Marquette Law Review

Volume 14
Issue 1 *December 1929*

Article 14

Parties: Service of Process: Witnesses: Non-Resident

Bernard Soref

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation

Bernard Soref, *Parties: Service of Process: Witnesses: Non-Resident*, 14 Marq. L. Rev. 44 (1929).
Available at: http://scholarship.law.marquette.edu/mulr/vol14/iss1/14

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

was issued in this instance on an affidavit of one Sharp who stated positively that he had purchased intoxicating liquor from the appellant at his residence on September 24. At the preliminary hearing before the commissioner, Herter brought in twelve good men who swore that they had seen him at various places on the twenty-fourth and that for that reason the affidavit of Sharp must be false. The commissioner decided that the affidavit might have been incorrect and that the *preponderance* of evidence showed that no intoxicating liquor was served to Sharp on the day in question. The commissioner ordered the warrant quashed and the evidence obtained thereunder suppressed. As to disposing of the liquor seized, the commissioner left that to the court.

At the trial, Herter objected to the introduction of any evidence obtained under the warrant, not on the ground that the warrant was void but solely because of the ruling of the commissioner at the preliminary hearing. But the court found that the decision of the commissioner was not binding as a matter of law and that therefore the evidence was properly admitted and the conviction sustained.

JOHN J. MCRAE

Parties: Service of Process: Witnesses: Non-Resident

It appears to be well established that service of process on witnesses or parties from foreign states while in attendance in the court in which the cause is pending, is invalid.

In *Harvey* v. *Harvey et al.* Wis. 225 N.W. 703, the defendants, residents of Ohio, came to Milwaukee at the request of a party to an action then pending in the Circuit Court of Milwaukee County. They were prepared to testify as witnesses, if necessary. While in attendance, the defendants in *Harvey* v. *Harvey et al., supra,* were each served with a summons. The lower court, passing on the motion, set aside such service on the ground that the defendants were exempt from service while attending court within the state.

The basis of the appellant's argument was that the general rule of privilege does not apply to witnesses or parties not necessarily in attendance. But the court was of the opinion that as a matter of public policy non-resident witnesses or parties shall be exempt from service of process upon them which seeks to subject them to liability while they are attending court in another state.

The decisions are all in accord in declaring that witnesses or parties from a foreign state who are necessarily in attendance on a court are immune from the service of a summons while so within the state.[1]

[1] *Kaufman* v. *Kennedy,* 25 Fed. 785; *Skinner and Mounce Co.* v. *Waite,* 155 Fed. 828; *Cameron* v. *Roberts,* 87 Wis. 291, 58 N.W. 376; *Rix* v. *Sprague,* 157 Wis.

But the instant case is noteworthy in that it extends this immunity to all witnesses or parties not necessarily in attendance upon the court. This broadening of the rule in Wisconsin is based on the same reasoning that was originally applied to cases in which the witnesses or parties of a foreign state were necessarily in attendance upon the court in another state:

> Witnesses are to be encouraged to so attend court without fear of subjecting themselves to process while so in attendance in such foreign state. Such witnesses should not be required to determine at their peril whether or not their attendance is actually necessary. It is enough that the witness acts in good faith in attending upon the court for the purpose of giving testimony as required.[2]

Other jurisdictions have similarly extended the original rule of exemption to include non-residents not necessarily in attendance upon the court.[3]

Several other jurisdictions, however, have not adopted the general rule of privilege. In *Baldwin* v. *Emerson,* 16 R.I. 304, 15 Atl. 83, it was held that a non-resident plaintiff while attending court in the prosecution of his suit was not immune from the service of a summons against him in another suit. The court in *Lewis* v. *Miller,* 115 Ky. 623, 74 S.W. 691, decided that service of a summons on the plaintiff, a non-resident, while temporarily in the state testifying in an appeal from a judgment was valid.

Sampson v. *Graves,* 204 N.Y. Supp. 212, held that a party attending the argument of an appeal in order to personally observe the manner in which the argument was presented and received, was not immune from service of process.

In holding that non-residents are subject to the service of process, the court in *Bishop* v. *Vose,* 27 Conn. 1 at 12, reasoned as follows: "We are at a loss to discover why our citizens should be obliged to go into a foreign jurisdiction in pursuit of their debtors, when those debtors are here and can be sued here, and can receive here that consideration which is meted out to all indiscriminately." *Bishop* v. *Vose, supra,* is approved in *Baisley* v. *Baisley,* 113 Mo. 544, 21 S.W. 29.

From an examination of the different reported cases it appears that the reasoning applied by the court in *Harvey* v. *Harvey et al., supra,* is sound and logical and contributes to a proper administration of justice.

BERNARD SOREF

572, 147 N.W. 1001; *Bunce* v. *Humphrey,* 214 N.Y. 21, 108 N.E. 95; *Wolfe* v. *McIntyre,* 192 N.Y. Supp. 650; *Cooper* v. *Wyman,* 122 N.C. 784, 29 S.E. 947.

[2] *Harvey* v. *Harvey.* ——Wis.—— 225 N.W. 703.

[3] *Rosenblatt* v. *Rosenblatt,* 180 N.Y. Supp. 463; *Thompson's Case,* 122 Mass. 428; *Minnich* v. *Packard,* 42 Ind. App. 371, 85 N.E. 787.