IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

No. 105.

GEORGE W. STEWART,
Plaintiff in Error,
vs.
CHARLES H. RAMSAY,
Defendant in Error.

Error to the District Court of the United States for the Northern District of Illinois.

BRIEF OF DEFENDANT IN ERROR.

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Attorney for Defendant in Error.

Geo. Hornstein Co., Printer, Chicago.

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BRIEF OF THE ARGUMENT.

I.

The law as to the privilege or immunity of non-resident suitors or witnesses embraces and includes immunity from service of summons in civil suits, as well as exemption from arrest.

Greenleaf on Evidence, Vol. 1, p. 434, and cases cited.

Troubart and Haley's Practice, par. 236 and cases cited.

Cyclopedia of Law and Proc., Vol. 32, p. 492.

Kaufman v. *Garner* (C. C.), 173 Fed., 550.

Hale v. *Wharton*, 73 Fed., 739.

Mechanical Appl. Co. v. *Castleman*, 215 U. S., 437.

Cain v. *Commercial Publ. Co.*, 232 U. S., 124.

II.

The privilege or immunity in question is accorded to parties plaintiff as well as parties defendant.

Roschynialiki v. *Hale,* 201 Fed., 1017.
Hale v. *Wharton,* 73 Fed., 739.
Fisk v. *Westover,* U. S. D., 233.
Roberts v. *Thompson,* 134 N. Y. Suppl., 363.
Parker v. *Marco,* 136 N. Y. Suppl., 585.

III.

The privilege or immunity is personal to the suitor or witness, and is based on fundamental considerations of public policy and the impartial and efficient administration of justice.

U. S. v. *Edme,* 9 Serg. & R., 147.
Re Healey, 53 Vt., 694.
Person v. *Grier,* 66 N. Y., 124.
Halsey v. *Stewart,* 4 N. J. Law, 366.
Brown v. *Getchell,* 11 Mass., 11.
Andrew v. *Lembeck,* 46 Ohio St., 38.

VI.

The privilege or immunity is not based on any statute or specific provision in the Federal or State Constitutions, but is a common-law privilege firmly established and consistently applied in the courts of the United States as well as in the great majority of our states.

Smith v. *Alabama,* 124 U. S., 591.

ARGUMENT.

We respectfully submit to this Honorable Court the following propositions of law:

I.

Suitors, as well as witnesses, coming from foreign jurisdictions for the sole purpose of attending court, whether under summons, or subpoena, or not, are held immune from service of civil process while engaged in such attendance, and for a reasonable time in coming and going.

II.

This privilege or exemption extends to non-resident plaintiffs, as well as to non-resident defendants, whether the former are also witnesses in the suit or not.

III.

This privilege or exemption is personal in the suitor or witness, and is based upon fundamental considerations essential to the efficient and even-handed administration of law and justice.

I.

THE NATURE OF THE PRIVILEGE AND THE GROUNDS FOR IT.

The question presented to the court in this case is very simple, involving the privilege or exemption of a non-resident plaintiff, in a civil suit, from service of a summons in another civil suit, while such plaintiff is attending court in another jurisdiction for the sole purpose of testifying as a witness in his own behalf and advising his attorney with reference to the proper prosecution of his suit.

We respectfully submit that the law on this question has long been well established, especially in the Federal Courts, and is absolutely free from doubt. We do not think it necessary or proper to trespass unduly on the time and attention of this court by arguing the points involved at any considerable length. It is plain to us that counsel for the plaintiff in error proceeds on the theory that, although the law of privilege or exemption has long been firmly established, the grounds for it have never really received sufficient consideration in this or any other high court, and that if the matter were discussed *de novo,* and on principle, all the innumerable precedents and authorities which establish the privilege in question would be deliberately and sweepingly reversed, at least in so far as non-resident plaintiffs in civil suits are concerned. This ambition of counsel to reopen the question may be laudable, but we hardly think that this court will concur in the view that during the centuries in which the law of privilege or exemption has been developed

and applied no court of high authority has given the question the full and thorough consideration that it demands.

In the Cyc. of L. & P., Vol. 32, P. 492, the rule is stated as follows:

> "SERVICES ON SUITORS AND WITNESSES. Suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending court, whether under summons or subpoena or not, are usually held immune from service of civil process while engaged in such attendance and for a reasonable time in coming and going."

The citations in the footnotes to this statement of law include decisions by the Supreme Courts of the States of New York, New Jersey, Michigan, Wisconsin, Ohio, Pennsylvania, Kansas, Indiana, Iowa, California, Minnesota, New Hampshire, Tennessee, etc., as well as decisions by many Federal courts, including this Honorable Court.

In Troubart and Halsey's Practice, para. 236, the doctrine of privilege is stated as follows:

> "The parties to a suit, their attorneys, counsel and witnesses, are, for the sake of public justice, privileged from arrest in coming to, attending upon and returning from the court. * * * And the privilege extends to the service of a summons as well as a capias. * * * The common-law term 'privilege from arrest' is, with us, substantially the same as privilege from suit."

Also:

Greenleaf on Evidence, Vol 1, pages 431-4.

The grounds for the privilege or exemption have been stated so often and so admirably by the highest courts, that the only difficulty one encounters in attempting citations is the one described as the "embarrassment of riches." The following statement and opinion in *Roschynialski* v. *Hale,* a case tried by the U. S. District Court in the Nebraska District, in January, 1913, covers the ground fully:

"The defendant was served with a summons issued in an action begun in the State court. He removed the action to this court, and has presented a plea to the jurisdiction. The petition was filed in the State court in March, 1912, and the summons was issued and served on July 25, 1912, while the defendant was in the county where the action was begun. The defendant, at the date of filing the petition and ever since, has been a resident of another state. At the date of the issuance of the summons in this case there was pending in the same county an action in replevin, wherein the defendant in this action was plaintiff. That action was about to be tried. The defendant had come from another state, bringing the body of a deceased relative for interment in another county in this State, and as soon as that duty was performed he was induced to go to the county where the action was brought, in pursuance of an agreement between the attorneys for the parties in the replevin action that his deposition should be taken there, before a Notary Public, as a witness on his own behalf in the replevin action. His deposition was so taken, and the summons in this action was served on defendant, within a few minutes of

the time he concluded his testimony, and before he had a reasonable time to depart for his home. Under the Civil Code of Nebraska, the defendant was not exempt from service of summons, on the ground that he was a non-resident of the State or of the county, as he was in the county when the summons was issued and served, although the petition was filed before he came into the county.

"(1) Was the defendant privileged from service of this process because of his attendance as a witness, to give his deposition in another action? There appears to be no decision by a United States court directly upon this point. The privilege of suitors and witness from service of process is not founded upon any statute in this State, and as it is a question of general jurisprudence, a definition of the common-law privilege, it is the duty of this court to decide the question by the exercise of its independent judgment.

Hale v. *Wharton et al.* (C. C.), 73 Fed., 739-746.

Skinner & Mounce Co. v. *Waite et al.* (C. C.), 155 Fed., 828-831.

Kaufman v. *Garner* (C. C.), 173 Fed., 550-552.

"(2) The reason why this privilege is extended to suitors and witnesses has often been stated. It is to secure them the right to give testimony and assistance in the trial of an action, unhindered by exposure to suits by reason of their presence upon the court. The rule is founded in public policy, and is for the benefit of the court, as well as of the parties. Its application has been illustrated by many

decisions of the United States courts, exhibiting a liberal interpretation in favor of the privilege.

Parker v. *Hotchkiss,* 1 Wall. Jr., 269; Fed. Cas. No. 10,739.

Lyell v. *Goodwin,* Fed. Cas. No. 8,616.

U. S. v. *Bridgman et al.,* Fed. Cas. No. 14,645.

Brooks et al. v. *Farwell et al.* (C. C.), 4 Fed., 166.

Bridges v. *Sheldon* (C. C.), 7 Fed., 17, 44.

Plimpton v. *Winslow* (C. C.), 9 Fed., 365.

Atchison v. *Morris* (C. C.), 11 Fed., 582.

Larned v. *Griffin* (C. C.), 12 Fed., 590.

Nichols v. *Horton* (C. C.), 14 Fed., 327.

Wilson Sewing Mach. Co. v. *Wilson* (C. C.), 22 Fed., 803.

Small v. *Montgomery* (C. C.), 23 Fed., 707.

Ex parte Schulenburg (C. C.), 25 Fed., 211.

Kauffman v. *Kennedy* (C. C.), 25 Fed., 785.

Holyoke & South Hadley Falls Ice Co. v. *Ambden* (C. C.), 55 Fed., 593.

Kinne et al. v. *Lant* (C. C.), 68 Fed., 436.

Hale v. *Wharton et al., supra.*

Morrow v. *U. H. Dudley & Co.* (D. C.), 114 Fed., 441.

Skinner & Mounce Co. v. *Waite et al., supra.*

Peet v. *Fowler* (C. C.), 170 Fed., 618.

Kaufman v. *Garner, supra.*''

II.

PARTIES PLAINTIFF ACCORDED THE PRIVILEGE.

Counsel for the plaintiff in error contends that even if it be admitted that defendants and witnesses are entitled to the immunity or exemption in question, there is no reason why parties plaintiff—whether they testify as witnesses in their own behalf or not—should be accorded the privilege. Parties plaintiff, counsel argues, of their own free will submit themselves to the jurisdiction of the courts of the State wherein they bring their suits, and cannot complain that the service of a summons in another civil suit distracts, embarrasses or defeats their purpose.

There is no ground or warrant for this distinction, although there are a few decisions—none well considered—in which an attempt is made to justify it. The overwhelming weight of authority is unquestionably the other way. Every careful or thoughtful statement of the grounds for the privilege clearly applies to parties plaintiff as well as to parties defendant. Every text-book of weight or consequence lays down the doctrine in terms that broadly include ''suitors'' ''parties,'' as well as witnesses, of every description. *In the Federal Courts no distinction has ever been made as to the privilege of exemption between parties plaintiff and parties defendant.*

In *Hale* v. *Wharton,* 73 Fed., 739, the court said:

> ''It is, perhaps, not too much to say that no rule of practice is more firmly rooted in the jurisprudence of the United States courts than

> that of the exemption of persons from the writ of arrest and of summons while attending upon courts of justice, either as witnesses or suitors."

The court added that "on principle" it was "unable to perceive any distinction in the privilege, both of the suitor and the court, between a plaintiff and defendant."

In *Fisk* v. *Westover,* 4 S. Dakota, 233, the court said that a perusal of the cases in which the immunity of a suitor has been upheld discloses no distinction between a plaintiff and a defendant, that the reasoning of the courts is as applicable to the one as to the other, and that the rule of privilege has been applied indiscriminately.

In *Roberts* v. *Thompson,* 134 N. Y. Supplement, 363, the court rejected the distinction sought to be made between plaintiffs and defendants and held that a non-resident coming into a state to attend litigation, whether as plaintiff or defendant, should be protected from being required to engage in other litigation against his will.

In *Parker* v. *Marco,* 136 N. Y., 585, the court observed that,

> "The tendency has been not to restrict, but to enlarge, the right of privilege so as to afford full protection to parties and witnesses."

III.

A COMMON LAW PRIVILEGE.

Counsel asks what statute or constitutional provision confers the immunity or privilege which the State and Federal courts have, since the foundation of our government, extended to non-resident suitors and witnesses. This query is based on a misapprehension. The privilege is a common-law privilege. It is very ancient. Our courts, Federal and State, accepted it at the outset as a settled common-law doctrine. It has not been abrogated by statute, except in two or three states possibly, and remains the law.

True, there is no common law in the United States, but in the language of this Honorable Court (*Smith* v. *Alabama,* 124 U. S., 591):

> "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

The judicial power of the United States is vested in the Supreme Court and other courts. Questions of jurisdiction, service, privilege and waiver are necessarily, in the absence of plain statutory provision, settled in the light of common law doctrines and principles. This court, as well as the subordinate Federal tribunals, have never had the slightest doubt as to their power, or as to the power of the State courts, to apply the ancient doctrine of privilege or immunity in the interest, not only of suitors

and witnesses, but in that of the judicial tribunals themselves—of their dignity and authority—and in that of the administration of justice.

We respectfully submit that the District Court of the United States for the Northern District of Illinois committed no error in entering its judgment quashing the service on the defendant in error, or in any other ruling complained of, and that the said judgment should be affirmed.

Respectfully submitted.

CLARENCE S. DARROW,
Attorney for Defendant in Error.