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Article 26

Pleading and Practice--Service of Process--Immunity of Non-Resident at Appellate Hearing (Chase National Bank v. Turner, 269 N.Y. 397 (1936))

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view of the remedial nature of the legislation, designed to afford greater protection to the personal safety of the travelers and to promote the public safety, and the apparent objectives sought to be attained, it is submitted that the term "non-residents" should be held to express the connection between person and place [6] and not as a synonym for domicile [7] and that the strict, literal interpretation of the statute be not adopted.[8] This decision limits the practical effectiveness of the section as an aid to the encouragement of greater care in the operation of motor vehicles and to the protection of the rights of injured persons.

A. S.

PLEADING AND PRACTICE—SERVICE OF PROCESS—IMMUNITY OF NON-RESIDENT AT APPELLATE HEARING.—Plaintiff, a resident of Connecticut, accompanied her counsel to the Appellate Division to hear the argument of her case. While returning home, she was served with a summons in a foreclosure suit. On appeal from an order denying a motion to set aside the service, *held,* order reversed, motion to set aside granted. Plaintiff is privileged from service of process while attending the argument of an appeal. *..Chase National Bank* v. *Turner,* 269 N. Y. 397, 199 N. E. 636 (1936).

A non-resident coming to this state solely to appear as a party or witness in a judicial proceeding is immune from service of civil process during the proceeding and for a reasonable time thereafter.[1] This immunity is a common law privilege and is intended to encourage voluntary appearance of non-residents and to secure the expedient administration of justice.[2] Non-residents who are here by compulsion of law are not so privileged.[3] Nor are persons who come here for the dual purpose of attending the proceeding and discharg-

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[6] Cincinnati H. & D. R. Co. v. Ives, 3 N. Y. Supp. 895 (Sup. Ct. 1889).

[7] "The courts have invariably distinguished residence from domicile particularly in connection with the construction of various statutory provisions." General Motors Acceptance Corp. v. Barrett, 142 Misc. 192, 196, 254 N. Y. Supp. 166, 170 (1931).

[8] Surace v. Danna, 248 N. Y. 18, 161 N. E. 315 (1928); Glennie v. Falls Equipment Co., 238 App. Div. 7, 11, 263 N. Y. Supp. 124, 129 (4th Dept. 1933).

[1] 2 CARMODY, N. Y. PRACTICE (1930) § 648.

[2] Person v. Grier, 66 N. Y. 124 (1876); Mathews v. Tuffts, 87 N. Y. 568 (1882); Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); Netrograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910).

[3] Williams v. Bacon, 10 Wend. 636 (N. Y. 1834); Slade v. Josephs, 5 Daly 187 (N. Y. 1870); Adriance v. Lagrave, 59 N. Y. 110 (1874); People *ex rel.* Post v. Cross, 135 N. Y. 536, 32 N. E. 246 (1892); Netrograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910).

ing personal business.[4] Every proceeding of a judicial nature which relates to the trial of the issues of a case or to a public matter comes within the rule.[5] Thus the privilege prevails as to proceedings in the federal courts, and as to hearings before referees, registrars, commissioners, examiners, masters in chancery, and legislative committees.[6] A non-resident who appears upon examination of his adversary's witness before a notary public is immune,[7] but not one who appears at the sale of land under a judicial decree.[8] *Sampson* v. *Graves*[9] denied the privilege to a non-resident who appeared at the Appellate Division to hear his case on the ground that he was a mere spectator and that he in no manner aided the administration of justice. But the court here overruled *Sampson* v. *Graves*[10] maintaining that on occasion attorneys require aid of parties and witnesses in the preparation of appeals. This observation, while true, strains the reason for the rule and does not seem to warrant the decision when weighed against the right of the creditor to press his claim and the existing practical difficulties of effecting service of process.

I. J. B.

PRACTICE—ANNULMENT OF MARRIAGE—PHYSICAL EXAMINATION BEFORE TRIAL—EVIDENCE—WAIVER OF PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.—The plaintiff brought an action for the annulment of a marriage on the ground of fraud, alleging that he had married the defendant in reliance on her representations that she was in good health, whereas she knew that she was a victim of tuberculosis. The plaintiff made a motion to compel defendant to submit to a physical examination to determine the state of her health. Defendant was willing to waive her privileged communications as to one physician, but not as to two others who had examined her. She refused, however, to submit to an examination before trial. *Held,* motion granted, unless defendant stipulates to waive the statutory privilege as to all physicians who exam-

[4] Finucane v. Warner, 194 N. Y. 160, 86 N. E. 1118 (1909); *cf.* Burroughs v. Cocke and Willis, 56 Okla. 627, 156 Pac. 196 (1916).

[5] Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); 2 CARMODY, N. Y. PRACTICE (1930) § 648.

[6] Larned v. Griffing, 12 Fed. 590 (C. C. D. Mass. 1882); Roschynialiski v. Hale, 201 Fed. 1017 (Dist. Ct. Neb. 1913); Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); Powers v. Arkadelphia Lumber Co., 61 Ark. 504, 33 S. W. 842 (1895); Mulhern v. The Press Publishing Co., 53 N. J. L. 153, 21 Atl. 186 (1890); Burroughs v. Cocke and Willis, 56 Okla. 627, 156 Pac. 196 (1916).

[7] Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893).

[8] Greenleaf v. Bank, 133 N. C. 292, 45 S. E. 638 (1903).

[9] 208 App. Div. 522, 203 N. Y. Supp. 729 (1st Dept. 1924).

[10] *Ibid.*