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Civil Procedure--Judicial Restraint in the Application of the Immunity Rule

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CIVIL PROCEDURE—JUDICIAL RESTRAINT IN THE APPLICATION OF THE IMMUNITY RULE. *Severn v. Adidas Sportshuhfabriken*, 33 Cal. App. 3d —, 109 Cal. Rptr. 328 (Ct. App. 1973).

In the recent case of *Severn v. Adidas Sportshuhfabriken*,[1] the California Court of Appeals markedly restricted the application of the immunity rule.[2] That rule allows, " . . . a state to grant immunity from service of process to non-residents whose presence it deems necessary for the proper conduct of a judicial proceeding."[3] Such immunity encourages the appearance of witnesses by protecting them from service of process while within the court's jurisdiction. The *Severn* case held that a court need no longer grant immunity from California summons to one appearing in a jurisdiction other than his residence. The court restricted the application of the immunity rule because modern longarm statutes would allow service on the non-resident whether he participated in such out of state judicial proceedings or not. The privilege considered by the California court concerned immunity from service granted to one appearing in a state other than the state issuing the summons. It is similar to the Oklahoma rule granting immunity to one appearing in a county not of his residence. Unlike the immunity rule considered in the California case, the Oklahoma intra state rule is by statute,[4] not case law, and this may limit the Oklahoma courts' ability to alter it.

In *Severn v. Adidas Sportshuhfabriken*, one Dassler, a resident of France, was in Florida for the sole purpose of giving a deposition in a federal court case. While in Florida, Dassler was served with a California summons, in Dassler's capacity as representative of the defend-

1. Severn v. Adidas Sportshuhfabriken, 33 Cal. App. 3d —, 109 Cal. Rptr. 328 (Ct. App. 1973).

2. "Immunity" is actually a misnomer. The rule merely relieves the effect of service after it has been made, it does not make one immune from being served. Severn v. Adidas Sportshuhfabriken, 33 Cal. App. 3d —, —, 109 Cal. Rptr. 328, 334 (Ct. App. 1973).

3. RESTATEMENT (SECOND) OF CONFLICTS § 83 (1971).

4. OKLA. STAT. tit. 12 § 399 (1971): A *witness* shall not be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning or attending, in obedience to a subpoena. (emphasis added)

While this section is overtly directed only at witnesses, the courts have read it to also include plaintiffs, State ex rel. Spigner v. Superior Court of Okmulgee County, 175 Okla. 632, 54 P.2d 317 (1936), and defendants, Burroughs v. Cocke and Willis, 56 Okla. 627, 156 P. 196 (1916).

ant corporation. Dassler specially appeared in California Superior Court, claimed immunity, and had the service quashed. The California Court of Appeals, First District, reversed in a decision of potentially far reaching significance.

Associate Justice Elkington, for the majority, briefly traced the history of the immunity rule. He pointed out that as states extended the reach of their counties' process to the states' borders, a non-resident's appearance in the county of jurisdiction, merely for the purpose of the litigation, no longer was sufficient to secure the non-resident immunity.

Since California has longarm statutes that greatly expand its jurisdiction outside of the state, the court of appeals, by analogy to the diminution of immunity within the state, reasoned that other states should cease offering asylum from California's courts. The court adopted the opinion that the immunity rule should not be enlarged beyond the reason for which it was instituted, and that it should thus be extended or withheld only as judicial necessity requires.[5] Since the defendants, " . . . could have been served at their place of residence or business . . . the [immunity] rule has no legitimate application to them."[6] There was no longer any reason to protect the defendant from service while in Florida, regardless of the fact that his appearance there was compelled.

The dissent of Associate Justice Sims conceded that California's longarm statute gave the court jurisdiction, but questioned whether such jurisdiction should have been exercised under the circumstances of the case. The dissent agreed with the majority that the immunity rule is for the benefit of the court rather than of witnesses and parties. It felt that the defendant was " . . . entitled to immunity from the effect of that service of process because of the needs of judicial administration."[7]

The dissent felt that allowing such service would interfere with the administration of justice of the place where service was effected. Justice Sims would have quashed the service, believing that the determination of the defendant's immunity should be by Florida law, "by comity, if not by full faith and credit."[8]

California's longarm statute, which the court relied upon to in-

5. Lamb v. Schmitt, 285 U.S. 222, 225 (1932).
6. 33 Cal. App. 3d at —, 109 Cal. Rptr. at 334.
7. *Id.*
8. *Id.*

validate the immunity rule, is very liberal. It broadly states that, "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[9] It thus allows for service of process outside of California and outside of the United States.

The abrogation of the immunity rule eases the prospective plaintiff's search for his defendant. He now has his choice of places and times to serve his defendant. This supplements the general rule that a creditor may subject his debtor to service of process in whatever jurisdiction he finds him.

In this respect, the majority correctly limited immunity. It reasoned that such immunity should be extended or withheld only as judicial necessity requires. Certainly the court's protection is not necessary to insure a witness's appearance, by guaranteeing his freedom from service of process, if he can be served even if he stays at home. The court left unanswered the question of how to treat a defendant, served while making a court appearance in another state, who could not have been served if he had not appeared as a witness. One may infer that such a defendant would be granted the benefit of the immunity rule.

The dissent takes a broad view of judicial necessity, and wishes to "encourage"[10] the appearance of witnesses by not subjecting them to service. This is the view of the Restatement of Conflicts 2d, § 83.

The advent of expansive, state longarm statutes may force many states to re-examine immunity. This was what many were forced to do when county exercise of jurisdiction was extended to the state's boundaries. The majority's analogy to the end of immunity in California, based upon witnesses' subpoenaed appearance in a county solely for the purpose of litigation, is persuasive.

By statute in Oklahoma, the non-resident of a county is granted immunity in state courts from service of process while appearing as a witness. Because the Oklahoma intrastate immunity rule is by statute, the Oklahoma courts are unable or reluctant to restrict its application. However, Oklahoma has followed the trend of adopting more liberal longarm statutes. Without the judicial history of interpretation of a common law immunity rule, the question of immunity of defendants served while appearing in courts of other states will be one of first impression.

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9. CAL. CIV. PRO. CODE § 410.10 (West 1973).
10. 33 Cal. App. 3d at —, 109 Cal. Rptr. at 335.