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Immunity and Sentimentality

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IMMUNITY AND SENTIMENTALITY

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When a non-resident comes to New York (or to any one of the other states) to sue a resident, there often appears on the scene that ubiquitous figure in the law, the third party.[1] He wants to bring suit against the non-resident. The answer almost invariably given by the courts[2] is that he may not do so, though he be a descendant of Peter Minuit and serve the non-resident with a perfectly valid summons.

The purpose of this paper is to make a brief inquiry into the problem of immunity, and to consider those theories, among others, which preclude the unfortunate third party from suing the non-resident.

There may be other fields in the law of more commanding importance and more subtle and intricate facets, but it is believed that the immunity problem is worthy of attention for two reasons. First, there is perhaps nothing more frustrating and disillusioning to the putative litigant (and his lawyer) with a good cause of action than to find himself, at the very threshold of his law suit, forced abruptly out of court, because of an invalid service of summons. Second, when the rules which are decisive in a field of law seem in the main to impose arbitrary and unjust burdens and benefits, they are in need of drastic revision and change.

The problem has been with us a long time, although its antecedents in English case law are relatively few.[3] In America, however, where a citizen of one state is a non-resident of 47 other states,[4] it has frequently become

[1]The privilege embraces not only non-residents in attendance but those coming to or going from a judicial proceeding. It has even been held that a non-resident returning from a trial in a foreign state is immune from the service of a summons issued in a state through which he is passing on his way home. Sofge v. Lowe, 131 Tenn. 626, 176 S. W. 106 (1915) L. R. A. 1916A, 734.

[2]See note 13 *infra*.

[3]See VINER, ABRIDGMENT, Tit., Privilege, B, pl. 1, 16; ALDERSON, JUDICIAL WRITS AND PROCESS (1895) §§ 116, 118; Notes 25 L. R. A. 721 (1894); (1920) 33 HARV. L. REV. 721, 722.

[4]The number of counties of which a citizen is a non-resident is astronomical. Yet in most states, courts whose jurisdiction is limited to the confines of the county grant immunity to persons who are not residents of the county. For a compilation of the cases see 50 C. J. §§ 231-233.

important to know whether a non-resident engaged in a civil suit or other judicial hearing[5] can be served with process in another suit by a third party.

As a consequence, a considerable body of American case law has been built up. Whether, as the writers believe, the principles and policies it embodies are generally unsound and undesirable or not, few deny that the cases present a tangled underbrush devoid of reliable paths for the guidance of litigants. There are minority rules and majority rules and sufficient dicta to provide several intermediate ones.[6] But there seems to be a dearth of studied opinons and a disdain or unawareness of practical considerations.

To vivify the situations wherever possible and to avoid ambiguity, the non-resident whether he be plaintiff, defendant or witness, will be called *N;* the resident whether sued or suing will be called *R;* and the third party, whether he be resident or non-resident, or, as is sometimes the case, an original litigant attempting an independent action, will be called *T*. That *T* is usually unfortunate will appear.

I

The leading Supreme Court decision[7] considers the *N, R* and *T* triangle in its stock arrangement: the non-resident plaintiff in a civil action against whom suit is attempted.

There *N,* a resident of Colorado, came down to the Northern District of Illinois to start an action against *R*. During the pendency of the suit, *T,* a citizen and resident of Illinois, served a summons upon *N* in order to begin an independent action. *N* pleaded in abatement that he was a citizen of Colorado and that he had been served while leaving the courthouse where he had been in attendance, as witness, upon the suit which he was prosecuting.

The District Court held *N* exempt from service of process. The Supreme Court affirmed, explaining the immunity of *N* by this argument:

> "The true rule, well founded in reason and sustained by the greater weight of authority, is, that suitors, as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process

[5]The privilege has not been restricted to court proceedings however but has been claimed generally in any proceeding which is judicial in nature. Matthews v. Tufts, 87 N. Y. 568 (1882) (a meeting of creditors before a register in bankruptcy); Roschynialski v. Hale, 201 Fed. 1017 (D. C. Neb. 1913) (taking of a deposition before a notary public); Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893) (examination before trial). See Notes (1934) 23 GEO. L. J. 314, 316; (1932) 10 NEB. L. BULL. 450.

[6]See Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 379, 90 N. E. 962, 27 L. R. A. (NS) 333 (1910).

[7]Stewart v. Ramsay, 242 U. S. 128, 37 Sup. Ct. 44 (1916).

while in attendance upon court, and during a reasonable time in coming and going. . . . 'Courts of Justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen . . . should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance.' . . . 'The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attempting to testify.' "[8]

We see, then, that the opinion makes these two points:

1. "Courts of Justice ought everywhere to be open" and protect every man who approaches them.

2. The privilege of immunity is founded upon the necessities of the judicial administration which might be embarrassed and interrupted if a litigant were served with process.

These are two classical arguments which have been quoted and requoted for years by federal and state courts in cutting off the rights of the unfortunate *T*.[9]

There are these further reasons that have been employed:

3. The doctrine of immunity is necessary to the maintenance of the court's dignity.[10]

4. The reason for the rule of immunity is to promote the due administration of justice and encourage the attendance of persons necessary to the exercise of the judicial function.[11]

5. The doctrine of immunity is based on sound public policy being for the benefit of the court as well as for the parties.[12]

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[8]*Id.* at 129, 130, Sup. Ct. at 45.

[9]Parker v. Hotchkiss, 18 Fed. Cas. 1137, No. 10,739 (C. C. E. D. Pa. 1849); Long v. Ansell, 293 U. S. 76, 55 Sup. Ct. 21 (1934); Person v. Grier, 66 N. Y. 124 (1876); Halsey v. Stewart, 4 N. J. L. 366 (1817); Diamond v. Earle, 217 Mass. 499, 105 N. E. 363 (1914), 38 Ann. Cas. 1915D 984, 985.

[10]Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); Finucane v. Warner, 194 N. Y. 160, 86 N. E. 1118 (1893).

[11]Page Co. v. MacDonald, 261 U. S. 446, 43 Sup. Ct. 416 (1923); Stratton v. Hughes, 211 Fed. 557 (D. C. N. J. 1914); Chittenden v. Carter, 82 Conn. 585, 74 Atl. 884 (1909); Matthews v. Tufts, 87 N. Y. 568 (1882); Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549 (1887); Martin v. Bacon, 76 Ark. 158, 88 S. W. 863 (1905).

[12]Chittenden v. Carter, 82 Conn. 585, 74 Atl. 884 (1909); Powell v. Pangborn, 161 App. Div. 453, 145 N. Y. Supp. 1073 (2d Dep't 1914); Rizo v. Burruel, 23 Ariz. 137, 202 Pac. 234 (1921); Wilson v. Donaldson, 117 Ind. 356, 20 N. E. 250 (1888); Halsey v. Stewart, 4 N. J. L. 426 (1817). *Cf.* Hardie v. Bryson, 44 F. Supp. 67 (E. D. Mo.

II

N *Considered as Plaintiff*

The courts that have granted immunity from service of process to non-resident plaintiffs[13] have based their decisions on some or all of the above formulae.

But what do they mean? It is a rather important question for *T*s everywhere since it deprives them of their common law right to sue their debtors wherever they may find them.[14] The writers believe that the formulae above, when applied, are devoid of either intellectual or moral forces; that in most instances the privilege of immunity is granted for reasons that are not sound but sentimental.[15]

1. *Courts of Justice ought everywhere to be open . . .*

The premise that courts of justice ought to be open to all is desirable and unassailable. But when upon it is predicated the theory that non-resident plaintiffs are immune from suit, we have a contortion whose desirability is dubious. The *Stewart* v. *Ramsay*[16] court made the premise and then proceeded to quash the service on *N*, thereby quite effectively closing the court of justice to *T*. The result is justified by saying that it is unfair to subject *N* in a foreign state to the uncertainties and financial burden of defending a suit which he may not have contemplated;[17] and that *T*'s rights are not impaired since he may sue his cause of action in Colorado.

But this is the partisan argument of a lawyer and should not be that of a court. It disregards the uncertainties and financial burden to which *T* may have been or will be subjected. It is impossible and undesirable for

1942). The rule of immunity is solely for the benefit of the court and is exercised in its discretion (and hence does not fall within the doctrine of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938)).

[13]The great majority of the courts grant the privilege to non-residents plaintiffs. 21 R. C. L. 1305, §§ 50-59; Note (1933) 85 A. L. R. 1340. The cases which deny non-resident plaintiffs immunity are few. Bishop v. Vose, 27 Conn. 1 (1858); Guynn v. McDaneld, 4 Idaho 605, 43 Pac. 74 (1895); Ellis v. De Garmo, 17 R. I. 715, 24 Atl. 579 (1892); Baldwin v. Emerson, 16 R. I. 304, 15 Atl. 83 (1888); Greer v. Young, 120 Ill. 184, 11 N. E. 206 (1887); Cassem v. Galvin, 158 Ill. 30, 41 N. E. 1087 (1895); Baisley v. Baisley, 113 Mo. 544, 21 S. W. 29 (1893); Mertens v. McMahon, 334 Mo. 175, 66 S. W. (2d) 127, 93 A. L. R. 1285, 1302 (1933).

[14]Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910). It is a basic concept that a person within the jurisdiction of a court is susceptible to its process. 1 BEALE, CONFLICT OF LAWS (1935) § 78.1; RESTATEMENT, CONFLICT OF LAWS (1934) § 78.

[15]For a contrary view that would consider such an opinion heretical as well as "absurd", see ALDERSON, JUDICIAL WRITS AND PROCESS (1895) § 119.

[16]242 U. S. 128, 37 Sup. Ct. 44 (1916).

[17]See notes 10 and 11 *supra*.

the court to attempt to weight the relative financial status and motives of litigants properly before the court in determining whether or not jurisdiction will be taken.

If we are to be just before we are generous, it will be seen that the premise is two-headed. If courts are to be accessible to all, *T*'s suit should be as maintainable as that of *N* against *R*. The result, then, is that the principle that courts of justice ought everywhere to be open is as sound a reason as can be found for achieving the contrary solution.[18]

2. *The necessities of the judicial administration.*

It is argued also that *N* might be distracted in the conduct of his suit against *R*, and that he might thereby be deterred from protecting his just rights by reason of liability to suit by *T* in Illinois.[19] Therefore, the necessities of the judicial administration require that *N* be granted immunity from suit by *T*.

Service of a summons upon a person who is already engaged in litigation is to be sure a distraction. It is similarly a distraction for residents in a like position; but it is nowhere argued that other suits against resident plaintiffs be likewise quashed.[20] Litigants always and everywhere are subject to distraction. Courts do not usually take cognizance of them unless they interfere with the progress of the suit. The test should not be the sentimental one of distraction but the real one of obstruction. Clearly, once *N* has begun suit against *R*, the mere pending of another action against *N* cannot conceivably obstruct the work of the court.[21]

Will *N* be deterred from "the fearless assertion"[22] of his claims and defenses if service is not quashed? If he will be, there is surely need for some immunity rule. But *T*'s suit is on an independent cause of action, entirely unrelated to the original litigation. It is difficult to see how the prosecution of *N*'s action will suffer in consequence of the possible liability

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[18]Note (1920) 33 HARV. L. REV. 721, 723. The writer of the note makes a vigorous criticism of the immunity doctrine.

[19]Stewart v. Ramsay, 242 U. S. 128, 37 Sup. Ct. 44 (1916).

[20]*Cf.* Baldwin v. Emerson, 16 R. I. 304, 15 Atl. 83 (1888). *But see* Cameron v. Roberts, 87 Wis. 291, 58 N. W. 376 (1894). Of course, a judge always has the power to punish for contempt an actual intrusion into the court.

[21]The courts which use the obstruction test make no distinction between the summons as a possible deterrent to a non-resident's suit and a summons as an obstruction to a suit already commenced. Ellis v. De Garmo, 17 R. I. 715, 24 Atl. 579 (1892).

[22]Parker v. Hotchkiss, 18 Fed. Cas. 1137, No. 10,739 (C. C. E. D. Pa. 1849) (cited and quoted with approval in Stewart v. Ramsay, 242 U. S. 128, 37 Sup. Ct. 44 (1916)).

to *T*.[23] As will be seen *N* may be dissuaded from suing at all, but once he does *N* requires no special protection against third parties.

The necessities of the judicial administration doctrine illustrates the cogency of the criticism that the courts have lost sight of the real reasons for granting immunity. Thus, if the proposition that the non-resident plaintiff be permitted the fearless assertion of his claims is carried to its logical extreme, a native defendant, such as *R* when sued by a non-resident, such as *N*, would be denied the right to counterclaim or make affirmative defenses. No court has yet arrived at the *reductio ad absurdum;* but the New York courts have approached it.[24]

However some jurisdictions do permit service on non-resident plaintiffs where the second cause of action is related to or arises out of the first.[25] And the Supreme Court[26] has recently declared constitutional a statute[27] which permits a cross-action against a non-resident plaintiff by service of summons on his attorney.

Such views are commendably progressive and perhaps indicate that the

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[23]The only considerations would be those of time and convenience. But no court would deny *N*, upon his application, a stay of adequate duration. *T*'s desire is to obtain jurisdiction over his adversary, not to saddle him with two simultaneous law suits.

[24]Petrova v. Roberts, 216 App. Div. 814, 216 N. Y. Supp. 897 (2d Dep't 1926) *aff'd without opinion,* 245 N. Y. 518, 157 N. E. 841 (1927). The original suit was begun by a non-resident alleging plagiarism. The defendant sought to institute an action for libel. Because at that time the Civil Practice Act (§ 266) forbade a counterclaim of this nature, the defendant was required to attempt an independent action. But service was quashed by the Appellate Division in a memorandum decision citing a long line of opinions granting immunity to non-resident suitors. Two judges dissented on the grounds that here at least an exception should be made to the immunity rule. The Court of Appeals affirmed without opinion, indicating the inflexibility of the immunity rule in New York. There seem to be no grounds for justifying the decision. It is interesting to note that if the instant case had arisen after 1936 (when the counterclaim statute was extensively liberalized) the libel action would have been permitted as a counterclaim. However, before 1936 the libel action could not be prosecuted *at all.*

Contra: Parmentier v. Cassies, 5 Alaska 83 (1914) where plaintiff was held amenable to process in an independent action by defendant which was not maintainable by way of counterclaim because of a controlling statute.

[25]Mullen v. Sanborn, 79 Md. 364, 29 Atl. 522 (1894) (attachment and malicious prosecution); Rizo v. Burruel, 23 Ariz. 137, 202 Pac. 234 (1921) (*habeas corpus* for child and adoption action); Tiedemann v. Tiedemann, 35 Nev. 259, 129 Pac. 313 (1912) (*habeas corpus* for child and divorce action); Livengood v. Ball, 63 Okla. 93, 162 Pac. 768 (1916) (debt and usury); Mosely v. Ricks, 223 Iowa 1038, 227 N. W. 23 (1937) (will contest an action against executrix). Similarly a non-resident is not exempt from suit based on an actionable wrong which he committed while in the state. Nichols v. Horton, 14 Fed. 327 (C. C. N. D. Iowa 1882); Iron Dyke Copper Mining Co. v. Iron Dyke R. R. Co., 132 Fed. 208 (C. C. N. D. Ore. 1904).

[26]Adam v. Saenger, 303 U. S. 59, 58 Sup. Ct. 454 (1938). Noted (1939) 12 So. CALIF. L. REV. 464.

[27]CAL. CODE CIV. PROC. (1937) §§ 442, 1015.

doctrine which prohibits suit against a non-resident plaintiff is in the slow process of being discarded. For there is an inherent inconsistency in holding that the fearless assertion of a non-resident's rights are impeded by his subjection to suits based on an independent cause of action but not by his subjection to suits arising out of or related to the original cause of action.

3. *The dignity of the court.*

The argument that the privilege of immunity for non-residents is necessary to maintain the dignity of the court probably has its origins in the early cases in England and America that held parties and witnesses—both resident and non-resident—immune from civil arrest.[28] There is a close relation between the authority and dignity of the court and the physical restraint of those who have come before it on judicial matters.

But a writ of arrest is a rare animal; and actions nowadays are commenced by a summons which is a mere notice. It is difficult to see how the service of a summons affects the authority and dignity of the court.[29] Is it not the business of the court to issue a summons?

The summons that *T* attempted to use against *N* in *Stewart* v. *Ramsay*[30] was issued by a Federal District Court. Is it not an affront to its own dignity when the Federal Court must quash its own service because *N* is busy suing in the very same court?

Or is it the dignity of the court in one aspect only that is involved?

In truth, it may well be argued that to deny immunity to *N* rather than confer it would enhance the dignity of the court. For once *N* invokes the jurisdiction of a given court in order to sue it is illogical to hold that he may not be sued within the same jurisdiction.

At any rate, "dignity" would seem to be a rather elusive concept for the unfortunate *T* to comprehend. In fact it would seem to be a rather difficult concept for anyone to comprehend.

4. *Due administration of justice . . . encouraging the attendance of necessary parties.*

The concept that the due administration of justice will be impeded unless

[28]See Montague v. Harrison, 3 C. B. N. S. 292, 298 (1857); Norris v. Beach, 2 Johns. 294 (N. Y. 1807); Sanford v. Chase, 3 Cow. 381 (N. Y. 1824). Service without arrest, however, was merely a contempt of court; the writ remained valid. Cole v. Hawkins, 2 Strange 1094 (1738); Poole v. Gould, 1 H & N 99 (1856).

[29]A summons amounting merely to a notice can neither obstruct justice nor interfere with the attendance of a party to a suit already on trial. Ellis v. De Garmo, 17 R. I. 715, 24 Atl. 579 (1892).

[30]242 U. S. 128, 37 Sup. Ct. 44 (1916).

the necessary persons are in attendance is the sound basis upon which the immunity doctrine arose.[31] Where the exigencies of the judicial machinery are such that the presence of certain persons otherwise unobtainable is needed the granting of privileges to secure their attendance is a logical and necessary function.

Thus, it is everywhere recognized that witnesses from other jurisdictions are immune from service of process while coming to, attending upon, and returning from a judicial hearing.[32] If they do not come voluntarily, their presence cannot be compelled; hence immunity from suit is granted them. Although a deposition could be taken and used there is a natural and proper preference for oral testimony delivered in the court room.

In the case of non-resident witnesses, then, to speak of "due administration of justice", "encouragement of necessary persons", "judicial necessities", is to make a substantial argument, since the formulae are solidly welded to real considerations.[33]

Can these arguments now be transposed, by quick and neat analogies as so many courts have done,[34] to the non-resident plaintiff, or more specifically *N*?

There is surely a clear cut distinction, unbridgeable by analogy, between *N* who comes to Illinois to begin a law suit and *X*, a witness who comes to testify in a law suit already before the court. The court is not concerned with whether *N* comes to Illinois to sue *R* or waits until he can catch *R* in Colorado climbing Pike's Peak and there halt his progress with a summons. The same court is, however, from the point of view of due administration of justice, concerned with the presence of *X*.

To say that *N* comes to Illinois to further the interests of justice is rather fanciful.[35] He comes, almost always, because he cannot do otherwise. If *R* had been seen loitering about the base of Pike's Peak or if he had property in

[31]Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910).

[32]Only one case has been found which refused to grant a non-resident witness immunity. Baskerville v. Kofsky, 18 N. J. Misc. 325, 13 Atl. 2d 562 (C. P. 1940), noted (1940) 5 U. OF NEWARK L. REV. 410; (1940) 74 N. Y. L. REV. 363. (The witness' actions had been both fraudulent and collusive in regard to the original proceedings.)

[33]The administration of justice might be retarded if non-resident witnesses entering a state voluntarily were not entitled to immunity. 1 BEALE, CONFLICT OF LAWS (1935) § 78.5.

In a civil action a non-resident witness' attendance could not be compelled. In regard to witnesses in criminal cases a different situation prevails under the UNIFORM CRIMINAL EXTRADITION ACT § 4. See *infra* note 83.

[34]Page Co. v. MacDonald, 261 U. S. 446, 43 Sup. Ct. 416 (1923); Person v. Grier, 66 N. Y. 124 (1876); Matthews v. Tufts, 87 N. Y. 568 (1882); Halsey v. Stewart, 4 N. J. L. 366 (1817).

[35]Baldwin v. Emerson, 16 R. I. 304, 15 Atl. 83 (1888).

Colorado which might have been attached or other constructive service had been available against him,[36] it is extremely doubtful that *N* would have sought him out in Illinois.

There is a need for granting the reward of immunity to witnesses since in a real sense, conduct of law suits would be obstructed if they are not in attendance to give oral testimony; and their physical presence cannot be compelled. But it is a plaintiff's own interest which causes him to come to sue, not the court's. His inducement is the judgment which he is seeking.

5. *Public Policy.*

The concept of public policy is at best tenuous but nevertheless its invocation is quite essential when privileges and rights are at issue. Few decisions in the immunity field have omitted references to "sound public policy."[37]

It is only a partial solution to the prerequisites of public policy to aver that *N* has a constitutional right to enter Illinois and maintain an action in either the federal or state courts free from molestation. For he has, for example, an equal right to confer in Chicago with Marshall Field about a million dollar contract. In the latter event he is not immune from service of process. Does the right to go to Illinois to sue constitute a right of a higher dignity? And, if so, is it so high that it will serve to deprive an Illinois resident, such as *T*, of *his* right to sue his debtor wherever he may find him?

Most courts recognize that if *N* had visited Illinois not only to commence an action but also to attend to personal affairs, he would not have been exempt from service of process in the action by *T*.[38] Such a distinction is a forceful illustration of the argument that immunity for non-resident plaintiffs cannot have its basis on the supposed necessities of public policy. For if sound public policy requires that plaintiffs be immune, does it matter whether *N* is in Illinois only in order to bring suit or is there also for other reasons?

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[36]Service by publication or service upon a designee in certain cases can be had against a non-resident without the necessity of leaving the state. See *e.g.*, N. Y. CIV. PRAC. ACT §§ 232-235; N. Y. VEHICLE & TRAFFIC LAW § 52.

[37]Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); Powell v. Pangborn, 161 App. Div. 453, 145 N. Y. Supp. 1073 (2d Dep't 1914); Rizo v. Burruel, 23 Ariz. 137, 202 Pac. 234 (1921); Mitchell v. Huron Cir. Judge, 53 Mich. 541, 19 N. W. 176 (1884); Massey v. Colville, 45 N. J. L. 119 (1883); Cummins Adm'r v. Scherer, 231 Ky. 518, 21 S. W. (2d) 836 (1929).

[38]U. S. v. Lynch, 256 Fed. 983 (S. D. N. Y. 1918); Finucane v. Warner, 194 N. Y. 160, 86 N. E. 1118 (1893); Connally v. Judge Wayne Civ. Ct., 227 Mich. 139, 198 N. W. 585 (1924); Breon v. Miller Lumber Co., 83 S. C. 221, 65 S. E. 214, 24 L. R. A. (N.S.) 276 (1909). But if personal business was not the controlling reason for entering the state, some cases grant the immunity. Hammons v. Superior Court, 63 Cal. App. 700, 219 Pac. 1037 (1923); Burroughs v. Coche, 56 Okla. 627, 156 Pac. 196, L. R. A. 1916 E. 1170, 1173 (1916).

Or if it is maintained that the true reason is to encourage *N*'s entry and suit, it is submitted that Illinois is not the jungle and out-of-staters are hardly in need of privileges when pleading before its courts of justice.

In a day when persons were subject to arrest and physical restraint, all persons related to a cause which called for their attendance in court were exempt from such process.[39] The interest of the public required that such machinery not impede or obstruct the functions of the courts. And the determining factor was not residency or non-residency but the nature of the interference.[40]

But today the writ of arrest is but rarely used. Yet the thinking of the courts which find it necessary to protect non-residents from suit is based on the anachronism of actual interference with the judicial process.[41]

It is submitted that an approach more consonant with reality and more in accord with even-handed justice is illustrated by this extract from the opinion in *Baldwin* v. *Emerson*:[42]

> "The reason assigned for the exemption of non-resident suitors from the service of a summons are that courts of justice ought to be open and accessible to suitors; that they ought to be permitted to approach and attend the courts in the prosecution of their claims and the making of their defenses without the fear of molestation or hindrance; that their attention ought not to be distracted from the prosecution or defense of the pending suit; that they might be deterred from prosecuting their just rights or making their just defenses to a suit by reason of their liability to suit in a foreign jurisdiction. While we concede the force of the reasons advanced for protecting non-resident witnesses . . . , we are not convinced of the sufficiency of the reasons assigned for the

[39]In England the privilege was considered as solely that of the court, and the exemption from process extended only to arrest. ALDERSON, JUDICIAL WRITS AND PROCESS (1895) §122.

[40]Montague v. Harrison, 3 C. B. N. S. 292 (1857); Poole v. Gould, H. & N. 99 (1856). VINER, ABRIDGMENT, Tit., Privilege, B, Pl. 1, 3, 16.

[41]The history of the immunity privilege in New York is typical. In the early days suitors and witnesses alike were privileged from arrest because arrest meant an actual interference with the function of the court. Norris v. Beach, 2 Johns. 294 (N. Y. 1807); Sanford v. Chase, 3 Cow. 381 (N. Y. 1824). It was held clearly that suitors were not immune from service of a summons, as distinguished from arrest; and the only exception was for witnesses. Hopkins v. Coburn, 1 Wend. 292 (N. Y. 1828); Merrill v. George, 23 How. Pr. 331 (N. Y. 1862). However in Person v. Grier, 66 N. Y. 124 (1876) a dictum noted with approval that an unreported case (Van Lieuw v. Johnson (1871)) had held a non-resident suitor exempt from process. On the basis of this dictum the New York courts consistently have held non-resident suitors and witnesses immune, essentially on grounds that an interference with the court's function would otherwise result. For a review of the cases since Person v. Grier, see N. Y. L. J. March 13, 1936, p. 1294, col. 1, March 14, 1936, p. 1318, col. 1 and Sept. 4, 1936, p. 594, col. 1.

[42]16 R. I. 304, 15 Atl. 85 (1888).

exemption of non-resident suitors from such process. We think it would rarely happen that the attention of a non-resident plaintiff or defendant would be so distracted by the mere service of a summons from the immediate business in hand . . . that the interests of justice would suffer in consequence, or that the liability to such service would often deter them from prosecuting or defending their just claims or rights. The reasons assigned for the exemption would apply equally as well to resident as to non-resident suitors, and it has never been deemed necessary to exempt resident suitors from the service of a summons. . . . We think the reasons are fanciful rather then substantial."[43]

III

N *Considered as Defendant*

Except for an extremely small number of cases, the courts have not considered it necessary to make distinction[44] between non-resident plaintiffs and non-resident defendants for the purpose of immunity.[45] Rather, the same tests and formulae considered above have been utilized; and the courts, generally, have argued deductively from the premises rather than inductively from the facts. It is submitted that if, as one court has pointed out, "The privilege should . . . not be extended beyond the reason of the rule upon which it is founded",[46] a more pragmatic approach is necessary.

The writers have already attempted to point out the undesirability of extending the rule to plaintiffs. It does not follow that it is therefore undesirable in all cases to grant immunity from process to defendants. Each aspect of the problem must be considered separately.

A

Suppose *N* comes to Illinois as defendant in an action and is accompanied by his attorney *A* who is also a non-resident. The court appoints a re-

[43] *Id.* at 10.

[44] The distinction has been made in Connecticut. Bishop v. Vose, 27 Conn. 1 (1858) (plaintiff not privileged, with a dictum that defendants should not be privileged); Wilson Sewing Machine Co. v. Wilson, 51 Conn. 595, 22 Fed. 803 (C. C. D. Conn. 1885) (defendant distinguished from plaintiff and held privileged.) These cases have considered and rejected the distinction: Hale v. Wharton, 73 Fed. 739 (C. C. W. D. Mo. 1896); Roberts v. Thompson, 149 App. Div. 437, 134 N. Y. Supp. 363 (4th Dep't 1912); Fisk v. Westover, 4 S. D. 233, 55 N. W. 961 (1893).

[45] Rhode Island and Illinois are the only states in which non-residents are held without qualification to be amenable to process. Ellis v. DeGarmo, 17 R. I. 715, 24 Atl. 579. (1892); Capwell v. Sipe, 17 R. I. 475, 23 Atl. 14 (1891). Baldwin v. Emerson, 16 R. I. 304, 15 Atl. 83 (1888); Cassem v. Galvin, 158 Ill. 30, 41 N. E. 1087 (1895); Gree v. Young, 120 Ill. 184, 11 N. E. 167 (1887); compare Baisley v. Baisley, 113 Mo. 544, 21 S. W. 29 (1893) (where local statute involved).

[46] Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 380, 90 N. E. 962, 963 (1910).

ceiver and decrees conveyance of certain moneys and property. However, before the receiver can collect the money N conveys it to A as counsel fees. The receiver now commences an action against A to recover the money. Is A immune from service?[47]

This case came before the Supreme Court as *Lamb* v. *Schmitt*[48] and is considered here because it is the most recent[49] pronouncement of the Court on the subject of immunity. The Court found the attorney amenable to service of process. Its decision narrowed somewhat the broad immunity rule[50] which had been developed by the federal courts[51] and indicated that the Court may move in this direction in the future.

These two limitations of the immunity rule were approved: (1) no immunity need be conferred upon persons whose attendance—no matter how vital his personal interests—is not for the purpose of facilitating the progress of the cause, and (2) no immunity is required for persons whose attendance is not voluntary since service upon such has no tendency to interfere with judicial administration. Speaking through Mr. Justice Stone, the Court went on to say:

> "The test is whether the immunity itself, if allowed would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it."[52]

This is a noteworthy example of looking behind the formulae to the facts. If such a method is pursued in examining cases, it will be seen that it cannot be said flatly that all non-residents in attendance upon a judicial proceeding are immune from service of process.

Bearing in mind the stricture that that due administration of justice necessarily implies a balancing of conflicting rights and that, as the *Lamb* v. *Schmitt* Court points out, there is a distinction between voluntary and involuntary attendance,[53] a solution of the problems presented is not difficult.

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[47]There is conflicting authority on immunity for attorneys. See Ray, *Privilege of Non-Resident Attorneys From Service of Civil Process* (1929) 17 KY. L. J. 197. See also Note (1932) 16 MINN. L. REV. 599.

[48]285 U. S. 222, 52 Sup. Ct. 317 (1932); noted (1932) 41 YALE L. J. 1089.

[49]Long v. Ansell, 293 U. S. 76, 55 Sup. Ct. 21 (1934) is more recent but there the court considered the constitutional privilege of immunity from service of process as pleaded by a legislator.

[50]Compare Page Co. v. McDonald, 261 U. S. 446, 43 Sup. Ct. 416 (1923).

[51]The federal courts have consistently sustained the privilege for suitors as well as witnesses. It was first upheld in Parker v. Hotchkiss, 18 Fed. Cas. 1137, No. 10,739 (C. C. E. D. Pa. 1849) which overruled an earlier case which held that the privilege extended only to arrest and not to service of a summons. Blight v. Fisher, 3 Fed. Cas. 705, No. 1,542 (C. C. D. N. J. 1809).

[52]Lamb v. Schmitt, *supra* note 48 at 228, Sup. Ct. at 319.

[53]The voluntary-involuntary test has been used most frequently in cases where a civil summons is attempted upon a defendant or witness in a criminal action.

B

Suppose that *N* from Colorado has been defendant in a suit in New York. Later *N* returns to New York to attend a hearing on appeal and upon its conclusion and while returning home, though still within the state, is served with a summons in an action commenced by *T*. Should service upon *N* be quashed?

The answer in New York today is in the affirmative. The problem, in precisely this form, arose there twice.

In *Sampson* v. *Graves*[54] the Appellate Division found no relation between the attending of an appeal and the due administration of justice. Consequently, it refused to set aside service of the summons on the defendant. However the Court of Appeals in *Chase National Bank* v. *Turner*[55] reached the contrary result[56] on an identical fact situation. In the meantime, the United States Supreme Court in the *Lamb* case had cited the *Sampson* case with approval for the reasons given above.

The decision in the *Turner* case is based primarily on the argument that a client may be of some assistance to his attorney on the hearing before the appellate court. This is questionable but granting its merit, it is submitted that this is not the point.

The issue is, rather, whether the defendant's appearance is to be clothed with a privilege, not whether he is to be admitted or forbidden. The defendant comes as even the Court intimates, because it is in his best interests to come.[57] Because the personal interests of *N* are served by his presence, it does not follow that, therefore, the dignity and authority of the court and the due administration of justice require that *N*'s presence be accompanied by an immunity from suit. Ultimately, the soundness of the decision in the *Turner* case depends on whether or not a defendant in attendance upon the trial court should be immune, since logically there can be no distinction between the two. This will be considered below.

C

Suppose *N* comes to Brooklyn to attend a Dodgers baseball game at Ebbetts Field. While there he is served with a summons. *N* returns home

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[54]208 App. Div. 522, 203 N. Y. Supp. 729 (1st Dep't 1924).

[55]269 N. Y. 397, 199 N. E. 636 (1936), noted (1936) 5 BROOKLYN L. REV. 338; (1936) 10 ST. JOHN'S L. REV. 348.

[56]*Accord,* Miles v. McCullough, 1 Binn. 77 (Pa. 1803).

[57]"But it would seem that it is the party's own interest, whether he be plaintiff or defendant, and not the court's, which demands his presence". Note (1920) 33 HARV. L. REV. 721, 723.

and later returns to Brooklyn to attend the trial where he is to be a witness on his own behalf. While within the state *N* is served with summons in an independent action by *T*. Should this service of summons be set aside? This is the pattern of the more usual situation.[58]

There is some force in the argument that a party who comes into a state to defend a suit is unlike the one who enters to commence a suit.[59] He does not invoke the jurisdiction of the Court; it is invoked against him. Thus, *N* here may well refrain from appearing at all if he fears other actions against him.

Hence, it is argued, such a person requires a privileged status else the due administration of justice may be impeded. What is really meant, however, is not that the judicial necessities will be obstructed but that the personal interests of *N* may suffer.[60]

For, basically, the *N* who appears before the trial court is in the same position as the *N* who attends the hearing on appeal. It is for this reason that the *Turner* decision is actually quite consistent with the broad application of the immunity privilege. Once the premise that parties at judicial functions are to be privileged is postulated, then the demonstration of *any* connection of the party with the proceedings is sufficient;[61] one word into the attorney's ear may be as efficacious as ten pages of testimony, as the court points out by implication.

If the decision in the *Turner* case is unsound, it must follow not that defendants attending hearings on appeal are subject to service of summons and those attending trial court proceedings are immune, but that non-residents in either situation are not immune.

However, almost all courts have held that non-resident defendants are exempt from service of process.[62] The arguments are precisely those we have considered in connection with plaintiffs. Whether they are applicable depends on the factual position of the defendant.

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[58]Hardie v. Bryson, 44 F. Supp. 67 (E. D. Mo, 1942); Hale v. Wharton, 73 Fed. 739 (C. C. W. D. Mo. 1896); Wilson Sewing Machine Co v. Wilson, 51 Conn. 595, 22 Fed. 803 (C. C. D. Conn. 1885). Similar situations on principle are those where a non-resident enters a state to attend a judicial proceeding in a capacity other than that of plaintiff or disinterested witness, *e.g.*, Matthews v. Tufts, 87 N. Y. 568 (1882); Powell v. Pangborn, 161 App. Div. 453, 145 N. Y. Supp. 1073 (2d Dep't 1914).

[59]Wilson Sewing Machine Co. v. Wilson, 51 Conn. 595, 597, 22 Fed. 803, 804 (C. C. D. Conn. 1885).

[60]See note 57 *supra*.

[61]However non-residents who come within the jurisdiction to attend to matters which may become the subject of litigation have been held not privileged. Vaughn v. Boyd, 142 Ga. 230, 82 S. E. 576 (1914).

[62]For those jurisdictions which have not, see note 43 *supra*.

Having been served with a summons in New York, *N* is under an economic and often moral compulsion to return to defend the action against him. In this sense his re-entry into the state will not be voluntary. Nevertheless, as respects the judicial process, his re-entry is voluntary since he is under no legal compulsion to appear in actions against him. And we can be sure that if the service is for any technical reason void or voidable, *N* will not re-enter.

But his presence will not facilitate the progress of the cause since, if the service was good, the court can proceed without *N* and render a valid default judgment which will be *res adjudicata* against him in every state of the Union. Because of the possibility of other, more burdensome judgments against him, it may or may not be in *N*'s best interests to appear. His presence is a question of interest which he must decide. It should not be clothed with the dignity of a privilege and protected by the courts since such a practice deprives resident creditors of the conflicting right to sue.[63] The due administration of justice is aided not at all by merely abetting the interests of one class to the detriment of another.

If any service to justice were indeed rendered by the granting of immunity to suitors, then it would inescapably follow that *resident* suitors should be as immune as the great weight of authority now holds non-residents to be immune. For, if it is maintained, as it has been, that suitors should not be disturbed by other litigation while engaged in the prosecution or defense of a law suit, the matter of residency is irrelevant.

However, assuming for the sake of argument that a sound public policy requires that *N* should be immune from suit by *T* when he comes to New York to defend the action begun by *R*, there is a final consideration to be dealt with.

If suit could have been begun in New York by *T* without the necessity of personal service of summons on *N*, such suit should not fall within the ambit of the immunity rule. There should be a distinction, at least, between actions against *N* which require personal service and those which could have been commenced in New York against him even though he never left Colorado.[64] It would be a strange anomaly to hold that a non-resident is amenable to constructive service but not amenable to personal service while within the jurisdiction. Yet, though such a distinction would be expedient as well as just, no court has made it and it would seem to be precluded by the present broad immunity doctrine.

[63] See Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910).
[64] See note 36 *supra*.

Conversely, if neither personal nor constructive service is available against *N*, and he enters the jurisdiction voluntarily in order to submit to suit, there would seem to be a valid ground for granting the privilege.

IV

N *Considered as Defendant in a Criminal Action*

Courts have experienced a great deal of difficulty with the cases on immunity but nowhere is there more confusion[65] than in the cases concerning non-resident defendants in criminal actions. These arise when a non-resident defendant in a criminal action is served with a summons in a civil action and the non-resident pleads the immunity privilege as a bar to the service. The principles we have adduced in respect to witnesses and suitors in civil actions while not necessarily decisive may be used by way of analogy.

It is perhaps the only undisputable premise in the field that persons whose presence is required but unobtainable should be privileged upon voluntary attendance. Sound public policy requires such an immunity. But the premise has, as we have seen, been enlarged. The difficulty lies in determining how far the expansion should go.

Requests for immunity by non-resident defendants in criminal actions may arise in one of four possible situations.[66]

1. Where *N* has been arrested in the state where the alleged offense has been committed and is served with civil process either while in custody or immediately after his discharge, but before departure from the state.

In such cases it would require an extreme and insubstantial argument to grant immunity. But such argument has been found and employed.[67] However, contrary to the fears of such courts that the accused will be "distracted"[68] and justice obstructed, the privilege is generally denied.[69]

2. Where the defendant *N* has been extradited and is served with civil process while in custody or immediately after discharge.

Though in this situation the defendant has done nothing to merit a special

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[65]The confusion is actually a healthy sign since it indicates that here at least the courts have not granted a blanket immunity.

[66]Note (1925) 20 ILL. L. REV. 172.

[67]Feister v. Hulic, 228 Fed. 821 (E. D. Pa. 1916); Silvey's Estate v. Koppel, 107 S. C. 106, 91 S. E. 975 (1917).

[68]Silvey's Estate v. Koppel, *supra* note 67 at 108.

[69]Netograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910); State ex rel. Alexander-Coplin Co. v. Superior Ct. for King County, 186 Wash. 354, 57 P. (2d) 1262 (1936), noted (1937) 37 COL. L. REV. 137; Ryan v. Ebecke, 102 Conn. 12, 128 Atl. 14 (1925); Husby v. Emmons, 148 Wash. 333, 268 Pac. 886 (1928).

privilege, some courts grant him an immunity.[70] The exemption is based on the theory that the stimulus to the non-resident's coming to plead in a civil action is immaterial, and, apart from any consideration of voluntary or involuntary appearance, "broad grounds of public policy and individual right,"[71] require the invocation of the immunity rule.

The better view followed by the majority of courts[72] is that when defendant *N* has been extradited and makes an involuntary appearance there is no need of gratuities. The objection that such a view may lead to an abuse of extradition is of little force since fraudulent use of extradition to obtain civil process is everywhere recognized as ground for vacating process.[73]

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

Within the area of voluntary submission of defendants to the criminal court, there is varying authority. If *N* could not have been extradited, it is clear that there is a need for encouraging his presence. Since the state requires his presence, and there is no method for compelling it, liability to a civil action is a possible though remote deterrent which is properly eliminated.

Extradition proceedings are almost always available, however, against defendants who are absent from the state of the alleged offense. Nevertheless, if *N* though extraditable, returns before extradition, a majority of courts grant an immunity from civil process.[74] The reason given is that a voluntary appearance saves the state expense and trouble and should, therefore, in the interests of sound policy be encouraged.[75] And, by analogy to the majority rule respecting non-resident defendants in civil actions, it is argued that if it is fair to grant the immunity to *N* in a civil action, it is likewise fair to grant it to him in a criminal action.[76]

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[70]Weale v. Clinton Circuit Judge, 158 Mich. 563, 123 N. W. 31 (1909); Moletor v. Sinnen, 76 Wis. 308, 44 N. W. 1099 (1890); Compton v. Wilder, 40 Ohio St. 130 (1883).

[71]Feuster v. Redshaw, 157 Md. 302, 145 Atl. 560 (1929).

[72]Williams v. Bacon, 10 Wend. 636 (N. Y. 1834); Reid v. Ham, 54 Minn. 305, 56 N. W. 35 (1893); *In re* Walker, 61 Neb. 803, 86 N. W. 510 (1901); Rutledge v. Krauss, 73 N. J. L. 397, 63 Atl. 988 (1906).

[73]Willard v. Zehr, 215 Ill. 148, 74 N. E. 107 (1905); Byler v. Jones, 79 Mo. 261 (1883); Smith v. Canal Zone, 249 Fed. 273 (C. C. A. 5th 1918). See generally on the subject of fraudulent enticement within the jurisdiction, Note (1930) 39 YALE L. J. 889.

[74]Benesch v. Foss, 31 F. (2d) 118 (E. D. Mass. 1929); *In re* Hall, 296 Fed. 780 (S. D. N. Y. 1924), *appeal dism. mem.* 2 F. (2d) 1016 (C. C. A. 2d, 1924); Church v. Church, 270 Fed. 361 (App. D. C. 1921); Michaelson v. Goldfarb, 94 N. J. L. 352, 110 Atl. 710 (1920).

[75]Church v. Church, 270 Fed. 361 (App. D. C. 1921).

[76]Kaufman v. Garner, 173 Fed. 550 (C. C. W. D. Ky. 1909). A similar argument is

Assuming that *N*'s immunity in civil cases is desirable, this attempt to make a uniform rule overlooks an important distinction: a defendant who commits an extraditable act needs no encouragement to appear since there is a legal weapon to compel his attendance.

Since the majority of the cases provide no immunity for extradited defendants, there can be no valid reason for granting it to those who return before extradition except the desire to save the state expense and trouble.[77] But such a rule incurs expense and trouble for the party *T*, with a cause of action against the defendant. And since it is not primarily the desire to be free of civil suits but the possibility of extradition which encourages recusant fugitives to submit to justice, there is no real need for expanding the rule of immunity.

4. Where a non-resident defendant *N* has given bail and returns to stand trial.

The opinion in *Netrograph Mfg. Co.* v. *Scrugham*[78] seems to have given the determinative answer to this problem. It was held there that there is no real difference between a person who is actually in custody and one who is at large on bail and that, therefore, the latter is not immune from service of process. The view has been followed elsewhere and would seem to be the sound one. The particular basis of the *Netrograph* decision is that a person admitted to bail is in *constructive* custody and thus as amenable to process as one actually in custody. The rule has been attacked as technical;[79] yet it is a logically necessary one. For it is based on the consideration that though a defendant on bail is apparently free not to appear, he is actually constrained to appear since he is always susceptible to extradition or to being forfeited by his bondsmen.

V

N *Considered as Witness in a Criminal Action*

The rule of immunity for non-resident witnesses voluntarily in attendance

that a possible liability to civil suit would subject the defendant to an harassing burden. Silvey's Estate v. Koppell, 107 S. C. 106, 91 S. E. 975 (1917).

[77]In many states part of the problem has been resolved by the adoption of the UNIFORM CRIMINAL EXTRADITION ACT which provides immunity from service of process for criminal defendants "in civil actions arising out of the same facts as the criminal proceeding". 9 UNIFORM LAWS ANNOTATED § 25 (1942). It would seem that the same rule should apply to defendants who come voluntarily before extradition.

However, in regard to immunity from civil actions not related to the criminal proceeding for which the defendant has been extradited, the case law is still controlling.

[78]197 N. Y. 377, 90 N. E. 962 (1910).

[79]Note (1925) 20 ILL. L. REV. 172, 177.

upon a criminal proceeding is as universal as the rule in civil cases.[80] There has been some conflict of authority, however, in regard to witnesses whose presence has been compelled by a subpoena.[81]

It would seem, on the basis of the preceding analysis[82] that a witness who attends involuntarily is not in need of an exemption. Nevertheless, the question of its desirability has now been rendered academic by statutes[83] which have been generally adopted granting the immunity to subpoenaed non-resident witnesses.

It may be that the great necessity for obtaining fleeing witnesses in criminal cases makes desirable the granting of any inducement to insure their coming.[84] And the urgency of this consideration may be argued as the justification for the immunity.

Conclusion

The immunity cases have in most instances been determined by a sentimentality singular in the law. The courts have often been preoccupied with concepts anachronistic at best with the result that the unfortunate *T* everywhere has been bearing a burden founded on neither good sense nor good law.

The time is surely at hand when the problem of immunity should be re-examined and more rational and liberal solutions, wherever they are needed, arrived at. Except for the statutes dealing with defendants and witnesses in criminal actions, the law has been made generally by the courts; the solutions lie with them. The precedents[85] for taking new and vigorous action are obscured but not dead.

The problem needs to be reconsidered anew. There is no better time than now.

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[80]Benesch v. Foss, 31 F. (2d) 118 (D. C. Mass. 1929); *In re* Hall, 296 Fed. 780 (S. D. N. Y. 1924). None of the cases which grant immunity to non-resident witnesses make any distinction between civil and criminal actions, so long as the witness' coming is voluntary.

[81]Kelly v. Pennington, 78 Colo. 482, 242 Pac. 681, 45 A. L. R. 339, 341 (1926); Underwood v. Fosha, 73 Kan. 408, 85 Pac. 564 (1906), 9 Ann. Cas. 833, 835 (1908); Dwelle v. Allen, 193 Fed. 546 (S. D. N. Y. 1912). *But see* Bunce v. Humphrey, 214 N. Y. 21, 108 N. E. 95 (1915). See for an excellent treatment of the subject, Note (1930) 43 HARV. L. REV. 802.

[82]See Lamb v. Schmitt, 285 U. S. 222, 52 Sup. Ct. 317 (1932).

[83]Most states have adopted the *Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings* which provides exemption for a subpoenaed witness "in connection with matters which arose before his entrance into this state under the subpoena". 9 UNIFORM LAWS ANNOTATED § 4 (1942).

[84]Toy and Shepherd, *The Problem of Fugitive Felons and Witnesses* (1934) 1 LAW & CONTEMP. PROB. 415, 420.

[85]See notes 41, 51 *supra*.