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PRIVILEGE OF NON-RESIDENT ATTORNEY FROM SERVICE OF CIVIL PROCESS

The privilege of attorneys from service of civil process seems to have had its origin in the ancient common law doctrine of privilege from arrest. For almost six hundred years in England men who were unable to pay their debts were subject to arrest and imprisonment. It was during this era that many privileges were granted to special classes. The doctrine of privilege from arrest took root and flourished in this time of special privileges. On the theory that witnesses, jurors, suitors and attorneys might be intimidated from attendance upon the courts and that the courts would be thus hampered in the administration of justice, it was thought necessary that these persons should be immune from arrest while in attendance upon and in going to and returning from the courts.

We find this doctrine and the reasons for it stated in various ways by the great legal writers. Bacon expresses it thus:

"It hath lately been laid down by the court of C. P. as a general rule that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process or not, are entitled to privilege from arrest eundo et redeundo, provided they come bona fide. And in this description bail and barristers, upon the circuit are included." ²

Mr. Blackstone stated it in this manner:

"Attorneys and all other persons attending the courts of justice (for attorneys being officers of the court, are supposed to be there attending) are not liable to be arrested by the ordinary processes of the court, but must be sued by a bill of privilege as being personally present in court." ²

¹This practice began with the "Statutes of Merchants" in 1288 and was not abolished until the year 1868. Statutes Victoria, 32 and 33, page 571.
²Bacon's Abridgement, 1849 Ed. Vol. 8, page 171.
³Blackstone Commentaries, star page 289.
Again we find it said:

"The parties to a suit and their attorneys and witnesses are, for the sake of public justice, protected from arrest in coming to, attending upon, and returning from the courts." ¹

Mr. Weeks has expressed the reason a little more clearly:

"It was an ancient privilege of attorneys to be exempt from arrest on mesne process, or being held to bail, because attorneys, being obliged to attend officially, and as the law presumes, continually, upon the courts, they were always amenable to their own courts, and could not be drawn away to attend others. . . . These privileges arose from the supposition that the business of their clients would suffer by their being drawn elsewhere." ²

Lord Halsbury says:

"A solicitor whilst engaged in his professional duties in going to or coming from the place of trial on behalf of a client is privileged from arrest on civil but not on criminal process." ³

However, the ancient rule which became established in England obtained no acceptance as an entirety, in the jurisprudence of this country; and a privilege of such a nature and extent could not well exist in the light of American institutions nor under present day conditions.⁴ In some states the privilege from arrest has been modified ⁵ or repealed and in many states it seems

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¹ Tidd's Practice, page 195.
² Weeks, Attorneys at Law, sections 107, 108.
⁴ See also Central Trust Company v. Milwaukee & St. Paul Railway Company, 74 Fed. 442, (1896). But see Brooks v. State ex rel Richards, 3 Boyce (Del.) 1, 79 Atl. 790, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915A 1133 (1911), where the court says in part, "The privilege of parties to judicial proceedings, as well as witnesses, attorneys, judges, jurors and certain other officers of the court, of going to the place where they are held, and remaining as long as necessary, and returning wholly free from restraint of process in other civil proceedings, has long been settled and liberally enforced. The rule is of ancient origin, and is mentioned in the year books as early as Henry VI. It came to us out of the common law with only such modifications as were required to make its principle harmonize with American institutions and to be in accord with American jurisprudence. . . . The privilege arises out of the authority and dignity of the court, it is founded on the necessities of judicial administration, it has for its primal object the protection of the court and not the immunity of the person, and is extended or withheld as judicial necessities require."
⁵ In Illinois by statute attorneys are still exempt from arrest on civil process while attending court. Cahill, Illinois Revised Statutes, (1927), Chap. 13, section 9. But see Robbins v. Lincoln, discussed infra, where the Federal Court in construing the statute said the privilege conferred by it did not extend to the mere service of summons.
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never to have been recognized or acknowledged. Yet we find that some American courts have attempted by analogy to apply the doctrine of the common law in this country, and out of the common law doctrine of privilege from arrest have tried to coin a rule exempting certain classes from service of civil process.

Even under the rule of the old common law, where physical restraint was not sought the reason for the privilege no longer existed. And so service of process in civil actions unaccompanied by arrest did not violate the privilege. Today, when arrest is no longer the ordinary means for bringing a suit, suitors, witnesses and attorneys, residing within the jurisdiction enjoy only the protection afforded by the dignity of the court. However, non-residents receive special considerations. Thus we find that in every state in our union non-resident witnesses are privileged from service of summons while in the state for the purpose of attending judicial proceedings. A majority of jurisdictions apply the same rule in favor of non-resident parties. The ground upon which such exemption is based is public policy; that is for the purpose of protecting the courts from interruption and delay and for the promotion of the free and fair administration of justice.

But what of the privilege of attorneys from service of civil process while attending court in jurisdictions other than those of their residence? To attempt to answer that question is the purpose of this article. The question seems to have been before


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<sup>10</sup> Ibid. see note 16. See also 10 Columbia Law Review 167.

<sup>11</sup> 21 Columbia Law Review 494. See also Diamond v. Earle, 217 Mass. 499, 105 N. E. 363, 51 L. R. A. (N. S.) 1178, Ann. Cas. 1915D, 984 (1914), where the reason is stated thus, "Non-residents cannot be compelled to come within the jurisdiction to testify. As such testimony may be essential in the due administration of justice, they ought to be protected in coming voluntarily into our courts to aid in the ascertainment of truth and in the accomplishment of right results by the courts. It is not merely a privilege of the person; it is a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice. Every party has a right to testify in his own behalf. He cannot do this freely, if hampered by the hazard that he may become entangled in other litigation in foreign courts. The rule is applied almost universally in behalf of witnesses coming from a foreign state. It is extended generally to defendants living outside the state where the litigation is pending." See further the reason expressed in Halsey v. Stewart, 4 N. J. Law Rep. 420 (1817), decided more than one hundred years ago.
the courts comparatively few times.\textsuperscript{13} A thorough search has revealed only sixteen cases directly in point and not all of those have been decided by courts of last resort. The cases, which have arisen in widely separated jurisdictions, group themselves into two distinct classes: (1) Those where the attorney is served in a county other than that of his residence, and (2) those where at the time of the service the attorney is in a state other than that in which he resides. In both instances he is there solely for the purpose of attending judicial proceedings. It will be convenient for our present purposes to consider them in this order.

**Service in County Other Than That of Attorney's Residence**

The first case presenting this phase of the question arose in Pennsylvania in 1889.\textsuperscript{14} A practicing attorney of the courts of Allegheny county, residing in Butler county, went to the city of Pittsburg for the purpose of trying a case before the court of common pleas of Allegheny county. After the hearing, while waiting for a train to go to his home in Butler, he was served with summons. The court held the service proper, saying the privilege was the privilege of the court rather than that of the attorney. It was admitted that there was good reason for exempting from service of process an attorney from another county in attendance upon the United States courts or on the Supreme court, and that good reason might exist for extending the privilege to an attorney from another county casually here and admitted to practice for a special case. However, the court could see no necessity for exempting its own attorneys from service of process, except in the presence of the court. Many attorneys residing in other counties practiced at the Allegheny bar and it was the opinion of the court that the cause of justice would not be served by granting such attorneys privilege from service in the county in which most all their business was transacted. Why should their privilege be greater than that of the attorneys residing in Allegheny county?

Three years later another Pennsylvania court denied the privilege.\textsuperscript{15} In that case the attorney, a resident of Allegheny

\textsuperscript{13} One court has spoken of it as a novel proposition. See concurring opinion of Clark, C. J., in Greenleaf v. People's Bank, supra note 9.


county and a member of the bar of Juniata county, took part in a trial in Juniata county and while returning home was served with summons in Blair county. The court cited the former case of *Bank v. McCandless*, discussed *supra*, as controlling this case, saying that an attorney who travelled from one county to another in the practice of his profession could not claim exemption from the service of a writ while en route to or returning from court. The facts of this case make it a stronger case for the denial of the privilege than the first case. Here the service was in an intermediate county, while in that case the attorney was served in the county where he was a member of the bar. The attorney in addition to acting as counsel had testified as a witness in the case in Juniata county. But the court said that his attendance was voluntary and not in obedience to any subpoena of the court and the fact that he was sworn as a witness did not affect the question, since he was not in attendance as a witness.

The first recognition of the privilege in the type of case under discussion came in 1897. In the Michigan case we have a slight variation of the problem. An attorney, who had argued a case before the Supreme court, was served with summons while on his way home. The circuit court denied his motion to dismiss the proceeding on the ground of privilege. But on a writ of mandamus the Supreme court upheld the attorney's contention that he was privileged. The court reasoned that the common law privilege from service of process had not been affected by a statute relating to arrest on civil process. It cited *Taylor on Evidence; page 1126*, in support of what it calls the common law rule. A glance at the section cited will suffice to show that it deals only with arrest on civil process, and not with mere

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17 See *Young v. Armstrong*, 13 W. N. C. (Pa.) 313 (1883), where the court seems to have upheld the privilege. But the question in that case was whether the attorney had waived the privilege by not claiming it in time.

18 "In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of the judicial proceedings, but in common with parties, barristers, solicitors and in short all persons who have that relation to a suit which calls for their attendance, they are protected from arrest on any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home." Italics are the writer's.
service of summons, not entailing arrest. The case of Central Trust Company v. Milwaukee & St. Paul Railway Company, discussed infra, was also cited by the court. Many of the cases referred to in the opinion are not in point and it is thought that none of them sustains its conclusion. We are much surprised to find such a poorly reasoned opinion from a state court which enjoys so high a standing.

An Ohio circuit court sustained the privilege on the ground of public policy. An attorney residing in Putnam county was served in Hancock county, immediately after the hearing of a case in which he was counsel. The service was quashed on the ground that public policy in the proper administration of justice recognized the necessity of safe conduct of counsel to and from foreign jurisdictions, that counsel whose presence is necessary at the forum wherein the rights of the suitor are pending may be free to come and go without incurring liability or submitting to inconvenience, which in order to avoid he must absent himself from the jurisdiction in which the client’s interests are being determined. “The rule applies to counsel as well as to the suitor. It requires no argument to reach the conclusion that the presence of counsel is always necessary, and at times and upon occasions far more necessary than the presence of the client himself.”

For sixteen years following the decision of the Ohio case no court seems to have been confronted with the precise question. We find it next presented in Arkansas. Here, the attorney, a resident of Jackson county, was engaged in the trial of a case in Pulaski county. While thus engaged he was called to the door of the courtroom and served with civil process. The lower court sustained defendant’s motion to quash the service, but the Supreme court in a well reasoned opinion denied the existence of any such privilege as that claimed by the attorney. Arkansas had a statute exempting witnesses from other counties under like circumstances. The same immunity had been extended to suitors by judicial decision. But the court refused to further extend the rule by analogy to include attorneys, saying that the public policy element was not present. The court said, in part,

\[^{20}\text{Whitman v. Sheets, 20 Oh. Cir. Ct. 1 (1899).}\]
\[^{21}\text{Ibid. page 3.}\]
\[^{22}\text{Paul v. Stuckey, 126 Ark. 389, 189 S. W. 676 (1916).}\]
"So far as the interest of the public is concerned, the ends of justice are fully satisfied when suitors are protected in the right to be heard by themselves and counsel. The selection of counsel by suitors is a matter of purely private concern and not of public interest. It is not essential to the administration of justice, and no rule of public policy therefore requires, that courts should extend the privilege, which was intended for the protection of its own authority and dignity and to enable it to do justice between the parties, so as to grant immunities to attorneys from their individual liabilities. The attorney is only the alter ego of his client in the limited sense that he may plead in matters pertaining to his client’s cause. The attorney is not subject, like the suitor, to the process of the court issued to enable it to carry out its orders in pending cases. He cannot stand in his client’s shoes as to the consequences of the judicial proceedings. Therefore it is not necessary for the courts, in order to deal out justice between parties litigant, to shield a non-resident attorney from the service of process in a matter that concerns him only, and which in no manner affects his client’s cause."

**Service in State Other Than that of Attorney’s Residence**

The first case presenting this phase of the question likewise arose in Pennsylvania, but was decided almost forty years before *Bank v. McCandless*, discussed supra. The attorney was served with civil process while attending in Pittsburgh, in the double capacity of a stockholder and attorney of W. B. Co., upon a notice to take depositions in a case pending in the United States Supreme Court between the state of Pennsylvania and W. B. Co. The service of the writ was set aside on the ground of privilege. The court seems to have based its decision on the case of *Wicks v. Brown* decided the previous January by the same court, in which the court had held that a counselor at law coming from another county to attend to the cases of his clients, before the Supreme court of the state, is exempt from service of a summons.

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23 This case seems never to have been reported. A thorough search of the digests and tables of cases fails to disclose it. The writer has noted one other reference to it in addition to that in the above case. But in neither is there any indication of where it is reported. The writer strongly believes that the case held that the attorney was privileged from arrest on summons, rather than from mere service.
in a civil action in going, remaining, and returning. After setting forth the reasons for the rule, the court said with reference to the case of Wicks v. Brown, "It was also shown that this exemption extends to the service of summons, as well as to arrest, because our summons answers substantially the same purpose as the capias did, under the English practice, in enforcing appearance, and the exception did not in most cases, in England, extend to a summons, because the place of service could not affect the place of trial as it does here." The court goes on to say that none of these principles was disputed by counsel, but that the case was attempted to be distinguished on the grounds, (1) that the attorney was a resident of another state, a foreigner, and (2) that the proceeding out of which the immunity was claimed to arise was before the United States Supreme Court. It was decided that these did not distinguish the case from the general rule.  

This type of case seems not to have confronted the courts again until the year 1886, when we have two courts refusing to recognize any such immunity on the part of an attorney. One is a Pennsylvania case. There a member of the Philadelphia bar, who had been residing in New York for some years, but who according to some evidence, continued to practice in Philadelphia, was held not exempt from service of a summons while in Philadelphia for the purpose of attending court. The court based its decision on the ground that he was still a member of the Philadelphia bar and practicing there and he must take this privilege of practicing there cum onere. Counsel for the defendant relied upon the cases of Holmes v. Nelson, discussed supra, and Young v. Armstrong. The court however did not consider those cases as controlling. It is interesting to note that the two first cases in which the question as to the privilege of an attorney from another state was asserted were decided by Pennsylvania courts. All four cases are from inferior courts. Although the question of the attorney's privilege has been before the courts of Pennsylvania more often than those of any other jurisdiction,

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24 It is not exactly clear just what the court means by the general rule. It is believed that it refers to the case of Wicks v. Brown, as laying down a rule that attorneys within the state are exempt while attending upon the supreme court.
25 Coleman v. Tim, 18 W. N. C. (Pa.) 240 (1886).
26 Supra note 17.
yet we have no decision from the highest court in that state. In both instances the attorney from another state was denied the exemption. And while in an early case the attorney from another state was held privileged, yet in the case just discussed the immunity was refused.

The other case in 1886 appeared in the Federal circuit court in Illinois. An attorney from Cincinnati was served with summons while attending the trial of a cause in the Federal court in Illinois. The court in denying the exemption was called upon to construe an Illinois statute which provided as follows: "All attorneys and counsellors at law, judges, clerks, sheriffs, and all other officers of the several courts within this state, shall be liable to be arrested and held to bail, and shall be subject to the same legal process, and may in all respects be prosecuted and proceeded against in the same court, and in the same manner, as other persons, any law, usage, or custom to the contrary notwithstanding, provided, nevertheless, said judges, counsellors, or attorneys, clerks, sheriffs or other officers of the several courts, shall be privileged from arrest while they are attending court, and while going to and returning from court."

The court said that the statute implied by the word "arrest" a detention of the person within the meaning of the word in contradistinction to mere service of summons. That although the proviso used the word arrest, yet it was evident that it related back to the phrase in the body of the section, shall be liable to be arrested and held to bail. And therefore that the only privilege granted the attorney by the statute was the privilege from such service of process as involved imprisonment or holding to bail. That as it construed the statute a resident attorney could be served with summons while in attendance upon the courts and an attorney from another state enjoyed no greater privilege.

Ten years later the Federal circuit court in Wisconsin was asked to pass upon this question. A New York attorney went to Wisconsin to attend the Federal court for a client. Immediately after the hearing and before he had had reasonable time to take his departure he was served with a subpoena requiring

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18 Italics are the writer's.
him to attend hearings as a witness. The service was declared invalid on the ground of privilege. The court referred to the common law rule of privilege from arrest and said that the immunity necessarily extended to the attorney representing the cause of his client before the court. It further said that the rule applied to the service of civil process where there was no arrest. None of the authorities cited in the opinion are directly in point, but a few of them contain dictum. The court seemed very much inclined to extend the privilege and was evidently hunting for some ground upon which to stand. The real basis of the case seems to have been, that if the service were held valid it would compel the attorney's attendance at a time when his attention was greatly needed by matters of these same clients in the courts of other states. This appears a very loose ground upon which to rest the case.

In a case, the facts of which are very similar to those of the one just discussed, the North Carolina court answered the question by saying that a non-resident attorney in the state to represent his clients in a matter pending in the Federal courts is not privileged from service of summons. Clark, C. J., stated that the proposition was a novel one in a land where equality before the law is the ruling principle and where special privilege to any class of our citizens is not only not recognized by law but is prohibited by the Constitution. He cites the case of Hoffman v. Circuit Judge, discussed supra, saying that the authorities which appear in the opinion do not support its conclusion. He also criticizes the basis of the decision in Central Trust Company v. Milwaukee, etc., discussed supra, saying that the result is not sustained by any previous authority.

Five years after the North Carolina case a New York Supreme court denied the existence of any such privilege on the part of non-resident attorneys. In passing upon the question the court said, 'The only non-residents who appear to be exempt from service while attending court in this state are necessary or interested parties, suitors, witnesses or creditors in bankruptcy.'

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30 The attorney was counsel for a large railway company.
32 The concurring opinion of Clark, C. J., in this case is a splendid example of legal reasoning.
The reason for the exemption of such persons, viz., the promotion of the due and efficient administration of justice, fails when it is sought to be applied to foreign attorneys at law, and to extend the rule to them would enable foreign attorneys to practice law constantly in this state and at the same time extend to them immunity from the process of the courts in this state." This the court was not willing to do.

After the lapse of a few years the question is again before the Federal court and again the privilege is recognized. A resident of Illinois, who had sued a citizen of Iowa in the Federal district court in Iowa, employed Mr. Silas H. Strawn, a prominent Illinois attorney, to represent him. Mr. Strawn went to Iowa to attend to the case. After the trial was over and while waiting for the verdict of the jury Mr. Strawn was served with summons issued out of the same court. The motion to vacate the service of the summons on the ground of privilege was sustained by the court. It stated that there was a spirit of comity between all courts, national and state, by reason of which any court allowed on motion an attorney from another jurisdiction to appear in a particular case. The court thought that it was not within the spirit of fair dealing and such comity for it to hold that if a lawyer from another state came into this court he did so at the peril of being sued. The cases of Hoffman v. Bay, Circuit Judge and Central Trust Company v. Milwaukee, etc., discussed supra, were cited in support of the view taken by the court. Robbins v. Lincoln and Greenleaf v. People's Bank were noted as holding adversely to the position of the court, but they were declared not to be persuasive.

During the same year we have a state court declaring that non-resident lawyers coming into the state for the sole purpose of attending to the trial of a case in court are immune from the service of civil process. The South Carolina court dismissed the question with only a few remarks. It said that a former case had settled the question as to parties and witnesses and the same principle applied to attorneys. No authority was referred to by the court.

A Minnesota case refused to extend the privilege to an attorney. A South Dakota lawyer came into Minnesota for the purpose of taking the deposition of a witness residing there, for use in the trial of an action in South Dakota. Here we have a slightly different situation. The business of the attorney is not to attend court, but rather to secure a deposition. The North Carolina case was cited in support of the stand taken by the court. The court took the position that since there was no cause pending in Minnesota with reference to which the defendant came into the state, the rule applied to non-resident witnesses was not applicable to an attorney under the facts of this case.

Is the case weaker because the attorney did not come into the state to attend court, but only to take the deposition of a witness to be used in a trial in another state?

The following year the problem was presented to the California court in a slightly different form from any it had ever taken before. An Illinois attorney while in California was served with process issued out of a state court. The motion to quash was based upon the fact that the defendant was in California for the purpose of assisting as an attorney in connection with two cases then pending in the United States District Court for the southern district of California. It was not alleged or claimed that he was an attorney of record in the two cases, or entitled to practice, but his affidavit did state that he came to California solely for the purpose of assisting as counsel in the preparation and argument of numerous demurrers and motions in the above mentioned cases. The court recognized the fact that there were cases holding both ways on the question of privilege.

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37 See Simon v. De Gersdorff, 166 Wis. 170, 166 N. W. 818 (1917), where a New York attorney came to Wisconsin to assist in the examination of the plaintiff before a court commissioner, in a pending action, and was served with summons. The court assumed for the purposes of deciding the appeal that the privilege existed and the question was whether the attorney had waived his privilege. In the opinion of the court we find this statement, "Assuming for the purposes of this appeal without deciding the same, that the circuit court was right in holding that the defendant, as counsel, was entitled unless he had waived the same, to his plea of privilege while in this jurisdiction for the purpose of attending such proposed examination of the plaintiff." . . . . . And the dissenting judge says this, "It is conceded that the appellant is entitled to the privilege claimed. . . . . ."
38 Tadge v. Byrnes, 179 Cal. 275, 176 Pac. 439 (1918).
of non-resident attorneys from service of civil process while in a jurisdiction for the sole purpose of appearing in court to represent their clients. However the court could find no cases holding that an attorney who was not an attorney of record and did not become such was entitled to any such exemption. So without determining the right of an attorney of record to protection the court refused to extend any such immunity to an attorney not of record. This is a weaker case than any of the others which have denied the privilege.

The last case to pass upon the question was decided by the Supreme Court of Nebraska in 1924. In that case, the facts of which are practically the same as those in Nelson v. McNulty, discussed supra, the privilege was denied recognition. A Minnesota attorney on his way to York, Nebraska, for the purpose of taking depositions to be used in the trial of an action pending in Minnesota, stepped off the train at Lincoln, Nebraska, and while on the depot platform was served with summons. The court cited the Minnesota, the North Carolina and the Arkansas cases in support of its position. It also noted the two Federal cases as sustaining the privilege but said the better reasoning was with the rule denying the exemption. Of course in this as in the Minnesota case the attorney's presence in the state was for the purpose of taking depositions to be used in a trial in his own state. Should a different rule apply in this type of case from that obtaining where the attorney is in the state to attend the trial of a cause? The testimony of the witness is necessary to the proper administration of justice. It is very likely that the attendance of the witness at the trial of the cause pending in the state of the attorney's residence could not be secured. It is submitted that the rule should be consistent throughout and that no such distinction should be made. If the attorney is entitled to privilege while in the state attending a trial, he should likewise be exempt from service while in the state to take the deposition of a witness. There would seem to be no sound basis for any distinction as to the effect of service in the two situations.

By way of summary we may note that of the five courts passing upon the validity of the service of process on an attorney while attending court in a county other than that of his residence, three have upheld the service, while only two have said the attorney was privileged. Two of the cases denying the privilege are from inferior courts and the other was decided by the Supreme Court of Arkansas. One of the two courts sustaining the exemption is an inferior court while the other is a court of last resort. As far as the cases are concerned the balance is with the denial of the privilege in this type of case. Since the two inferior court cases are both from Pennsylvania, the states stand two and two on the question, namely, Pennsylvania and Arkansas refusing to recognize the immunity; Michigan and Ohio upholding it. The first four cases were decided prior to 1900, and the only case dealing with the question in the last quarter of a century says the privilege does not exist. It would seem to us that by far the best reasoned case of the group is the most recent one, that from Arkansas.

In the eleven instances when the privilege of an attorney from another state has been asserted, seven of the courts have refused to recognize it while only four have declared the service void. Again we see that as regards the cases the majority recognize no such exemption. Out of the eleven cases only five were decided by courts of last resort, and four of these were opposed to the privilege, namely, North Carolina, Minnesota, California and Nebraska, while South Carolina upheld it. Of the remaining, a Pennsylvania inferior court and two Federal courts favored the immunity, while a Pennsylvania inferior court, a Federal court and a New York Supreme court denied it. The Pennsylvania case refusing the privilege came some thirty years later than the one which had recognized the exemption. In the light of that, together with the fact that in the analogous cases both Pennsylvania courts held against the privilege, we may say that in Pennsylvania no such immunity exists. The early Federal case denied that the attorney was immune, but the last two Federal courts confronted with the question squarely

The two Pennsylvania cases denying the attorney from another county the privilege claimed.
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upheld the exemption. Although we have no decision of the United States Supreme Court on the point, we may conclude that the Federal courts favor the privilege. As regards the jurisdictions we have six states, namely, North Carolina, Minnesota, New York, Nebraska, California and Pennsylvania, refusing to grant the foreign attorney any such privilege, while South Carolina and the Federal courts sustain it. If we were to omit the California case from our consideration, because the attorney was not an attorney of record, the count is still five against two; and even if we were to leave out the Minnesota and Nebraska cases because the business of the attorney was to take depositions, we still have a decision of three to two against the privilege.

If we should consider the two types of cases together, we find that seven jurisdictions deny the immunity and only four grant it; that ten of the sixteen cases are against any such exemption, while only six support it. Any way we might choose to consider it we would find the majority rule to be that non-resident lawyers are not entitled to immunity from service of civil process while in foreign jurisdictions attending court.

Mr. Browers in his work on Process and Service\(^4\)\(^1\) says of the attorney’s privilege, “The majority opinion, however, seems to be that during his necessary attendance upon the court in connection with an action then being heard, and during his coming to and returning from such court he is exempt from service.” This is not an accurate statement of the weight of authority, as the summary above shows. Mr. Bowers cites section 1330 of Taylor on Evidence.\(^4\)\(^2\) We have noted that this section only deals with arrest on civil process. The author has only cited four of the sixteen cases, discussed supra. He could not well get an accurate picture of the majority view from so small a per cent of the cases, and yet his work was published three years after the last case was decided. Likewise in Corpus Juris\(^4\)\(^3\) we find this statement in regard to the exemption, “It has been held that it does not extend to non-resident lawyers,\(^4\)\(^4\) but the weight

\(^{4}\)\(^1\) Civil Process and Its Service, Renzo D. Bowers (1927), section 379.

\(^{4}\)\(^2\) Supra note 18.

\(^{4}\)\(^3\) Vol. 6, “Attorney and Client,” section 102.

\(^{4}\)\(^4\) Citing Kutner v. Hodnett, supra note 33, discussed supra.
Neither is this a correct picture of the way the cases line up. The North Carolina case is cited in a note to a subsequent statement, but we look in vain for the Minnesota case, the Arkansas case, the California case, as well as the Pennsylvania cases. The only case decided after that volume was published is the one from Nebraska. We would not be so unreasonable as to expect an author to cite all the cases on a point, but where the question has been before the courts so seldom and the point seems doubtful, is it asking too much to expect a more accurate statement of the rule?

**SHOULD THE NON-RESIDENT ATTORNEY BE PRIVILEGED?**

Are the same reasons which exist in favor of exempting a non-resident witness present in the case of an attorney from a foreign jurisdiction? They have been variously stated; that causes may be fully heard and justice administered in an orderly manner; that the privilege arises out of the authority and dignity of the court; that it has for its object the protection of the court and the consequent subservience of public interests; that the privilege exists solely to prevent the clogging of judicial business. Does such service affect the dignity of the court? It is impossible to see how the mere service of summons upon an attorney while attending court in his professional capacity would in any way infringe upon the dignity of the court. It could in no way interrupt the orderly progress of the trial nor have the least tendency to hamper or embarrass the court in the administration of justice.

What brings the attorney within the jurisdiction? Is it the order of the court? Certainly not. Is it his desire to see justice fairly administered? This can hardly be said to be his primary motive. Rather, it is his desire to look after the interests of his client and in the last analysis his own interests. An attorney who goes into a jurisdiction other than that of his residence to represent a client in the courts of that state, does so by virtue of a private contract and of his own motion. He is in a different position

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"Citing three of the cases, discussed *supra* in this article, upholding the privilege.

"The reason for this (denial of privilege) is that such a summons amounting simply to notice does not obstruct the administration of justice nor interfere with the attendance of a party to a suit then on trial." *Ellis v. De Ganna*, 17 R. I. 715, 24 Atl. 578 (1892)."
from the witness or suitor. He is not entitled to the protection of the court because he has entered its doors as a suitor, nor is he in attendance in obedience to its process. Witnesses are extended the privilege, because their presence is necessary to the complete administration of justice. The process of the court could not compel their attendance and thus the exemption is extended as an inducement, so their testimony may be had from the witness stand and the cause of justice served. Is the presence of non-resident counsel such a necessity that so great a privilege should be extended? We think not. The suitor can easily secure counsel within the state. If he be intent on retaining counsel from another jurisdiction that is his own affair, but such counsel is entitled to no special privilege. We consider the language of the Arkansas court very pertinent, quoting from the opinion, 47 "The selection of counsel by suitors is purely a matter of private concern and not of public interest. It is not essential to the administration of justice and no rule of public policy requires that the courts should extend the privilege which was intended for the protection of its own authority and dignity, and to enable it to do justice between the parties, so as to grant immunities to attorneys from their own individual liabilities."

Does the mere service of summons upon the non-resident attorney deprive the client in any way of the services of his attorney? This can likewise be easily answered in the negative. The effect of the service of civil process upon such counsel does not operate like arrest to deprive the client of his services. We can conceive that in case of arrest of the attorney and the requirement of bail or the inability to give bail might put the client at a disadvantage, but how a mere service of summons, amounting only to notice, could have any injurious effect is more than we can see. Neither would mere service of process upon an attorney attending court have the effect of so embarrassing the attorney and distracting his attention from the case as to virtually deprive the client of the benefit of counsel. If these things be true, as we verily believe, then the public good would not be adversely affected by such service and the rule of public policy applied to suitors and witnesses is not applicable to the case of a non-resident attorney.

Attorneys within the state enjoy no privilege from service of civil process. Why should a state extend a greater preference to a lawyer from another jurisdiction than to one residing within its own boundaries? The above reasoning would tend to show that the administration of justice does not require it, public policy does not necessitate it, the dignity and protection of the courts do not demand it. The idea of privilege to a certain class or group is contrary to our fundamental principles of government and should not be countenanced unless absolutely necessary for the furtherance of justice. The privilege of lawyers from arrest has been modified in some states, expressly repealed in others, and in some states never existed. To exempt non-resident attorneys from mere service of summons is to approve a doctrine contrary to the very ideals upon which our government was founded. Members of Congress enjoy no privilege from mere service of summons. Why non-resident attorneys? Is there any more reason why foreign counsel, coming into the state for a consideration, should be exempt from service of civil process than a non-resident physician or member of some other profession? Service on neither will violate the dignity of the court nor hamper the administration of justice. The courts of a state extend a non-resident attorney the courtesy of allowing him to appear before the courts in special cases, without having to go through the technical requirements for admission to the bar of that state. This privilege he must take cum onere, which is his chance of being served with process while within the state. To adopt any other rule would enable foreign attorneys to practice law constantly in the state and at the same time be immune from the process of the courts of the state.

We have noted that the reasons which were responsible for the establishment of the common law doctrine of privilege from arrest are not applicable to the mere service of summons. It is submitted that the decisions upholding the privilege follow

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48 "Any decision which separates the bar from the people, in sympathy or identity of privileges, would prove one of the greatest curses which could befall the profession. From the 'day it is made the bar will receive a downward impulse in the eyes of the community.' Elam v. Lewis, 19 Ga. 608 (1856).

49 Usual constitutional privilege of exemption from arrest does not, by the better view, extend to an exemption from service of summons in a civil suit. 6 Minn. Law Review 605, and cases there cited.
rather loosely the doctrine of the common law without a proper analysis of the reasons upon which the doctrine was founded; that the courts extending the exemption to foreign attorneys on the ground of public policy suppose the presence of an element which it is believed will on close inspection be found utterly wanting. The sounder view would seem to be exemplified by those cases in which the privilege is denied.

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