

1957

Western States Refining Co. v. Blair Berry : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Arthur H. Nielsen; Nielsen & Conner; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Western States Refining Co. v. Berry*, No. 8602 (Utah Supreme Court, 1957).
https://digitalcommons.law.byu.edu/uofu_sc1/2729

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

of the
STATE OF UTAH

FILED

APR 10 1957

WESTERN STATES REFINING
COMPANY, a Utah corporation,
Plaintiff and Respondent,

—vs.—

BLAIR BERRY,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8602

RESPONDENT'S BRIEF

ARTHUR H. NIELSEN
NIELSEN & CONDER

Attorneys for Respondent

510 Newhouse Building
Salt Lake City, Utah

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	3
STATEMENT OF POINTS.....	7
ARGUMENT	7
I. DEFENDANT WAS NOT IMMUNE FROM SERVICE OF SUMMONS	7
CONCLUSION	18

AUTHORITIES CITED

(CASES)

Filer v. McCormick (DC) 260 F. 309, 314.....	12, 14
Franklin v. Superior Court, 98 Cal. App. 2d 292, 220 P. 2d 8.....	7, 13
Jaster v. Currie, 198 U.S. 144, 25 Sup. Ct. 614, 49 L. Ed. 988.....	10-12
Lingo v. Reinchenbach Land Company, 225 Iowa 112, 279 N.W. 121.....	15-18
Murrey v. Murrey, 216 Cal. 707, 16 P. 2d 741, 85 A.L.R. 1335	13
State ex rel Ellan v. District Court of Eighth Judicial District, 97 Mont. 229, 33 P. 2d 526, 93 A.L.R. 865.....	7, 12

MISCELLANEOUS

42 Am. Jur. "PROCESS", Sec. 35, p. 32.....	8
42 Am. Jur. "PROCESS", Sec. 36, p. 33.....	9

IN THE SUPREME COURT of the STATE OF UTAH

WESTERN STATES REFINING
COMPANY, a Utah corporation,
Plaintiff and Respondent,

—vs.—

BLAIR BERRY,
Defendant and Appellant.

} Case No. 8602

RESPONDENT'S BRIEF

STATEMENT OF FACTS

As stated by Appellant, this action was commenced on June 7, 1956, by the service upon the Defendant of a "ten day" Summons. Thereafter, the Complaint was filed in the District Court of Davis County in which it is alleged that Defendant had breached a certain contract theretofore entered into between him and the Plaintiff in that he failed to purchase all of the petroleum products required by him from the Plaintiff; that he transferred from the service station owned by the Plaintiff various customers and accounts to another station owned

by the Defendant. It also alleged that Defendant had assigned certain credit card charges to Plaintiff with recourse and that the same had not been paid so that the outstanding balance in the sum of \$2,592.15 was owing by Defendant to Plaintiff. Plaintiff further sought to recover rent owing upon the service station leased by it to the Defendant (R. 2, 3, 4).

Instead of answering the Complaint, Defendant filed a motion to quash the service of Summons upon the ground that "the Plaintiff, through its agents, obtained the service of said Summons on the Defendant by inveigling or enticing the Defendant into the jurisdiction of the above-entitled Court by deceit, artifice or trick." (R. 7). Thereafter, at the time of the hearing of said motion, the Defendant added an additional ground for quashing the service of Summons "for the reason that the Defendant was, at the time of the service of said Summons, immune from the service of process by the Plaintiff in relation to the subject of this action." (R. 9).

Between the time of filing the motion to quash and the hearing thereof by the Court, Defendant had taken the deposition of three members of the organization of the Plaintiff Company: W. F. Wagstaff, President, Neal R. Olson, General Sales Manager, and Richard G. Boren, an employee of the Sales Department, who at the time was also acting as attorney for the Company. Defendant also took the deposition of Royal A. Reynolds, Marshall of North Salt Lake, who had served the Summons upon the Defendant. Apparently after taking the foregoing depositions, Defendant realized that the claim of "inveigling or enticing the Defendant into the State

of Utah by deceit, artifice or trick" was not well founded thereby necessitating the general claim that Defendant was immune from service at the time that process was in fact served upon him. Although the first ground of the motion was not entirely abandoned at the time of the hearing, Defendant has now apparently waived it by conceding in his Brief that the trial court resolved the issues of fact against Defendant, by its determination that the service of process was good.

Although Appellant has set forth with clarity most of the facts in respect to the matter now before the Court, some conflicts in the evidence exist that should be pointed out. The Defendant, Mr. Berry, testified that all he was advised by Mr. Boren was that "he wanted me to come to Salt Lake to go over my accounts, which they figured was delinquent, and a few other matters that they wanted to talk over while I was there." (R. 14, 15). Mr. Berry further testified that he told Mr. Boren that he would be down on the 6th or the 7th of June (R. 16). On the other hand, Mr. Boren testified that he talked to Mr. Berry and asked him when he would be able to come down, and Mr. Berry said "he was very busy, and he didn't know whether or not he would be able to come down and talk to them;" (R. 63) "that he didn't know whether he would come down, but it might be the first of the following week," (R. 64). Mr. Berry refused to state when he would come down. Mr. Boren replied, "Well then, if you like make it at your own convenience. We will meet with you on Saturday or Sunday or anytime you say." Thereupon Mr. Berry said "I can't tell you definitely. Probably Thursday or Friday." And

that was the way it was left. As a matter of fact Mr. Boren stated he was surprised when he came into the office the morning after his return from Idaho and Mr. Berry arrived (R. 65).

One of the first things that happened after the conference began at the offices of Plaintiff Company was that Mr. Wagstaff, President of the Company, came in and stated, "As far as I am concerned, why I would sue you. I wouldn't monkey with you. But if you can make some sort of agreement with these boys — meaning Neal and Dick — why that is fine with me. But as far as I am concerned, I have wasted all the time coaxing you that I am going to and trying to meet your demands." With that Mr. Wagstaff left the room (R. 42). Later on, Mr. Wagstaff directed Mr. Boren to prepare a Summons in order that a suit might be instituted before Mr. Berry left if no agreement was reached (R. 43). Mr. Berry first admitted that Mr. Wagstaff had stated that he would just as soon sue him as not, but then later stated that he had no recollection thereof (R. 27, 28).

Both Mr. Boren and Mr. Olsen testified that an agreement was tentatively reached with Mr. Berry and that he left the room and went out and discussed the matter with his wife. When he returned he then made some changes and demands which could not be met by the Plaintiff, whereupon Mr. Olson indicated that if nothing was worked out they would have to sue Mr. Berry. Mr. Berry then replied, "Well, you go ahead and sue me, if you want. I don't care. You do whatever you please." (R. 53, 61, 62). It was at that point that the Marshall was called in to serve the Summons (R. 61).

STATEMENT OF POINTS

The only point raised on appeal is whether the Defendant was immune from service of Summons at the time the Summons was served upon him.

ARGUMENT

POINT I.

DEFENDANT WAS NOT IMMUNE FROM SERVICE OF SUMMONS.

It must be pointed out that the issue presented to this Court is one of law, inasmuch as the trial court found the factual issues against the Defendant and in favor of the Plaintiff. In determining whether the trial court properly overruled Appellant's motion all intendments are in favor of the ruling and the burden is upon Appellant to satisfy this court that as a matter of law the lower court was in error. *Franklin v. Superior Court*, 98 Cal. App. 2d 292, 220 P. 2d 8.

Defendant's contention is that he came into the State of Utah at the invitation of the Plaintiff "for the sole purpose of conferring with the Plaintiff in regard to the settlement of a then existing controversy" and for that reason was immune from service during the time he was here. In support of this contention, Appellant relies upon the decision of the Supreme Court of Montana in the case of *State ex rel Ellan v. District Court of Eighth Judicial District*, 97 Mont. 229, 33 P. 2d 526, 93 A.L.R. 865. However, the decision of Montana Supreme Court stands alone and is not supported by reason or by authority in any other jurisdiction.

The general rule is that if personal service of process is procured by fraud, trickery, or artifice, it will not be sufficient to give the court jurisdiction of the person thus served. This rule applies irrespective of whether the Defendant is a resident or non-resident of the state or county where the service of process is made, although it is usually found to apply in instances where a non-resident of the state is served with process while in another state. A general discussion of the matter is contained in 42 *Am. Jur.*, "*PROCESS*" Sec. 35, p. 32, where the rule is stated thusly:

"Thus, if a person resident outside the jurisdiction of the court and the reach of its process is inveigled, enticed, or induced, by any false representation, deceitful contrivance, or wrongful device for which the Plaintiff is responsible, to come within the jurisdiction of the court for the purpose of obtaining service of process on him in an action brought against him in such court, process served upon him through such improper means is invalid, and upon proof of such fact the court will, on motion, set it aside. This principle has been applied generally to the Defendant's property as well as to his person. The rule applies also where the presence of the Defendant within the jurisdiction of the court has been procured by force, or by abuse of criminal process. Thus, although the authorities are not harmonious in respect of the right of a nonresident Defendant in a criminal case to immunity from the service of civil process, there seems to be no dissent from the proposition that rightful jurisdiction cannot be acquired by the improper use of the criminal process of a state; and consequently, where the attendance has been procured by an arrest caused for the sole purpose of securing jurisdiction so

that the Defendant may be served with civil process, the courts will set aside the service. However, the mere fact that the person causing the Defendant to be brought into the jurisdiction for the trial of a criminal offense is also the person at whose instance the civil action is instituted does not itself show bad faith in procuring the return of the accused. And no bad faith can be predicated upon the fact that the criminal prosecution was instituted by the Plaintiff in the civil action when it appears that the Defendant had been a resident of the state for some two weeks prior to the institution of the criminal proceeding, and so could have been served with civil process without employing the aid of any criminal prosecution.”

In determining what evidence is sufficient to show fraud and fraudulent intent or purpose Am. Jur. further states: (Ibid. Sec. 36, p. 33)

“Fraud and fraudulent intent and purpose in enticing a person to come within the reach of the process of a court may be inferred from the acts and representations of the parties and all the facts and circumstances shown. But, as between honest and dishonest motives and purposes, honesty of intent and purpose will be presumed unless the facts and circumstances are such as to satisfy the mind that the acts and statements relied on are fraudulent or dishonest. The service of a writ, otherwise lawful, does not become unlawful because the hope for a chance to make it was the sole motive for other acts tending to create the chance, which other acts would themselves have been lawful except for that hope. Nor is fraud predicable of conduct by means of which the Plaintiff has merely taken advantage of the usual course of business.”

In the case of *Jaster v. Currie*, 198 U.S. 144, 25 Sup. Ct. 614, 49 L. Ed. 988, the problem of what constitutes fraud or trickery was directly before the court. There the Plaintiff in error (Jaster) had originally filed an action in Nebraska against the Defendant. In connection with such action a notice of a taking of a deposition in Ohio was given to the Defendant through his attorney. The Defendant went to Ohio for the purpose of attending at the time the deposition was taken, whereupon he was served with a Summons in a similar action brought against him in Ohio. He appeared specially in the Ohio action and moved to set aside the service but his motion was denied. This decision of the trial court was affirmed in 66 Ohio State 661, 65 N.E. 1127. Thereafter, judgment was taken against him and subsequently an action on the Ohio judgment was filed in Nebraska. Again the Defendant appeared and claimed that the judgment in Ohio had been taken against him by reason of fraud perpetrated upon him in the original service of summons. The Supreme Court of Nebraska affirmed the decision of the trial court to the effect that there was fraud and dismissed the action, whereupon the Plaintiff appealed to the Supreme Court of the United States. In posing the question to be decided by it, the Supreme Court stated:

“If the inducement to enter the State of Ohio furnished by the notice to take a deposition there was made fraudulent by the motives by which the notice was given, then there was fraud; otherwise there was not. On the face of the answer fraud is simply the pleader’s conclusion from the specific facts. The question is whether the motive alleged can have the effect supposed.”

In determining that the service of process was not obtained by fraud (and reversing the decision of the Nebraska Supreme Court), the Supreme Court of the United States stated:

“It will be observed that there was no misrepresentation, express or implied, with regard to anything, even the motives of the Plaintiff. The parties were at arm’s length. The Plaintiff did not say or imply that he had one motive rather than another. He simply did a lawful act by all the powers enabling him to do it, and that was all. Therefore the word ‘fraud’ may be discarded as inappropriate. The question is whether the service of a writ, otherwise lawful, becomes unlawful because the hope for a chance to make it was the sole motive for other acts tending to create the chance, which other acts would themselves have been lawful but for that hope. We assume that motives may make a difference in liability. But the usual cases where they have been held to do so have been cases where the immediate and expected effect of the act done was to inflict damage, and where therefore, as a matter of substantive law, if not of pleading, the act was thought to need a justification (see *Aikens v. Wisconsin*, 195 U.S. 194, 204, ante, 154, 159, 25 Sup. Ct. Rep. 3), or else where the intent was to do a further and unlawful act to which the act done was the means. *Swift v. United States*, 196 U.S. 375, 396, ante, 518, 524, 25 Sup. Ct. Rep. 276.

“It is hard to exhaust the possibilities of a general proposition. Therefore it may be dangerous to say that doing an act lawful in itself as a means of doing another act lawful in itself cannot make a wrong by the combination. It is enough to say that it does not usually have that result, and that the case at bar is not an excep-

tion to the general rule. We must take the allegations of the answer to be true, although they are manifestly absurd. The Plaintiff could not have known that the Defendant's lawyer would advise him to go to Ohio, and that the Defendant would go to his father's house, instead of to Nebraska, when his business was over. But we assume, as far as possible, that the anticipation of these things was the sole inducement for giving the notice and taking the deposition. Still the notice was true, and the taking of the deposition needed no justification. It could be taken arbitrarily, because the Plaintiff chose. On the other hand, the Defendant could be served with process if he saw fit to linger in Ohio. That also the Plaintiff could do arbitrarily, because he chose, if he thought he had a case. He arbitrarily could unite the two acts, and do the first because he hoped it would give him a chance to do the last."

The theory of the court in the *Ellan* case, *supra*, appears to be that since by long precedent the courts have granted immunity to non-resident individuals appearing in a state to attend at the trial or other judicial proceedings in such state, that such immunity should extend to all matters relating to problems of difference between parties which might be settled outside of the court. The fallacy of such reasoning is readily observed when the basis for the rule is considered. In the court's opinion appears the following quotation from Federal Judge Van Fleet in the case of *Filer v. McCormick* (DC) 269 F. 309, 314:

"Originally it was asserted solely as the privilege of the court for the protection of its own jurisdiction, but later as that of the person concerned as well. Bacon's Abr. tit. 'Privilege.' What

the precise limits of the right were in its earlier history, or those to whom extended, it is not very material to here inquire. * * * While it is quite true that the right has most frequently arisen and been applied in connection with parties and witnesses in judicial proceedings, its extension in the process of time to those engaged in other departments of the public service has been more largely by analogous application by the courts than as a result of legislation."

If, as stated above, the rule originally came into existence to protect the court in its own jurisdiction, how can it be said that any social policy is served by allowing a person to be immune from process on the pretext that he has come into the state to engage in a discussion regarding differences which have not even been brought to the attention of the court? There is far more reason to restrict the rule to the situation where the sole purpose of coming into the state is to attend a trial or other hearing as a witness, than to extend the immunity from service of process to a situation where no action has even been filed. In the case of *Franklin v. Superior Court in and for San Francisco County*, supra, the court held that the privilege of exemption from service of process for persons coming into the jurisdiction for the purpose of attending court did not extend to persons voluntarily coming within the jurisdiction of the court for the purpose of consulting with the attorney or investigating the transaction or otherwise attending to matters which may be subject to litigation or which may eventually reach a trial.

In *Murrey v. Murrey*, 216 Cal. 707, 16 P. 2d 741, 85 A.L.R. 1335, the Supreme Court of California refused to

exempt from service of process a non-resident reserve officer of the United States Army temporarily within the state for the purpose of training as a reserve officer. The Defendant in that case was admittedly a resident of the State of Utah, and while on active duty with the 57th Coast Artillery was served with a Summons and Order to Show Cause in an action by a minor child to compel the Defendant, his father, to contribute to the minor's support. The Defendant relied upon the language of Judge Van Fleet in the Filer case, *supra*, and urged that on the basis of public policy he should be immune from service of process while on active duty with the United States Army. The Supreme Court of California enunciated the following general proposition with respect to the privilege:

“This exemption from service of process is, of course, in derogation of the right which every creditor has to collect his debt by subjecting his debtor to suit in any jurisdiction where he may find him. Since this is so, the privilege should not be extended beyond the reason of the rule upon which it is founded. *Fitzhugh v. Reid* (D. C.) 252 F. 234.”

The Supreme Court of California went on to point out that in the Filer case, *supra*, the Defendant was granted immunity from service as a matter of public policy because “he had come to this state to perform a public duty during a time of national emergency.” (*Ibid*, p. 743)

The problem of immunity from service of process while attending a hearing in a foreign state as well as immunity from process where attendance in the par-

ticular state was obtained by fraud is thoroughly discussed in the case of *Lingo v. Reichenbach Land Company*, 225 Iowa 112, 279 N.W. 121. There the original process was served upon an officer of the Reichenbach Land Company, a corporation, while he was in the state of Iowa where he had gone for the purpose of attempting to settle and compromise an action in ejectment which had previously been commenced by the corporation against some individuals in Iowa. The same attorneys who represented the defendants in the first action in connection with which Mr. Reichenbach had gone to Iowa, were also attorneys for the plaintiff who commenced the action against the Reichenbach Company. As soon as Mr. Reichenbach had left the attorney's office (and before he left the building) after failing to settle the ejectment action, the attorneys had service of process served upon him. The record showed without dispute that the sole and only purpose of the defendant Reichenbach in going to Iowa, was to secure settlement of the action pending in Fremont County, Iowa.

The trial court sustained the special appearance of the defendant and plaintiff appealed. In reversing the decision, the Supreme Court discussed the matter as follows:

“It is the general and well-recognized rule of law in this and other states that witnesses and suitors in attendance on a court outside of the territorial jurisdiction of their residence are immune from service of civil process while attending court, and for a reasonable time before and after attending said court. (citing numerous cases)

.

“Appellees contend, however, that the rule granting immunity also extends to cases where a nonresident is present in the state in which the action is pending for the good-faith purpose of attempting a compromise or settlement thereof. The immediate question in this case therefore is whether or not Appellee is entitled to immunity from service of the original notice in the case at bar while he was in this state for the purpose of attempting to settle an action pending in an adjoining county.

“We have been cited no cases in this or any other state in which the rule of immunity from process had been extended to a case in which the nonresident is present in this state solely and only for the purpose of effecting a settlement of a case pending here. While this precise question has not been determined in this state, appellee contends that the same rule of justice granting immunity to parties and witnesses attending a trial also applies where the party is present in this state for the purpose of talking settlement of an action pending here.

.

“A number of cases hold that where a nonresident enters a state at the request of his adversary for the purpose of effecting a compromise or settlement of the case, and a notice of another action is served upon him while in the foreign state, immunity from service will be allowed the nonresident where the evidence tends to show that he was induced to enter another state through fraud or bad faith. (Cites several cases, including the Montana case of *Ellan v. District Court*, 97 Mont. 160, 33 P.2d 526, [1934])

“An examination of these cases holding that a nonresident is entitled to immunity from ser-

vice in the state of his adversary, will disclose that the holding was based upon bad faith or fraud of the adversary in inducing or enticing the nonresident to enter the foreign state. These cases announce the rule that the question of immunity from service of a process where the nonresident enters another state for the purpose of settling or compromising the action usually turns upon the question as to whether or not such nonresident was fraudulently or in bad faith induced to come into the other state.

.

“It seems to be the general rule, however, that where no fraud or bad faith has been practiced upon the nonresident by his adversary in a foreign state for the purpose of inducing or enticing him to enter that state, immunity from service of notice will not be allowed, and service of notice upon a nonresident under such circumstances will not be set aside. Miami Powder Co. v. Griswold, 5 Ohio Dec. Reprint, 532, 6 Am. L. Rec. 464; Cavanagh v. Manhattan Transit Co., CC, 133 F. 818; Allen v. Wharton, 59 Hun. 622, 13 NYS 38; Olean St. Railway Co., vs. Fairmount Construction Co., 55 App. Div. 292, 67 NYS 165; Empire Mfg. Co. vs. Ginsburg, 253 Ill. App. 242; Baker v. Wales, 35 NY Super. Ct. 403, 3 Jones & S. 403; Watkins v. North American Land & Timber Co., 20 Times L. R. (Eng.) 534, H. L.” (Italics added.)

The court finally determined:

“No cases have been cited by appellees holding that immunity from process will be extended to a nonresident entering another state simply for the purpose of attempting to secure a settlement of an action pending therein, unless it is clear from the evidence that the nonresident was

induced or enticed to enter the foreign state through fraud or bad faith on the part of his adversary. It is our conclusion from the evidence in this case that appellees have failed to show that appellant was guilty of any fraud or bad faith in enticing the defendant Reichenbach to enter this state on a pretext of trying to effect a settlement of the action pending in Page County.

“We are therefore constrained to hold that the rule of immunity from process claimed by appellees cannot be applied under the facts of this case.”

CONCLUSION

In conclusion Respondent respectfully submits that Appellant was not immune from service of process when he entered the State of Utah to discuss matters of difference between him and the Plaintiff; that no public policy requires the granting of any immunity to Appellant; and the finding of the court that he was not immune from service should be affirmed.

Respectfully submitted,

ARTHUR H. NIELSEN
NIELSEN & CONDER

Attorneys for Respondent

510 Newhouse Building
Salt Lake City, Utah