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PROCESS--IMMUNITY FROM SERVICE--PERSON ENTERING A STATE TO FILE AN ACTION

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PROCESS—IMMUNITY FROM SERVICE—PERSON ENTERING A STATE TO FILE AN ACTION—Petitioner, a resident of Missouri, entered California to gain custody of his child from its maternal grandmother. After eight days of fruitless negotiation he commenced habeas corpus proceedings. While attempting to serve the writ of habeas corpus, petitioner was served with a summons in an action brought

by the grandmother for support of the child. When the trial court denied petitioner's motion to quash the service of summons on him, he sought a writ of prohibition from the district court of appeals to prevent further prosecution of the second action. *Held,* petition denied; petitioner's eight day delay justified inference that his controlling purpose in entering the state was not to file an action. *Franklin v. Superior Court,* (Cal. App. 1950) 220 P. (2d) 8.

As a general rule, nonresidents who enter a state to testify at the trial of an action are immune from the service of civil process in another action while in court and for a reasonable time required in coming and going.[1] The privilege extends to persons who are witnesses only[2] and generally also to persons who are both witnesses and parties to the action.[3] These exemptions are founded on sound public policy in that the due administration of justice requires that persons whose presence is necessary to the full presentation of a cause should be available to the court and should be encouraged to enter the state without fear of being served with process in another action.[4] But because the principle of immunity is in derogation of every creditor's right to subject his debtor to suit wherever the debtor is found, the privilege should not be extended beyond the reason of the rule on which it is founded.[5] The immunity rule has been extended to include nonresident parties in attendance on any judicial proceeding which directly relates to the examination of the issues of fact involved.[6] Thus, the privilege has been granted to a nonresident party present to attend the taking of depositions of his adversary's witnesses[7] and to a nonresident creditor present to attend a hearing before a commissioner in bankruptcy.[8] Since in these instances the presence of such persons facilitates the full presentation of the cause, these decisions are well within the policy behind the rule. On the other hand, it is generally recognized that one who comes into a jurisdiction merely to confer with counsel, or to discuss matters that may become the subject of litigation, is not exempt.[9] The usual statement of the immunity rule is broad enough to include within its terms persons who enter a state to commence an action.[10] How-

[1] Moseley v. Ricks, 223 Iowa 1038, 277 N.W. 23 (1937); Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

[2] Nichols v. Norton, (8th Cir. 1882) 14 F. 327.

[3] Stewart v. Ramsay, 242 U.S. 128, 37 S.Ct. 44 (1916); Diamond v. Earle, 217 Mass. 499, 105 N.E. 363 (1914). Some jurisdictions do not grant the privilege to parties, even though they are also witnesses. Baldwin v. Emerson, 16 R.I. 304, 15 A. 579 (1892); Guynn v. McDaneld, 4 Idaho 606, 43 P. 74 (1895). In Connecticut, defendants are immune but plaintiffs are not. Bishop v. Vose, 27 Conn. 1 (1858); Wilson Sewing Machine Co. v. Wilson, 51 Conn. 595 (1884); Ryan v. Ebecke, 102 Conn. 12, 128 A. 14 (1925).

[4] Sofge v. Lowe, 131 Tenn. 626, 176 S.W. 106 (1915); Brooks v. State ex rel. Richards, 3 Boyce (26 Del.) 1, 79 A. 790 (1911); ALDERSON, JUDICIAL WRITS AND PROCESS §119 (1895).

[5] Murrey v. Murrey, 216 Cal. 707, 16 P. (2d) 741 (1932). See also Guynn v. McDaneld, supra note 3.

[6] Durst v. Tautges, (7th Cir. 1930) 44 F. (2d) 507.

[7] Parker v. Marco, 137 N.Y. 585, 32 N.E. 989 (1893).

[8] Matthews v. Tufts, 87 N.Y. 568 (1882).

[9] Vaughn v. Boyd, 142 Ga. 230, 82 S.W. 576 (1914); Brooks v. State ex rel. Richards, supra note 4.

[10] Stewart v. Ramsay, supra note 3.

ever, there appears to be no decided case holding that such a person is immune, nor any case holding to the contrary. It is submitted that such persons should not be immune, since the only sound basis for the rule limits the privilege to persons whose presence is necessary to the court in the administration of justice.[11] However, the courts have often used reasons to support the immunity rule that are as applicable to persons who enter a state to file an action as they are to parties who enter to attend the trial.[12] Moreover, immunity has been granted to persons whose presence could not be considered necessary to the court. Thus, parties present to attend argument on demurrer[13] and parties present to attend proceedings before an appellate tribunal[14] have been held exempt. These decisions and statements of policy have been criticized;[15] and it is difficult to see that any real public interest is served by making exempt from service of process persons whose presence is not necessary to the determination of the cause. However, there is some authority for extending the privilege to a person who enters a state to commence an action. The court in the principal case shows no unwillingness to grant immunity to such a person,[16] but the decision rests on a different ground. Petitioner was denied the privilege because his controlling purpose in entering California was not to commence litigation but to gain custody of his child without litigation. No court has granted immunity to any party unless it appeared that his "main and controlling reason"[17] in entering the jurisdiction had some reference to judicial proceedings, and some courts require that attendance on such proceedings be his "sole purpose."[18] It is submitted that the decision is thus consistent with the general current of the authorities.

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[11] Brooks v. State ex rel. Richards, supra note 4. Keeffe and Roscia, "Immunity and Sentimentality," 32 CORN. L.Q. 471 (1947).

[12] Halsey v. Stewart, 1 Southard (4 N.J.L.) 426 (1817); Stewart v. Ramsay, supra note 3.

[13] Kinne v. Lant, (C.C. Mich. 1895) 68 F. 436.

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

[15] Keeffe and Roscia, "Immunity and Sentimentality," 32 CORN. L.Q. 471 (1947).

[16] Principal case at 10.

[17] Burroughs v. Cocke, 56 Okla. 627, 156 P. 196 (1916).

[18] Connelly v. Wayne Circuit Judge, 227 Mich. 139, 198 N.W. 585 (1924); Sofge v. Lowe, supra note 4.