be speculative. However, unless the Court avoids the problem, it is difficult to see how they could justify holding to the contrary.

If the unlawful jurisdiction rule is changed many new problems will be encountered. Should it matter if the impropriety was interstate or intrastate?[76] Would a different rule apply if the state was not involved in the wrongful act?[77] How should the defendant be disposed of?[78] All of these questions would have to be answered. This comment cannot solve the myriad of new problems that would be created by a new rule. These problems, however, are no different than the many other issues which face a court with every judicial change. They should not deter the altering of the old rule.[79] Under certain circumstances there is nothing wrong with the criminal going free because the police have blundered.[80]

III.

CONCLUSION

Both the civil and criminal areas desperately need reform and rethinking. While various states indicate concern over the technicalities of protection for the nonresident in civil litigation they refuse to give even the barest protection to the nonresident accused of a crime. Clearly such an attitude is inequitable and possibly unconstitutional. The time has come for a complete reorganization of our treatment of the nonresident.

Malcolm J. Gross

Robert M. Schwartz

---

76. An absurd situation could arise in the intrastate impropriety. As the defendant is released because of the unlawful jurisdiction, he could be arrested instantly for the same crime if the illegality occurred because of brutality.

77. Perhaps an analogy could be made to evidence obtained by private individuals pursuant to an unlawful search and seizure. The introduction of such evidence was held not to be violative of the defendant's constitutional right since the Constitution restrains only governmental action. See Burdeau v. McDowell, 256 U.S. 465 (1921); State v. Woods, 62 Utah 397, 220 Pac. 215 (1923); *Cf.*, Moody v. United States, 163 A.2d 337 (D.C. App. 1960).

78. One easy solution would be to allow the defendant a reasonable time in which to leave the state.

79. In accord with this position is Scott, *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953).

80. See People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), where Judge Cardozo gave, as one of his reasons against the exclusionary rule, the principle that "The criminal is to go free because the constable has blundered."