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The Immunity Doctrine Under Attack

Wangler v. Harvey

Defendant, a New York resident, was devisee of property located in New Jersey, and also was named executor of the estate in the will. Plaintiff, a New Jersey real estate broker who wished to sell the property, alleged that she was injured while being escorted by the defendant through the devised premises.

A suit based on these facts was instituted by plaintiff in New Jersey against defendant in his capacity as executor of the estate. Since defendant was a nonresident, this suit was instituted by serving process upon the surrogate pursuant to the power of attorney required to be filed with the surrogate. During the course of the trial, defendant was served with summons and complaint which named him as defendant in his individual capacity, as beneficiary under the will.

Defendant moved to quash the service of the summons, arguing that as a nonresident of New Jersey in the state solely for the purpose of attending court proceedings he was immune from service. The Superior Court's granting of this motion was reversed on appeal.

The appellate court rejected the doctrine of immunity for nonresident plaintiffs and defendants, stating that it

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“moves in a direction wholly inconsistent with today’s concept of justice.” In a concurring opinion, one justice felt it was unnecessary to reconsider the doctrine of immunity which has long been the law of New Jersey, since the claims in the two cases arose out of the same transaction, and an exception to the general immunity rule could be applied. Under the early common law, the courts attempted to prevent interference with the administration of justice by exempting from arrest litigants who were under civil or criminal process. Designed to prevent interruptions and delays which could be caused if necessary participants had to defend other actions, the privilege of declaring immunity was considered that of the court rather than that of the individual. The immunity developed to include all forms of civil process. Although initially conferred upon all persons attending judicial proceedings, immunity was later limited to nonresidents.

Under the prevailing view today, a nonresident witness, plaintiff, or defendant is not subject to service of process while in a foreign forum for purposes of testifying, prosecuting, or defending in any civil cause of action which existed prior to his entrance into the jurisdiction. The argument is advanced that unless the nonresident is granted immunity he will stay away, and injustice might result from his absence. As a corollary to this argument, it is contended that no one is hurt by the exemption, because, if

8 196 A. 2d at 517. The court relied on the position of the Rhode Island court, Baldwin v. Emerson, 16 R.I. 304, 15 Atl. 83 (1888); and the recent New Jersey decisions of Grober v. Kahn, 76 N.J. Super. 252, 184 A. 2d 161 (1962), in which the court held that a nonresident in the state for the purpose of obtaining a deposition was not immune from service of process; and Koff v. G. & G. Corp., 21 N.J. 558, 122 A. 2d 889 (1956), in which the doctrine of immunity was held not to apply to a nonresident plaintiff endeavoring to avoid a counterclaim in his action.

4 196 A. 2d at 519.


6 See Whited v. Phillips, 98 W. Va. 204, 126 S.E. 916 (1925), for a discussion of the history of the immunity doctrine. Today there appears to be a split of authority as to whether the privilege of immunity is that of the court or of the individual. See Annot. 85 A.L.R. 1340 (1933). The Supreme Court, Lamb v. Schmitt, 285 U.S. 222 (1932), and Maryland, Feuster v. Redshaw, 157 Md. 302, 145 Atl. 560 (1929), adhere to the traditional view.


it did not exist, the nonresident would not go into the for-

eign jurisdiction, and service of process could not be made

on him in any event. It is also argued that since courts

should be open and accessible to all who approach them, the

immunity is granted to encourage the attendance of nec-

essary participants.

In recent years the courts have begun to subject these

arguments to close scrutiny and as a result a tendency to

limit the immunity doctrine has developed. In *Lamb v. Schmitt*, the Supreme Court emphatically enforced the

position that the doctrine was founded upon the conven-

cience of the court, not the convenience of the individual

and stated that immunity should not be granted if it "would

so obstruct judicial administration in the very cause for the

protection of which it is invoked as to justify withholding it". The Court then said that the privilege "should not be

enlarged beyond the reason upon which it is founded."

Some of the arguments against immunity are strongly

stated by the New Jersey court in the instant case. First

it is argued that a nonresident plaintiff voluntarily invokes

the court's jurisdiction and there is no valid justification

for giving him immunity.

"In the case of the nonresident plaintiff, the induce-

ment to sue in a foreign jurisdiction is the hope of

obtaining judgment, not immunity. The forum is his

choice and it is his own interest which causes him to

come."

Secondly, as to the nonresident defendant,

"[H]e too is not motivated by altruism but rather by

the desire to defend the action. He has exercised a

choice. His appearance is governed by selfish —

although proper — considerations. He must decide

whether the pains of other litigation are more severe

than the rigors of a default judgment in the first suit."

In addition, the court pointed out that the granting of an

exemption from process derogates from the right of a


10 285 U.S. 222, 225 (1932). Schmitt paid funds to Lamb pending the

outcome of another suit and sought to recover part of the funds. Lamb,
a resident of Illinois, was served with process in the suit to recover part

of the funds while he was in the Northern District of Mississippi in attend-
nance as an attorney in the principal suit. Lamb claimed immunity from

service of process as a nonresident participant in a judicial proceeding.

However, the Supreme Court refused to grant the immunity, stating, that

"Judicial necessities require that such immunity be withheld." *Id.* at 228.

11 *Id.* at 228.

12 285 U.S. at 225.

13 196 A. 2d at 517.

creditor to sue his debtor wherever he may be found\textsuperscript{15} and "shifts the burden of traveling to a foreign jurisdiction from the nonresident to the resident party."\textsuperscript{16}

Since the two suits in \textit{Wangler} seemingly arose out of the same transaction, the court could have disposed of the issue on the basis of this exception to the immunity doctrine. The court, however, was sufficiently aroused to repudiate the immunity doctrine as far as nonresident plaintiffs and defendants were concerned. The question as to nonresident witnesses was left open. The court stated that it "will retain jurisdiction unless there is an affirmative showing that it would violate traditional concepts of fair play and substantial justice to subject defendant to its jurisdiction."\textsuperscript{17}

The court also pointed out\textsuperscript{18} that the application of the doctrine of \textit{forum non conveniens},\textsuperscript{19} which has been accepted in New Jersey,\textsuperscript{20} was the best manner in which to dispose of the problem of immunity. If the nonresident can show that there is a more convenient forum in which to try the cause of action, the court can refuse to exercise its jurisdiction over the matter, but the court emphasized\textsuperscript{21} that the refusal to exercise jurisdiction will be considered an exception rather than the rule.

Most courts have not gone as far as New Jersey. But while practically all grant immunity to the nonresident witness,\textsuperscript{22} recent decisions indicate a trend toward a careful scrutiny of the circumstances of each case where party litigants are concerned,\textsuperscript{23} especially where the causes of action arise out of the same transaction.\textsuperscript{24} The courts have

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid. An argument might also be made that the rationale of accessibility of the courts is self-defeating since by granting immunity to a nonresident the courtroom doors are actually closed to anyone who might have a valid cause of action against the nonresident unless he goes to the state of the nonresident to try his cause of action.
\textsuperscript{17} Id. at 518.
\textsuperscript{18} Ibid.
\textsuperscript{19} "The rule of \textit{forum non conveniens} is an equitable one embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere." Price v. Atchison, T. & S.F. Ry. Co., 42 Cal. 2d 577, 268 P. 2d 457, 458 (1954). See also Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
\textsuperscript{20} See e.g., Gore v. United States Steel Corp., 15 N.J. 301, 104 A. 2d 670 (1954).
\textsuperscript{21} 196 A. 2d 518.
\textsuperscript{22} For a collection of cases see 42 \textit{AM. JUR. Process} § 139 (1942).
\textsuperscript{23} See 36 \textit{TEMP. L.Q.} 346 (1963).
\textsuperscript{24} See 84 A.L.R. 2d 421 (1962), where the suit for which process is served in the foreign forum relates to the same subject matter as that of the nonresident plaintiff's claim, the balance of convenience would seem to be
also tended to make a distinction between a voluntary and compulsory entrance into the jurisdiction, granting immunity only for the latter.25

The Maryland Court of Appeals has been very liberal in granting immunity to nonresident witnesses,26 plaintiffs,27 and defendants,28 and criminal defendants.29 The Maryland position is clearly stated in Rule 104g of the Maryland Rules of Procedure: "During such time as a nonresident is in this State for the purpose of testifying as a witness, or for prosecuting or defending an action, he shall not be subject to service of process."30

The most recent Maryland case involving the immunity doctrine is J. & H. Stables, Inc. v. Robinson.31 Robinson, the owner of a race horse which he had leased to the defendant, a nonresident corporation, instituted replevin proceedings against the horse's trainer in Maryland. Defendant was granted permission to intervene. During the trial, defendant was served in another action in which Robinson sought cancellation of the lease. The trial court refused to quash the service, but the Court of Appeals reversed, holding that defendant was immune and stating that "[T]he privilege of immunity is one which the courts deem vital to the administration of justice and the tendency is to extend rather than restrict it."32

Only once has the Maryland Court of Appeals made an exception to the immunity doctrine. In Mullen v. San-

sufficiently shifted to support a denial of immunity. See, e.g., Mullen v. Sanborn, 79 Md. 364, 29 Atl. 522 (1894); and State ex rel. Ivery v. Circuit Court, 51 So. 2d 792 (Fla. Sup. Ct. 1951).


27 Blick v. Cockins, 131 Md. 625, 102 Atl. 1022 (1911).


29 Feuster v. Redshaw, 157 Md. 302, 306, 145 Atl. 560, 562 (1929), noted in 65 A.L.R. 1370 (1930) and 20 A.L.R. 2d 178 (1951), in which the court said:

"The reason for the exemption is because it is grounded on public policy and necessary for the due administration of justice. The rule at once tends to assure the attendance of nonresident witnesses and suitors, and the free and complete presentation of the case in a trial in which the witnesses and the parties will not be distracted, harassed, or intimidated by the prospect of other litigation."

The Maryland cases have not relied upon 2 Md. Code Art. 26, § 3 (1957), which has been the law of Maryland since 1805. The statute provides that "No person shall sue or be sued in privilege," and arguably should be applicable law in the area of immunity. However, the cases seem to construe the statute as referring to the privilege of jurymen and government officers. See Peters v. League, 13 Md. 58 (1859). See also Brooks v. Chesley, 4 Har. & McH. 295 (1799).


31 Id. at 366. The court relied upon Rule 104g.
defendant nonresident had an attachment on original process issued against plaintiff in Baltimore. While defendant was in Baltimore to testify, the attachment was quashed, and plaintiff brought suit for malicious prosecution. In refusing to grant immunity to defendant the court stated:

"Sound public policy . . . as well as the administration of equal justice, would seem to demand that no inducements should be held out to nonresident suitors to avail themselves of the harshest remedy known to our statutes; but if they should come, and should abuse the remedy to the injury of an alleged debtor, let them answer here as the residents of the State must do in like cases."

Mullen presents a situation in which the application of the immunity doctrine would have obstructed rather than promoted the cause of justice. Yet in light of J. & H. Stables and Rule 104g, it is doubtful whether the court, in a similar case today, would be able to withhold immunity. Although Rule 104g merely states the existing case law, its incorporation into the Maryland Rules of Procedure provides it with the force of legislative enactment, at the loss of the judicial flexibility required to properly adjudicate a J. & H. Stables situation. It is suggested that those jurisdictions, such as Maryland, which adhere strictly to the immunity doctrine, might re-examine the rationale of the doctrine and abstain from arbitrary application when this rationale is non-existent or overridden by other valid considerations. Then it could no longer be said that the immunity cases are determined solely "by a sentimentality singular in the law."

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88 See Note, Immunity of Non-Resident Participants In a Judicial Proceeding From Service of Process — A Proposal for Renovation, 26 Ind. L.J. 459 (1951-52).
89 Keefe and Boscia, Immunity and Sentimentality, 32 Cornell L.Q. 471, 489 (1947).