Buffalo Law Review

Volume 8 | Number 1 Article 24

10-1-1958

Civil Procedure—Service of Process-Immunity of Non-Resident Attending Court in New York

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found, out of specific real estate; thus, the execution was both general and specific and as such violated section 651. Leave of court was in this case necessary.

To hold otherwise would mean that "a judgment creditor or his assignee who sleeps on his rights for 5 years must obtain leave to issue an execution, whereas if he sleeps on his rights for 10 or as many as 20 years, such leave is unnecessary."[43]

Service of Process—Immunity of Non-Resident Attending Court in New York

A non-resident defendant was indicted in a federal court located in New York for a federal offense. Without being served with a warrant or taken into custody, he appeared voluntarily before the court, pleaded not guilty, posted bond, and returned to his home outside the State. Subsequently, he returned to the court, changed his plea to guilty, and returned to his home, still under bail. At the time set for sentencing, he again returned to the court, was sentenced, and paid his fine. As he left the courthouse, he was served with a summons issued out of a New York court in an unrelated civil action, the service of which was contested on this appeal.[44]

It is well settled under the common law of New York that one who comes into the jurisdiction solely for the purpose of appearing in a proceeding of a judicial nature either as a party or witness is immune from service of process while within the state and until the termination of a reasonable time after the proceeding to enable him to leave the state.[45] The purpose of this immunity is to encourage voluntary attendance in New York courts of persons beyond the compulsory reach of the subpoena power, so as to facilitate the administration of justice.[46] But where the attendance is compulsory, the reason for the rule fails and the immunity is withheld. Thus, where one was brought into the jurisdiction by extradition, immunity was not available.[47] Similarly, as held in the case *Netograph Mfg. Co. v. Scrugham*,[48] one who is free on bail is considered constructively in the custody of the court and his appearance is not voluntary. However, as was held in *Bunce v. Humphrey*,[49] where a witness appeared in the state voluntarily for the purpose of attending court, the fact that he was then issued a subpoena to appear did not change the voluntary character of his entry into the jurisdiction.

The legislature has enacted a statutory exception to the rule that one com-

43. Levine v. Bornstein, 4 N.Y.2d 241, 244, 173 N.Y.S.2d 599, 601 (1958).
44. 4 N.Y.2d 494, 176 N.Y.S.2d 331 (1958).
45. Parker v. Marco, 136 N.Y. 585, 32 N.E. 989 (1893); Chase National Bank v. Turner, 269 N.Y. 397, 199 N.E. 636 (1936).
46. Netograph Mfg. Co. v. Scrugham, 197 N.Y. 377, 380, 90 N.E. 962, 963 (1910).
47. People ex rel. Post v. Cross, 135 N.Y. 536, 32 N.E. 246 (1892).
48. 197 N.Y. 377, 90 N.E. 962 (1910).
49. 214 N.Y. 21, 108 N.E. 95 (1915).

pulsory appearing is not eligible for immunity from service. Where one has been arrested in a foreign jurisdiction and is brought into the state after waiving extradition, he is immune from service until convicted or until a reasonable time after acquittal.[50] This enactment was made to prevent the abuse of the extradition process by creditors who might otherwise trump up criminal charges in order to get their debtor within the state for service. Once guilt was established, it was apparent that the extradition power had not been misused, and the immunity terminated immediately.[51]

The Appellate Division sustained the summons in the instant case on the theory that the statutory immunity provision applied and that the immunity ceased upon the defendant's conviction. Extradition was admittedly not involved, but there is no extradition in federal courts and hence the statute, if narrowly construed, would never apply to grant immunity to persons in federal courts. In the view of the Appellate Division, the legislature had expressed the policy that the immunity should last only until judgment if the defendant were convicted, and the fact that a federal criminal proceeding were involved rather than one in the state courts should not change the result.[52] The Court of Appeals rejected this argument, however, since, prior to his original appearance, the defendant had not been arrested or restrained in any way but had rather "in fact and in law" appeared voluntarily. Hence, the statute did not apply and the common law immunity principles ruled.

The decision is interesting in that it appears to extend the concept of immunity, contrary to previous cases, to situations where the defendant was free on bail. However, unlike the *Netograph* case, the defendant in the instant case originally appeared voluntarily. The Court is apparently holding, as in the *Bunce* case, that the mere fact that subsequent legal restraint is imposed after voluntary appearance does not change the original voluntariness or remove the immunity resulting therefrom. To hold otherwise would frustrate the underlying policy of the immunity doctrine. If the privilege of immunity may be avoided by the simple expedient of serving the person with a subpoena or imposing bail after he appears voluntarily, the doctrine in fact grants no immunity and offers no effective inducement for voluntary appearance.

Service of Process on Foreign Corporation Doing Business Within State

What constitutes the "doing of business" in the state sufficient to render a foreign corporation amenable to suit in New York? This familiar question was again presented when a plaintiff attempted to commence an action against a Florida hotel by service of summons pursuant to section 229 of the Civil Practice

50. N. Y. CODE CRIM. PROC. §855.
51. Thermoid Co. v. Fabel, 4 N.Y.2d 494, 500-501, 176 N.Y.S.2d 331, 335-336 (1958).
52. Thermoid Co. v. Fabel, 4 A.D.2d 475, 165 N.Y.S.2d 274 (1st Dep't 1957).